

2013 REGULAR SESSION

Acts and Joint Resolutions

of the

GENERAL ASSEMBLY
OF THE STATE OF SOUTH CAROLINA

Probate Code revisions..... 529

Numbers in parenthesis to left of act numbers (numbers in bold face) refer as follows: number with R before it refers to ratification number, number with S before it refers to bill number in Senate, and number with H before it refers to bill number in House of Representatives.

James H. Harrison, Code Commissioner, P.O. Box 11489,
Columbia, S.C. 29211

No. 100

(R46, S143)

AN ACT TO AMEND ARTICLES 1, 2, 3, AND 4 OF TITLE 62, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE SOUTH CAROLINA PROBATE CODE, SO AS TO, AMONG OTHER THINGS, DEFINE THE JURISDICTION OF THE PROBATE CODE, TO DETERMINE INTESTATE SUCCESSION, TO PROVIDE FOR THE PROCESS OF EXECUTING A WILL, TO PROVIDE FOR THE PROCESS TO PROBATE AND ADMINISTER A WILL, AND TO PROVIDE FOR LOCAL AND FOREIGN PERSONAL REPRESENTATIVES; AND TO AMEND ARTICLES 6 AND 7 OF TITLE 62, RELATING TO THE SOUTH CAROLINA PROBATE CODE, SO AS TO PROVIDE FOR THE GOVERNANCE OF NONPROBATE TRANSFERS, AND TO AMEND THE SOUTH CAROLINA TRUST CODE.

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

Articles 1, 2, 3, and 4 revised

SECTION 1. Articles 1, 2, 3, and 4 of Title 62 of the 1976 Code are amended to read:

“Article 1

General Provisions, Definitions, and Probate Jurisdiction of Court

Part 1

Short Title, Construction, General Provisions

Section 62-1-100. (a) Except as otherwise provided, this Code takes effect July 1, 1987.

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

- (1) the Code applies to any estates of decedents dying thereafter;
- (2) the procedural provisions of the Code apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the

opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative, including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. Unless otherwise provided in the Code, a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right;

(5) a rule of construction or presumption provided in this code applies to multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

(c) Section 62-2-502 is effective for all wills executed after June 27, 1984, whether the testator dies before or after July 1, 1987.

Section 62-1-101. Sections 62-1-101 et seq. shall be known and may be cited as the South Carolina Probate Code. References in Sections 62-1-101 et seq. to the term 'Code', unless the context clearly indicates otherwise, shall mean the South Carolina Probate Code.

Section 62-1-102. (a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(2) to discover and make effective the intent of a decedent in the distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

Section 62-1-103. Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

Section 62-1-104. If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application and to this end the provisions of this Code are declared to be severable.

Section 62-1-105. This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

Section 62-1-106. Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may: (i) obtain appropriate relief against the perpetrator of the fraud and (ii) restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

REPORTER'S COMMENT

By virtue of this section, the six-year period of limitation provided by Section 15-3-530(7) of the 1976 Code for actions for relief on the ground of fraud is reduced, with respect to fraud perpetrated in connection with proceedings and statements filed under this Code, or to circumvent its provisions or purposes. Under this section, actions for relief on the ground of fraud must be brought within two years after discovery of the fraud. In no event, however, may an action be brought against one not the perpetrator of the fraud (such as an innocent party benefiting from the fraud) later than five years after the commission of the fraud.

The last sentence of this section, however, excepts from this section actions 'relating to fraud practiced on a decedent during his lifetime which affect the succession of his estate' such as fraud inducing the execution or revocation of a will. There is some general authority for the proposition that one who is damaged by fraud which interferes with

the making of a will may maintain an action for damages against the person who commits the fraud, 79 Am. Jur. 2d, Wills Section 414. In cases involving direct contest of wills which are allegedly the result of fraud, however, the provisions of Section 62-3-108 would be applicable and a formal probate proceeding would have to be commenced within the later of twelve months from the informal probate or three years from the decedent's death, at which time the allegations of fraud would be considered.

The 2013 amendment clarified that any person injured by the effects of fraud may (i) obtain relief against the perpetrator of the fraud and (ii) restitution from any other person (other than a bona fide purchaser) benefitting from the fraud.

Section 62-1-107. In proceedings under this Code the South Carolina Rules of Evidence are applicable unless specifically displaced by the Code.

REPORTER'S COMMENT

This section states that the rules of evidence that apply in circuit court also apply in probate court proceedings unless specifically displaced by provisions of the South Carolina Probate Code. The 2011 Amendment removed those sections related to evidence as to the status of death, and these provisions have been incorporated into §62-1-507 of the Uniform Simultaneous Death Act. See §§62-1-500 to 62-1-510 for the Uniform Simultaneous Death Act.

Section 62-1-108. For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. The term 'presently exercisable general power of appointment' includes a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder's last will and testament, and the inclusion of a provision in the will sufficient to exercise this power.

REPORTER'S COMMENT

This section allows one who is the holder of a presently exercisable 'general power of appointment' (which, in this context, means one having the power to take absolute ownership of property to himself, either by appointment, by amendment, or by revocation) to agree to actions taken by a personal representative or by a trustee, to consent to the modification or termination of a trust or a deviation from its terms, and, thereby, to bind the beneficiaries whose interests are subject to the power.

Section 62-1-109. Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

REPORTER'S COMMENTS

This section was enacted and intended to clarify to whom an attorney representing a fiduciary owes a duty: unless a written employment agreement expressly provides otherwise, the attorney for a fiduciary owes a duty only to the fiduciary and not to any other person. Thus, this section confirms that an attorney for the fiduciary does not owe any duty or obligation to a beneficiary of the estate for which the fiduciary serves; there is no direct or vicarious duty owed by the attorney to a beneficiary without an express written agreement to the contrary. Moreover, the attorney for the fiduciary owes no duty to the fiduciary estate or property. The attorney effectively represents the fiduciary and not the fiduciary estate. The rule of this section applies even if the fiduciary pays the attorney from the estate for which the fiduciary serves. The section is expressly declarative of the common law and applies to attorney-client relationships existing before and after the enactment of this section.

Section 62-1-110. Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to

compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

REPORTER'S COMMENT

This section was enacted and intended to: (i) expressly reject the concept of a 'fiduciary exception' to any attorney-client privilege; (ii) encourage full disclosure by the fiduciary to the lawyer to further the administration of justice; and (iii) foster confidence between a fiduciary and his lawyer that will lead to a trusting and open attorney-client dialogue. See *Estate of Kofsky*, 487 Pa. 473 (1979). This section also expressly rejects the holding set forth in the case of *Riggs Natl. Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)(trustee's invocation of the attorney-client privilege does not shield document from disclosure to trust beneficiaries) as applied by the Court in *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).

Section 62-1-111. In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

REPORTER'S COMMENT

This section was enacted to clarify the probate court's authority to award costs and expenses. See §62-7-1004 for a similar provision in the South Carolina Trust Code.

Part 2

Definitions

Section 62-1-201. Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in this Code:

(1) 'Application' means a written request to the probate court for an order. An application does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court.

(2) 'Beneficiary', as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer

and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) 'Child' includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) 'Claims', in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) 'Court' means the court or branch having jurisdiction in matters as provided in this Code.

(6) 'Conservator' means a person who is appointed by a court to manage the estate of a protected person.

(7) 'Devise', when used as a noun, means a testamentary disposition of real or personal property, including both devise and bequest as formerly used, and when used as a verb, means to dispose of real or personal property by will.

(8) 'Devisee' means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(9) 'Disability' means cause for a protective order as described by Section 62-5-401.

(10) 'Distributee' means any person who has received property of a decedent from his personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, 'testamentary trustee' includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(11) 'Estate' includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(12) 'Exempt property' means that property of a decedent's estate which is described in Section 62-2-401.

(13) 'Expense of administration' includes commissions of personal representatives, fees and disbursements of attorneys, fees of appraisers, and such other expenses that are reasonably incurred in the administration of the estate.

(14) 'Fair market value' is the price that property would sell for on the open market that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.

(15) 'Fiduciary' includes personal representative, guardian, conservator, and trustee.

(16) 'Foreign personal representative' means a personal representative of another jurisdiction.

(17) 'Formal proceedings' means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons. Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title.

(18) 'Guardian' means a person appointed by the court as guardian, but excludes one who is a guardian ad litem.

(19) 'General power of appointment' means any power that would cause income to be taxed to the fiduciary in his individual capacity under Section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under Section 2041(a)(2) or 2514(c) of the Internal Revenue Code.

(20) 'Heirs' means those persons, including the surviving spouse, who are entitled under the statute of intestate succession to the property of a decedent.

(21) 'Incapacitated person' is as defined in Section 62-5-101.

(22) 'Informal proceedings' means those commenced by application and conducted without notice to interested persons by the court for probate of a will or appointment of a personal representative. Informal proceedings are not governed by or subject to the rules of civil procedure adopted for the circuit court.

(23) 'Interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(24) 'Issue' of a person means all his lineal descendants whether natural or adoptive of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.

(25) 'Lease' includes an oil, gas, or other mineral lease.

(26) 'Letters' includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(27) 'Minor' means a person who is under eighteen years of age, excluding a person under the age of eighteen who is married or emancipated as decreed by the family court.

(28) 'Mortgage' means any conveyance, agreement, or arrangement in which real property is used as security.

(29) 'Nonresident decedent' means a decedent who was domiciled in another jurisdiction at the time of his death.

(30) 'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

(31) 'Parent' includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(32) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(33) 'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. 'General personal representative' excludes special administrator.

(34) 'Petition' means a complaint as defined in the rules of civil procedure adopted for the circuit court. A petition requires a summons and is governed by and subject to the rules of civil procedure adopted for the circuit court and other rules of procedure in this title.

(35) 'Probate estate' means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy.

(36) 'Proceeding' includes action at law and suit in equity.

(37) 'Property' includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(38) 'Protected person' is as defined in Section 62-5-101.

(39) 'Protective proceeding' is as defined in Section 62-5-101.

(40) 'SCACR' means the South Carolina Appellate Court Rules.

(41) 'Security' includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(42) 'Security interest' means any conveyance, agreement, or arrangement in which personal property is used as security.

(43) 'Settlement' in reference to a decedent's estate includes the full process of administration, distribution, and closing.

(44) 'Special administrator' means a personal representative as described by Sections 62-3-614 through 62-3-618.

(45) 'State' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(46) 'Successor personal representative' means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(47) 'Successors' means those persons, other than creditors, who are entitled to property of a decedent under his will or this Code.

(48) 'Testacy proceeding' means a formal proceeding to establish a will or determine intestacy.

(49) 'Trust' includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. 'Trust' excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101 et seq.), custodial arrangements pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee

benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(50) 'Trustee' includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(51) 'Ward' is as defined in Section 62-5-101.

(52) 'Will' includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

REPORTER'S COMMENT

The definitions set out in this section are applicable throughout this Code. Of interest is the definition of 'claims' in item (4) which includes claims arising out of tort.

Also see Sections 62-4-101, 62-5-101, and 62-6-101 for additional definitions for Articles 4, 5, and 6.

The 2010 amendment revised certain definitions in Section 62-1-201, i.e., 'application' in item (1), 'formal proceedings' in item (17), 'informal proceedings' in item (22), 'petition' in item (34), and 'testacy proceeding' in item (48), as well as other relevant sections throughout the Probate Code, to clarify that the law requires a summons in formal proceedings and the rules of civil procedure adopted for the circuit court and other rules of procedure in this title apply to and govern formal proceedings in probate court. See S.C. Code §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; also see, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

Prior to the 2010 amendments, certain confusion existed regarding the requirement of a summons in a formal proceeding and how the South Carolina Rules of Civil Procedure apply to formal proceedings in the probate court. The 2010 amendments in this section and throughout other portions of the Probate Code are intended to minimize such confusion and to expressly clarify that a 'formal proceeding' is commenced by a summons and petition and governed by the rules of civil procedure adopted for the circuit court and other rules of procedure in this title, and that an 'application' does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court. Where applicable and appropriate, the 2010 amendments expand the matters in which an application may be utilized.

The 2013 amendment added definitions for 'Fair Market Value' and 'Probate Estate'. The 2013 amendment also made changes to the definitions of 'Guardian', 'Person', and 'State'. The definition of 'Stepchild' has been removed as a result of changes to Section 62-2-103(6).

Part 3

Scope, Jurisdiction, and Courts

Section 62-1-301. Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

REPORTER'S COMMENT

This section merely states that this Code applies to matters having a connection to this State by reason of a person's domicile or the situs of property.

Section 62-1-302. (a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:

(1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court;

(2) subject to Part 7, Article 5, and excluding jurisdiction over the care, custody, and control of a person or minor:

(i) protective proceedings and guardianship proceedings under Article 5;

(ii) gifts made pursuant to the South Carolina Uniform Gifts to Minors Act under Article 5, Chapter 5, Title 63;

(3) trusts, inter vivos or testamentary, including the appointment of successor trustees;

(4) the issuance of marriage licenses, in form as provided by the Bureau of Vital Statistics of the Department of Health and Environmental Control; record, index, and dispose of copies of marriage certificates; and issue certified copies of the licenses and certificates;

(5) the performance of the duties of the clerk of the circuit and family courts of the county in which the probate court is held when there is a vacancy in the office of clerk of court and in proceedings in eminent domain for the acquisition of rights of way by railway companies, canal companies, governmental entities, or public utilities when the clerk is disqualified by reason of ownership of or interest in lands over which it is sought to obtain the rights of way; and

(6) the involuntary commitment of persons suffering from mental illness, mental retardation, alcoholism, drug addiction, and active pulmonary tuberculosis.

(b) The court's jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.

(c) The probate court has jurisdiction to hear and determine issues relating to paternity, common-law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court, pursuant to Section 63-3-530.

(d) Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

(1) formal proceedings for the probate of wills and for the appointment of general personal representatives;

(2) construction of wills;

(3) actions to try title concerning property in which the estate of a decedent or protected person asserts an interest;

(4) matters involving the internal or external affairs of trusts as provided in Section 62-7-201, excluding matters involving the establishment of a 'special needs trust' as described in Article 7;

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value; and

(6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63.

(e) The removal to the circuit court of an action or proceeding within the exclusive jurisdiction of the probate court applies only to the particular action or proceeding removed, and the probate court otherwise retains continuing exclusive jurisdiction.

(f) Notwithstanding the exclusive jurisdiction of the probate court over the matters set forth in subsections (a) through (c), if an action described in subsection (d) is removed to the circuit court by motion of a party, or by the probate court on its own motion, the probate court may, in its discretion, remove any other related matter or matters which are before the probate court to the circuit court if the probate court finds that the removal of such related matter or matters would be in the best interest of the estate or in the interest of judicial economy. For any matter removed by the probate court to the circuit court pursuant to this subsection, the circuit court shall proceed upon the matter de novo.

REPORTER'S COMMENT

This section clearly states the subject matter jurisdiction of the probate court. It should be noted that the probate court has 'exclusive original jurisdiction' over the matters enumerated in this section. This means, when read with other Code provisions (such as subsection (c) of this section and Section 62-3-105), that matters within the original jurisdiction of the probate court must be brought in that court, subject to certain provisions made for removal to the circuit court by the probate court or on motion of any party.

The language of this section is similar to Section 14-23-1150 of the 1976 Code, which, in item (a), provides that probate judges are to have jurisdiction as provided in Sections 62-1-301 and 62-1-302, and other applicable sections of this South Carolina Probate Code.

The 2013 amendments added 'determination of property in which the estate of a decedent or protected person has an interest' to subsection (a)(1), substantially rewrote subsections (a)(2), (d)(3), and (d)(4), and added subsection (f), which allows the probate court to remove any pending matter to circuit court in the event a party or the court removes a related matter pursuant to subsection (d), even if that pending matter is not otherwise covered by the removal provisions of (d).

Section 62-1-303. (a) Subject to the provisions of Section 62-3-201, where a proceeding under this Code could be maintained in more than one place in South Carolina, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected persons, ward, or trust are commenced in more than one court of South Carolina, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and, if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that, in the interest of justice, a proceeding or a file should be located in another court of probate in South Carolina, the court making the finding may transfer the proceeding or file to the other court.

(d) If a court transfers venue of a proceeding or file to a court in another county, venue for that proceeding or file, and any subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which the venue has been transferred.

(e) If a probate court judge is disqualified from matters concerning a proceeding or a file, and venue has not been transferred to another county, a special probate court judge appointed for that proceeding or file has all of the powers and duties appertaining to the probate court judge of the county where the proceeding or file commenced, and venue for any subsequent matters concerning that proceeding or file, including appeals, remains with the county where that proceeding or file commenced.

REPORTER'S COMMENTS

This section provides that, where a proceeding could be held in more than one county under Section 62-3-201, the probate court in which the proceeding is first commenced has the exclusive right to proceed. If proceedings are commenced in more than one probate court, the court in which the proceeding was first commenced must continue to hear the matter unless it decides that venue is properly in another county, in which event it is to transfer the matter to that other county. Section 62-3-201 relates to testacy or appointment proceedings after death and grants venue to the county of the decedent's domicile or, if the decedent was not domiciled in this State, to any county in which his property was located.

This section also provides that venue with respect to a nonresident's estate could be in any county where he owned property. The 2013

amendment clarified that, when venue of a proceeding or file is transferred to another county, subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which venue has been transferred. If a special probate judge is appointed because a probate judge is disqualified and recused from hearing a proceeding or an entire file, venue remains with the county where the proceeding or file commenced, unless a probate court otherwise transfers venue.

Section 62-1-304. The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title. A formal proceeding is a 'civil action' as defined in Rule 2, SCRCP, and must be commenced as provided in Rule 3, SCRCP.

REPORTER'S COMMENT

The 2010 amendment revised and essentially rewrote Section 62-1-304 in order to clarify that 'formal proceedings' are governed by and subject to the rules of civil procedure adopted for the circuit court [SCRCP] and other rules of procedure in this title and that the SCRCP also govern formal proceedings and commencement of same. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; see also, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

Section 62-1-305. The court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this Code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the probate court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to letters must show the date of appointment.

REPORTER'S COMMENT

This section requires that the probate court keep a record of all matters filed with the court and that records be so indexed and filed as to make them useful to those examining them. Further, the court is required to issue certified copies of documents on file.

This section does not go into the detail of Sections 14-23-1100 and 14-23-1130 of the 1976 Code which list in some detail the records which must be kept by the probate court. These sections are not incompatible with Section 62-1-305. Probate Court Rule 1, pertaining to a calendar and to books denoting titles of all cases and transactions therein, is not disturbed by this section.

Section 62-1-306. (a) If duly demanded, a party is entitled to trial by jury in any proceeding involving an issue of fact in an action for the recovery of money only or of specific real or personal property, unless waived as provided in the rules of civil procedure for the courts of this State. The right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will.

(b) If there is no right to trial by jury under subsection (a) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

(c) The method of drawing, summoning, and compensating jurors under this section shall be within the province of the county jury commission and shall be governed by Chapter 7, Title 14 of the 1976 Code relating to juries in circuit courts.

REPORTER'S COMMENT

This section confers a right to trial by jury in the probate court in the same kinds of proceedings in which the right to jury trial exists in the circuit court, namely, proceedings involving an issue of fact in an action for the recovery of money only or of specific real or personal property, Section 15-23-60 of the 1976 Code. If no right to trial by jury exists, the court may impanel a jury to decide any issue or fact on an advisory basis.

Chapter 7, Title 14 of the 1976 Code, relating to juries in the circuit court, governs the method of drawing, summoning, and compensating jurors.

Section 62-1-307. The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a

person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court.

Section 62-1-308. Except as provided in subsection (1), appeals from the probate court must be to the circuit court and are governed by the following rules:

(a) A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court.

(b) Within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal (in a format described in Rule 208(b)(1)(B), SCACR) with proof of service and a copy served on all parties.

(c) Where a transcript of the testimony and proceedings in the probate court was prepared, the appellant shall, within ten days after the date of service of the notice of intention to appeal, make satisfactory arrangements with the court or court reporter for furnishing the transcript. If the appellant has not received the transcript within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant may make a motion to the circuit court for an extension to serve and file the parties' briefs and Designations of Matter to be Included in the Record on Appeal, as provided in subsections (d) and (e).

(d) Within thirty days after service of the Statement of Issues on Appeal, all parties to the appeal shall serve on all other parties to the appeal a Designation of Matter to be Included in the Record on Appeal (in a format described in Rule 209, SCACR) and file with the clerk of the circuit court one copy of the Designation of Matter to be Included in the Record on Appeal with proof of service.

(e) At the same time the appellant serves his Designation of Matter to be Included in the Record on Appeal, the appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The appellant's brief shall be in a format described in Rule 208(b)(1), SCACR. Within thirty days after service of the appellant's brief, the respondent shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with

proof of service. The respondent's brief shall be in a format described in Rule 208(b)(2), SCACR. Appellant may file and serve a brief in reply to the brief of the respondent. If a reply brief is prepared, the appellant shall, within ten days after service of the respondent's brief, serve one copy of the reply brief on all parties to the appeal and file with the clerk of circuit court one copy of the reply brief with proof of service. The appellant's reply brief shall be in a format described in Rule 208(b)(3), SCACR.

(f) Within thirty days after service of the respondent's brief, the appellant shall serve a copy of the Record on Appeal (in a format described in subsections (c), (e), (f) and (g) of Rule 210, SCACR, except that the Record of Appeal need not comply with the requirements of Rule 267, SCACR) on each party who has served a brief and file with the clerk of the circuit court one copy of the Record on Appeal with proof of service.

(g) Except as provided in this section, no party is required to comply with any other requirements of the South Carolina Appellate Court Rules. Upon final disposition of the appeal, all exhibits filed separately (as described in Rule 210(f), SCACR), but not included in the Record on Appeal, must be forwarded to the probate court.

(h) When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.

(i) The circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law. The hearing must be strictly on appeal and no new evidence may be presented.

(j) The final decision and judgment in cases appealed, as provided in this code, shall be certified to the probate court by the circuit court, court of appeals, or Supreme Court, as the case may be, and the same proceedings shall be had in the probate court as though the decision had been made in the probate court. Within forty-five days after receipt of written notice of the final decision and judgment in cases appealed, the prevailing party shall provide a copy of such decision and judgment to the probate court.

(k) A judge of a probate court must not be admitted to have any voice in judging or determining an appeal from his decision or be permitted to act as attorney or counsel.

(l) If the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court, and the procedure for the appeal must be governed by the South Carolina Appellate Court Rules.

REPORTER'S COMMENTS

This section provides that appeals from the probate court are to the circuit court. Under Section 62-1-308(i), any appeal from the probate court is strictly on the record.

The 2013 amendments to this section were intended to clarify the process for appeals from the probate court. With these changes, (i) the form for the Statement of Issues on Appeal follows that form set forth in Rule 208(b)(1)(B); (ii) the use of briefs is specifically contemplated and the form of the briefs follows that set forth in Rule 208, SCACR; (iii) the appellant bears the burden of preparing the record on appeal; and (iv) the prevailing party bears the burden of providing the probate court with a copy of the final decision and judgment from the circuit court, court of appeals, or Supreme Court. While the 2013 amendments do incorporate certain provisions of the SCACR, paragraph (g) clarifies that not all provisions of the SCACR apply to appeals from probate court to circuit court.

Section 62-1-309. The judges of the probate court shall be elected by the qualified electors of the respective counties for the term of four years in the manner specified by Section 14-23-1020.

REPORTER'S COMMENT

This section does not disturb Section 14-23-1040 of the 1976 Code which requires that a probate judge or an associate judge must be a qualified elector of the county in which he is to be a judge.

Part 4

Notice, Parties, and Representation in Estate Litigation and other matters

Section 62-1-401. (a) If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his

attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least twenty days before the time set for the hearing; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy thereof in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.

(b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

(d) Notwithstanding a provision to the contrary, the notice provisions in this section do not, and are not intended to, constitute a summons that is required for a petition.

REPORTER'S COMMENT

This section provides that, where notice of hearing on a petition is required, the petitioner shall give notice to any interested person or his attorney (1) by mailing at least twenty days in advance of the hearing, or (2) by personal delivery at least twenty days in advance of the hearing, or (3) if the person's address or identity is not known and cannot be ascertained, by publication as in the court of common pleas.

Under this Code, when a petition is filed with the court, the court is to fix a time and place of hearing and it is then the responsibility of the petitioner to give notice as provided in Section 62-1-401. See, for example, Sections 62-3-402 and 62-3-403.

The 2010 amendment added subsection (d) to clarify and avoid confusion that previously existed regarding the notice provisions in this section. The effect of the 2010 amendment was intended to make it clear that the notice provisions in this section are not intended to and do not constitute a summons, which is required for a petition in formal proceedings. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Section 62-1-402. A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

Section 62-1-403. In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements the following apply:

(1) Interests to be affected must be described in pleadings that give reasonable information to owners by name or class by reference to the instrument creating the interests or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a person may represent his minor or unborn issue.

(iii) A minor or unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Service of summons, petition, and notice is required as follows:

(i) Service of summons, petition, and notice must be given to every interested person or to one who can bind an interested person as described in (2)(i) or (2)(ii) above. Service of summons and petition upon, as well as notice, may be given both to a person and to another who may bind him.

(ii) Service upon and notice is given to unborn or unascertained persons who are not represented under (2)(i) or (2)(ii) above by giving

notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

REPORTER'S COMMENT

This section applies to formal proceedings and judicially supervised settlements. It provides that in certain specified instances a person will be bound by orders which are binding on others. Subitem (i) of item (2) provides that an order which is binding upon the person or persons holding a power of revocation or a general power of appointment will bind others, such as objects or takers in default, to the extent that their interests are subject to the power. This would mean that an order which is binding on one who has discretion will bind those in whose favor he might act.

Absent a conflict of interest, subitem (ii) of item (2) provides that orders binding a conservator or guardian are binding on the protected person. In certain limited instances, orders binding on a trustee or a personal representative are binding on beneficiaries and interested persons. Further, under subitem (iii) of item (2) an unborn or unascertained person is bound by orders affecting persons having a substantially identical interest. These provisions facilitate proceedings by limiting multiplicity of parties.

Item (4) permits the court at any point in a proceeding to appoint a guardian ad litem to represent a minor, an incapacitated person, an unborn or unascertained person, or one whose identity or address is unknown if the court determines that representation of that interest would otherwise be inadequate. Accordingly, in a proceeding where there are adult parties having the same interest as the minor or incapacitated person, the court may not deem it necessary to appoint a guardian ad litem if it appears that the common interest will be adequately represented. In the case of minors, the appointment of a guardian ad litem (or an attorney having the powers and duties of a guardian ad litem) is discretionary with the court. However, this Code does require that notice of the proceeding be given to adults presumably having an interest in the minor's welfare, such as the

person having care and custody of the minor, parent(s), or nearest adult relatives.

The 2010 amendment revised subsections (1) and (3) to clarify procedure for a formal proceeding, which requires a summons and petition to commence a formal proceeding. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC. The 2010 amendment also revised subsection (2)(ii) to delete 'parent' and replace it with 'person,' so that it is consistent with the remainder of that subsection and also delete 'child' and replace it with 'issue' to be broader and more inclusive.

Part 5

Uniform Simultaneous Death Act

Section 62-1-500. This part may be cited as the 'Uniform Simultaneous Death Act'.

REPORTER'S COMMENT

The 2013 amendment made significant changes to Part 5. Prior to the 2013 amendment, Part 5 did not include a 120 hour survival requirement similar to §62-2-104. The revisions to Part 5 now incorporate a default 120 hour survival requirement for testate and intestate decedents as well as for nonprobate transfers, subject to the exceptions set forth in §62-1-506.

Section 62-1-501. For purposes of this part:

(1) 'Co-owners with right of survivorship' includes joint tenants in a joint tenancy with right of survivorship, joint tenants in a tenancy in common with right of survivorship, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitle one or more to the whole of the property or account on the death of the other or others.

(2) 'Governing instrument' means a deed, will, trust, insurance or annuity policy, account with POD designation, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(3) 'Payor' means a trustee, insurer, business entity, employer, government, governmental agency, subdivision, or instrumentality, or

any other person authorized or obligated by law or a governing instrument to make payments.

Section 62-1-502. (a) Except as otherwise provided by this Code, where the title to property, the devolution of property, the right to elect an interest in property, or any other right or benefit depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by at least one hundred twenty hours is deemed to have predeceased the other individual.

(b) If the language of the governing instrument disposes of property in such a way that two or more beneficiaries are designated to take alternatively by reason of surviving each other and it is not established by clear and convincing evidence that any such beneficiary has survived any other beneficiary by at least one hundred twenty hours, the property shall be divided into as many equal shares as there are alternative beneficiaries, and these shares shall be distributed respectively to each such beneficiary's estate.

(c) If the language of the governing instrument disposes of property in such a way that it is to be distributed to the member or members of a class who survived an individual, each member of the class will be deemed to have survived that individual by at least one hundred twenty hours unless it is established by clear and convincing evidence that the individual survived the class member or members by at least one hundred twenty hours.

Section 62-1-503. Except as otherwise provided by this Code, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by at least one hundred twenty hours is deemed to have predeceased the event.

Section 62-1-504. Except as otherwise provided by this Code, if:

(a) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by at least one hundred twenty hours, one-half of the property passes as if one had survived by at least one hundred twenty hours and one-half as if the other had survived by at least one hundred twenty hours;

(b) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the

others by at least one hundred twenty hours, the property passes to the estates of each of the co-owners in the proportion that one bears to the whole number of co-owners.

REPORTER'S COMMENT

This section applies to property or accounts held by co-owners with right of survivorship. As defined in §62-1-501, the term 'co-owners with right of survivorship' includes multiple-party accounts with right of survivorship.

Section 62-1-505. Notwithstanding any other provisions of the Code, solely for the purpose of determining whether a decedent is entitled to any right or benefit that depends on surviving the death of a decedent's killer under Section 62-2-803, the killer is deemed to have predeceased the decedent, and the decedent is deemed to have survived the killer by at least one hundred twenty hours, or any greater survival period required of the decedent under the killer's will or other governing instrument, unless it is established by clear and convincing evidence that the killer survived the victim by at least one hundred twenty hours.

Section 62-1-506. Survival by one hundred twenty hours is not required if any of the following apply:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

(3) the imposition of a one hundred twenty hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under other provisions of the Code; but survival must be established by clear and convincing evidence;

(4) the application of a one hundred and twenty hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence;

(5) the application of a one hundred twenty hour requirement of survival would deprive an individual or the estate of an individual of an

otherwise available tax exemption, deduction, exclusion, or credit, expressly including the marital deduction, resulting in the imposition of a tax upon a donor or a decedent's estate, other person, or their estate, as the transferor of any property. 'Tax' includes any federal or state gift, estate or inheritance tax;

(6) the application of a one hundred twenty hour requirement of survival would result in an escheat.

REPORTER'S COMMENT

The 2013 amendment rewrote this section.

Subsection (1). Subsection (1) provides that the 120-hour requirement of survival is inapplicable if the governing instrument 'contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case.' The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that 'in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first,' my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under this section, G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Subsection (2). Subsection (2) provides that the 120-hour requirement of survival is inapplicable if 'the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a stated period.'

Mere words of survivorship in a governing instrument do not expressly indicate that an individual is not required to survive an event by any specified period. If, for example, a trust provides that the net income is to be paid to A for life, remainder in corpus to B if B

survives A, the 120-hour requirement of survival would still apply. B would have to survive A by 120 hours. If, however, the trust expressly stated that B need not survive A by any specified period, that language would negate the 120-hour requirement of survival.

Language in a governing instrument requiring an individual to survive by a specified period also renders the 120-hour requirement of survival inapplicable. Thus, if a will devises property 'to A if A survives me by 30 days,' the express 30-day requirement of survival overrides the 120-hour survival period provided by this Act.

Subsection (4). Subsection (4) provides that the 120-hour requirement of survival is inapplicable if 'the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition.' The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a \$50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised \$50,000 to the charity if W predeceased him. W's will devised \$50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (4), not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the \$50,000 devise, subsection (4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the \$50,000 charitable devise in W's will is effective.

Subsection (4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended \$50,000 devise from H's estate and half from W's estate.

Under subsection (5), if the application of the 120-hour survival requirement would cause the loss of an available tax exemption, deduction, exclusion, or credit, creating a federal or State gift, estate or inheritance tax, the 120-hour survival requirement will not be applied. Additionally, under subsection (6), the 120-hour survival requirement is not applicable if it would cause an escheat.

Section 62-1-507. In addition to the South Carolina Rules of Evidence, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual is determined to be dead under the Uniform Determination of Death Act, Section 44-43-460.

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death, and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under subsection (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) A person whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stated on a document described in subsection (2) or (3), a document described in subsection (2) or (3) that states a time of death one hundred twenty hours or more after the time of death of another person, however the time of death of the other person is determined, establishes by clear and convincing evidence that the person survived the other person by one hundred twenty hours.

REPORTER'S COMMENT

The 2013 amendment rewrote this section. This section incorporates the provisions of former Section 62-1-107.

Section 62-1-508. (1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a person designated in a governing instrument who, under this part, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a

claimed lack of entitlement under this part. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this part.

(2) Written notice of a claimed lack of entitlement under subsection (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this part, a payor or other third party may pay any amount owed or transfer or deposit any item of property, other than tangible personal property, held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this part, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(3) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is not obligated under this part to return the payment, item of property, or benefit, and is not liable under this part for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this part is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this part.

Section 62-1-509. This part [Sections 62-1-501 et seq.] shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact substantially identical laws.

REPORTER'S COMMENT

Prior to the 2013 amendment this section was previously Section 62-1-508.

Article 2

Intestate Succession and Wills

Part 1

Intestate Succession

Section 62-2-101. Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

REPORTER'S COMMENT

Section 62-2-101 establishes intestate succession as the method of disposition of any part of a decedent's estate not effectively disposed of by his will, as under Sections 62-2-501 and 62-2-602. It applies both in cases of total intestacy and in cases of partial intestacy. See Sections 62-1-201(11) and 62-1-201(35) for this Code's definition of the estate governed by Section 62-2-101 as to intestate succession.

Section 62-2-102. The intestate share of the surviving spouse is:

- (1) if there is no surviving issue of the decedent, the entire intestate estate;
- (2) if there are surviving issue, one-half of the intestate estate.

REPORTER'S COMMENT

Section 62-2-102 defines the intestate share of the decedent's surviving spouse (which term is in turn defined by Section 62-2-802) by limiting the persons with whom the surviving spouse must share any part of the intestate estate to the decedent's surviving issue, i.e., if no issue survive, the spouse takes all, and, in case issue do survive, the spouse takes one-half of the intestate estate. Section 62-2-102 draws no distinction between cases of single child survival and multiple child survival.

A husband or wife who desires to leave his or her surviving spouse more or less than the share provided by this section and to leave to other persons more or less than would otherwise be available to them may do so by executing a will.

Section 62-2-103. The part of the intestate estate not passing to the surviving spouse under Section 62-2-102, or the entire estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent: if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;

(5) if there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by one or more great-grandparents or issue of great-grandparents, half of the estate passes to the surviving paternal great-grandparents in equal shares, or to the surviving paternal great-grandparent if only one survives, or to the issue of the paternal great-grandparents if none of the great-grandparents survive, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving great-grandparent or issue of a great-grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

REPORTER'S COMMENT

Section 62-2-103 defines the intestate shares of persons, other than the surviving spouse, in that part of the intestate estate not passing to the surviving spouse under Section 62-2-102.

Subsection (1) of Section 62-2-103 gives preference to the decedent's issue as against all others, except the surviving spouse (see Section 62-2-102).

Where the surviving issue who are heirs are all of the same degree of kinship to the decedent, they take per capita, i.e., in equal shares. Where the surviving issue who are heirs are of unequal degrees, they take per capita with per capita representation, i.e., those in the nearest

degree take per capita, equal shares, as before, while those in the more remote degrees take, by representation, the equal share which their deceased ancestor in the nearest degree would have taken had he survived the decedent. Such issue in more remote degrees take their deceased ancestor's equal share, in turn, per capita with per capita representation. This section, read together with Section 62-2-106, minimizes the occurrence of unequal distributions among members of the same generation.

For an example of issue taking per capita with per capita representation, suppose death is indicated by parentheses and:

1. (X) dies intestate:
2. predeceased by two children, (A) and (B):
3. survived by two grandchildren, A's child C, and B's child D, and predeceased by one grandchild, B's child (E):
4. predeceased by two great-grandchildren, E's children (F) and (G):
5. and survived by three great-great grandchildren F's child H, and G's children I and J.

Under Section 62-2-103(1), the number of issue, in the nearest degree of kinship having surviving members, counting both those who survive and those who predecease leaving issue surviving, determines the basic shares. In this example, 'thirds' go to each of the living grandchildren C and D and, collectively, to the issue of the predeceased grandchild E. In turn, E's 'third' is divided among his issue in the same manner; and the number of his issue, in the nearest degree having surviving members, determines the further shares, which are, in this example, 'thirds' of E's 'third', or 'ninths' which go to H, I, and J. Under Section 62-2-103(1), the pre-existence of A, B, F, and G is ignored because no member of their respective degrees of kinship survived the decedent.

Subsection (2) of Section 62-2-103 allocates the entire intestate estate to the parents of the decedent if there is neither a surviving spouse nor any surviving issue.

Subsection (3) of Section 62-2-103 apportions the entire intestate estate, by representation, among the issue of the parents of the decedent only if the decedent leaves neither spouse nor issue nor parents. All issue of parents of the decedent, however remotely related to the decedent they may be, share by representation. For example, a grandnephew of decedent, related through a brother and nephew of decedent, themselves both predeceased, takes by representation and is not excluded by the survival of another brother or of another nephew of decedent.

All issue of the decedent's parents take under Section 62-2-103(3) by representation so that half blood heirs are treated the same as whole blood heirs.

Subsections (4) and (5) of Section 62-2-103 apply in cases in which the decedent is survived by neither spouse, nor issue, nor parents, nor issue of parents, but is survived by grandparents or their issue (then the entire intestate estate is distributed to them under subsection (4)), or the decedent is survived neither by grandparents nor their issue but by great-grandparents or their issue (then the entire intestate estate is distributed to them under subsection (5)). Persons, even more remotely related to decedent, the so-called 'laughing heirs,' do not share at all.

Section 62-2-104. (1) For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (2):

(a) an individual who was born before a decedent's death but who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent. If it is not established that an individual who was born before the decedent's death survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period;

(b) an individual who was in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth. If it is not established that an individual who was in gestation at the decedent's death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

(2) This section does not apply if it would result in a taking of the intestate estate by the state under Section 62-2-105.

REPORTER'S COMMENT

Section 62-2-104 makes clear that survival for the 120 hours is a condition for benefit of intestate succession, the homestead allowance, and the exempt property exclusion; the amendment clarifies that an infant in gestation must survive for 120 hours following birth.

Section 62-2-105. If there is no taker under the provisions of this article [Sections 62-2-101 et seq.], the intestate estate passes to the State of South Carolina.

REPORTER'S COMMENT

Section 62-2-105 provides for escheat of an intestate estate to the State of South Carolina whenever there are no heirs as prescribed in Sections 62-2-102 and 62-2-103, as affected by other sections of this Article 2, i.e., whenever neither spouse nor great-grandparents of decedent, nor issue thereof, survive decedent. The procedures regulating escheat to the State are embodied in Sections 27-19-10, et seq., of the 1976 Code.

Section 62-2-106. If representation is called for by this Code, the estate is divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner. If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for purposes of determining the generation at which the division of the estate is to be made.

REPORTER'S COMMENT

Section 62-2-106 defines the division of an intestate estate, among the heirs' respective shares, by 'representation,' i.e., as an equal division among the nearest surviving kin, with the issue of any equally near but predeceased kin taking their ancestor's share in the same manner, by representation. For an example of the application of Section 62-2-106, see the Comment to Section 62-2-103(1).

Section 62-2-107. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

REPORTER'S COMMENT

These rules of this section are carried over into the construction of wills' dispositions by Section 62-2-609.

Section 62-2-108. Issue of the decedent (but no other persons) conceived before his death but born within ten months thereafter inherit as if they had been born in the lifetime of the decedent.

REPORTER'S COMMENT

Section 62-2-108 codifies South Carolina case law establishing the right of an afterborn child of an intestate decedent to inherit. *Pearson v. Carlton*, 18 S.C. 47 (1882). This section expands the principle to

benefit other issue of the intestate decedent, more remotely related than his children, e.g., grandchildren. The section further expressly excepts collateral relatives of the decedent from the principle's operation.

Section 62-2-109. If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) From the date the final decree of adoption is entered, and except as otherwise provided in Section 63-9-1120, an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof, except that the paternity established under this subitem (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

(3) A person is not the child of a parent whose parental rights have been terminated under Section 63-7-2580 of the 1976 Code, except that the termination of parental rights is ineffective to disqualify the child or its kindred to inherit from or through the parent.

REPORTER'S COMMENT

Section 62-2-109 concerns intestate succession as affected by adoptions of persons, by births out of wedlock, and by the termination of parental rights. However, this section's definition of the parent-child relationship is imported by references in Sections 62-1-201(3) defining 'child', 62-1-201(24) defining 'issue', and 62-1-201(31) defining 'parent', and in Section 62-2-609 construing class gift and family relationship terminology into the meanings of such terms and terminology as used throughout this Code and also in testators' wills. See Sections 62-2-102, 62-2-103, 62-2-106, 62-2-302, 62-2-401, 62-2-402, 62-2-603, and 62-2-609.

The rule of general applicability of Section 62-2-109(1) is that upon adoption the adopted person's intestacy relationships with all his natural relatives are severed, but are supplanted by newly established intestacy relationships with all of his adopted relatives.

However, the general rule does not apply to cases of adoption of adults. Rather, the intestacy relationships of the parties are left undisturbed by the adoption decree, unless a court finds it to be in the best interests of the persons involved to apply the general rule.

To cover the case of the marriage of a child's natural parent to a person who adopts the child, Section 62-2-109(1) provides that adoption does not sever the adopted child's intestacy relationship with 'that' natural parent. Adoption does, however, sever the adopted child's intestacy relationship with the 'other' natural parent, i.e., the natural parent not married to the person adopting the child.

Subsection (2) of Section 62-2-109 relates to the taking in intestacy by, through, or from persons born out of wedlock. It does not purport to declare such illegitimate children to be legitimate. No part of the prior South Carolina law, establishing the legitimacy of a child, is meant to be affected by Section 62-2-109(2). The bases for a finding of legitimacy, i.e., either birth to validly married parents, whether validly ceremonially married or married as at common law, or birth to parents covered by one of the legitimation statutes, Sections 20-1-30, 20-1-40, 20-1-50, 20-1-60, 20-1-80, and 20-1-90 of the 1976 Code, remains as under prior law; and, of course, such legitimate children bear intestacy relationships with their relatives.

Section 62-2-109(2) merely establishes intestacy relationships between illegitimate children and their maternal and paternal relatives.

The rule set forth in Section 62-2-109(2)(i) relates to the establishment of the illegitimate child's intestacy relationship with his father, whenever the father and mother have been ceremonially married, albeit invalidly so.

Section 62-2-109(2)(ii) allows an illegitimate child to inherit from and through his father if paternity is established by an adjudication commenced either before the father's death or within six months thereafter. A standard higher than usual, clear and convincing proof is required to be met in an adjudication commenced after, but not in an adjudication before, the father's death.

The imposition of a required adjudication and a higher standard of proof upon illegitimate children seeking to inherit from their fathers, as compared with legitimate children not similarly burdened, should pass constitutional muster under the decision of *Lalli v. Lalli*, 439 U.S. 259 (1978). Section 62-2-109(2)(ii) precludes the father and his kindred

from inheriting from or through the child unless the father has openly treated the child as his and has not refused to support the child.

Subsection (3) of Section 62-2-109, on intestacy relationships following the termination of parental rights, is meant to conform with Section 63-7-2590 of the 1976 Code, cutting the parent off from the child's intestate estate, but not cutting the child off from the parent's intestate estate.

Section 62-2-110. If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing signed by the decedent or acknowledged in a writing signed by the heir to be an advancement. For this purpose, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

REPORTER'S COMMENT

Section 62-2-110 concerns the effect on intestate succession of lifetime gifts made by the intestate to donees who are his prospective heirs. The section charges such lifetime gifts, as advancements, against the intestate share of the donee-heir, but only if, first, the intestate dies wholly intestate, i.e., without a will disposing of any part of his estate. See Section 62-2-610 on satisfaction for a rule analogous to the rule of advancements but operative in the event of succession under a will.

Such gifts are treated as advancements under Section 62-2-110 only if, second, they are contemporaneously declared by the intestate or acknowledged by the donee, in writing, to be advancements.

If the donee predeceases the intestate, but issue of the donee survive as heirs of the intestate, Section 62-2-110 charges the ancestor's lifetime gifts as advancements against the intestate share of the issue-heirs, again, only if there is a total intestacy and the above-mentioned writing exists but not if the writing provides that the lifetime gifts to the ancestor are not to be treated as advancements to such issue.

Section 62-2-110 applies to lifetime gifts made to any of the heirs of the intestate, a class of donees broader than the former law's language 'child or issue of the intestate.' See Section 62-1-201(20) defining 'heirs'.

Section 62-2-110 values the advancement at the earlier of the donee's actual receipt of the gift or the intestate's death, resulting in most cases in a valuation at the date of the gift rather than at the date of death.

Section 62-2-111. A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

REPORTER'S COMMENT

Section 62-2-111 qualifies the personal representative's right and obligation of retainer, i.e., to offset or charge the amounts of debts owed to the decedent against the shares of successors to his estate, as provided for in Section 62-3-903. Section 62-2-111 limits such charge's effects so that they affect only the debtor's share and not also the intestate shares of the debtor's issue. This codifies South Carolina case law. See *Stokes v. Stokes*, 62 S.C. 346, 40 S.E. 662 (1902), where the debt of a predeceased brother of the intestate was not charged against the brother's children's intestate shares.

Section 62-2-112. No person is disqualified to take as an heir because he, or a person through whom he claims, is or has been an alien.

REPORTER'S COMMENT

Section 62-2-112 allows an individual to inherit property even though he, or a person through whom he claims, is or has been an alien. This was the prior South Carolina law notwithstanding the mandate of Article 3, Section 35 of the South Carolina Constitution (1895) and the provisions of former Sections 27-13-30 and 27-13-40 of the 1976 Code, limiting alien ownership of South Carolina land to five hundred thousand acres, the last obviously unrealistic as an effective limit at approximately twenty-eight miles square.

Section 62-2-113. A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.

REPORTER'S COMMENT

Section 62-2-113 precludes possibility of a person related to the decedent through two lines of relationship, adopted and natural or

either, from inheriting other than through the single line which will entitle him to the larger share.

Section 62-2-114. Notwithstanding any other provision of law, if the parents of the deceased would be the intestate heirs pursuant to Section 62-2-103(2), upon the service of a summons, petition and notice by either parent or any other party of potential interest based upon the decedent having died intestate, the probate court may deny or limit either or both parent's entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 63-5-20 and did not otherwise provide for the needs of the decedent during his or her minority. If the court makes such a determination as to a parent or parents, the parent shall be a disqualified parent. The proceeds, or portion of the proceeds, that a disqualified parent would have taken shall pass as though the disqualified parent had predeceased the decedent.

REPORTER'S COMMENT

The 2013 amendment makes clear that an action under this section must be commenced by the service of a Summons, Petition and Notice by either parent or any other party of potential interest; the amendment defines a disqualified parent as a parent found by the court by a preponderance of the evidence not to have reasonably have provided support for the deceased child; the amendment clarifies that the portion, or all, as the court determines, of the intestate share denied to the disqualified parent shall pass as if the disqualified parent had predeceased the child.

Part 2

Elective Share of Surviving Spouse

Section 62-2-201. (a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate, as computed under Section 62-2-202, the share to be satisfied as detailed in Sections 62-2-206 and 62-2-207 and, generally, under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

(c) ‘Surviving spouse’, as used in this Part, is as defined in Section 62-2-802.

REPORTER’S COMMENT

See Section 62-2-802 for the definition of ‘spouse’ which controls in this part.

Under the common law, a widow was entitled to dower which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. The South Carolina Supreme Court in *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984) declared that dower was unconstitutional as a violation of the equal protection clauses of the South Carolina and United States Constitutions. South Carolina, like other states, substitutes an elective share in the whole estate for dower and the widower’s common law right of curtesy.

Section 62-2-202. (a) For purposes of this Part, probate estate means the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy, reduced by funeral and administration expenses and enforceable claims.

(b) Except as provided in Section 62-7-401(c) with respect to a revocable inter vivos trust found to be illusory, the elective share shall apply only to the decedent’s probate estate.

REPORTER’S COMMENT

The 2013 amendment does not change the definition of ‘probate estate,’ a term with a settled meaning. As defined, the ‘probate estate’ to which the elective share is applicable is actually the net probate estate, after the probate estate is reduced by funeral and administration expenses and enforceable claims.

The 2013 amendment adds a new sub-paragraph (b), which takes into account and leaves unchanged the provisions of Section 62-7-401(c) of the South Carolina Trust Code. SCTC Section 62-7-401(c) is the statutory descendant of former SCPC Section 62-7-112, which was enacted after the *Siefert* decision, *Seifert v. Southern Nat’l Bank of South Carolina*, 305 S.C. 353, 409 S.E.2d 337 (1991). *Seifert* found that the revocable trust before the court was ‘illusory’ and, even though not a part of the settlor/decedent’s probate estate, assets owned by the trust were nevertheless subject to the elective share. The amendment means to leave intact Section 62-7-401(c), including the possibility that assets owned by a revocable inter vivos trust found not to be illusory are not subject to the elective

share. The amendment clarifies that the only nonprobate assets subject to the elective share in South Carolina are assets in a revocable trust found to be illusory under Section 67-7-401(c).

The intent of the amendment is to clarify and provide certainty with respect to all other of a decedent's nonprobate assets, which by this amendment are not subject to the elective share in South Carolina.

The amendment expressly rejects the concept of the 'augmented estate' as the multiplicand of the one-third elective share entitlement. This rejection is in keeping with and continues the intent of the drafters of the elective share statute as originally effective in 1987, whose comment to this section stated 'This section rejects the 'augmented estate' concept promulgated by the drafters of the Uniform Probate Code as unnecessarily complex.' The latest concept of 'augmented estate' promulgated by the drafters of the Uniform Probate Code is more onerous and complex than the version rejected in 1987.

The revised Uniform Probate Code last promulgated by the National Conference of Commissioners on Uniform State Laws, as well as statutes adopted in some states (for example, North Carolina) have extended the reach of the statutory spousal share or elective share to nonprobate assets. The property to which the surviving electing spouse is entitled to receive a portion is referred to as the augmented estate.

The effective and expeditious administration of decedents' estates would be virtually impossible if nonprobate assets owned by persons not subject to the personal jurisdiction of any South Carolina court are subject to disbursement by reason of the elective share. A similar problem presently exists in estates in South Carolina where an equitable apportionment of the estate tax imposes on the personal representative the duty of collecting the proportionate share of tax from recipients of nonprobate property. Current laws provide no efficient, cost effective means to reach these assets in the hands of persons outside the range of existing long arm statutes.

Section 62-2-203. The right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending.

REPORTER'S COMMENT

See Section 62-5-101 for definitions of protected person and protective proceedings.

Section 62-2-204. (A) The rights of a surviving spouse to an elective share, homestead allowance, and exempt property, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver voluntarily signed by the waiving party after fair and reasonable disclosures to the waiving party of the other party's property and financial obligations have been given in writing.

(B) Unless it provides to the contrary, a waiver of all rights in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, and exempt property by each spouse in the property of the other and a disclaimer by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of a will executed before the waiver or property settlement.

REPORTER'S COMMENT

The right to homestead allowance is conferred by Article 1, Chapter 41, Title 15 of the 1976 Code, and exempt property by Section 62-2-401. The right to disclaim interests passing by testate or intestate succession is recognized by Section 62-2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common and commendable desire of parties to second and later marriages to ensure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and disclaimer takes care of the situation which arises when a spouse dies while a divorce suit is pending.

Section 62-2-205. (a) The surviving spouse may elect to take an elective share in the probate estate by filing in the court and serving upon the personal representative, if any, a summons and petition for the elective share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after a surviving spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will.

(b) The surviving spouse shall give notice of the time and place set for the hearing on the elective share claim to the personal representative and to distributees and recipients of portions of the

probate estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw or reduce his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the probate estate or by contribution as set out in Sections 62-2-206 and 62-2-207.

(e) The order or judgment of the court for payment or contribution may be enforced as necessary in other courts of this State or other jurisdictions.

REPORTER'S COMMENT

The 2010 amendment revised subsection (a) by deleting "mailing or delivering" and replacing it with "serving upon" and also adding "summons and" to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for elective share. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. The 2013 amendment revised the time limit within which the surviving spouse may claim an elective share.

Section 62-2-206. A surviving spouse is entitled to benefits provided under or outside of the decedent's will, by any homestead allowance, by Section 62-2-401, whether or not he elects to take an elective share, but such amounts as pass under the will or by intestacy, by any homestead allowance, and by Section 62-2-401 are to be charged against the elective share pursuant to Section 62-2-207(a).

REPORTER'S COMMENT

This election does not result in a loss of benefits under, outside, or against the will (in the absence of renunciation) but (to the extent that such gifts are part of the estate) they are charged against the elective share under Sections 62-2-201, 62-2-202, and 62-2-207(a).

Section 62-2-207. (a) In the proceeding for an elective share, all property, including any beneficial interest, which passes or has passed to the surviving spouse, or would have passed to the surviving spouse, but was renounced or disclaimed, must be applied first to satisfy the elective share and to reduce any contributions due from other recipients

of transfers included in the probate estate, so long as the property is passed to the surviving spouse:

- (1) under the decedent's will;
- (2) by intestacy;
- (3) by a homestead allowance;
- (4) by Section 62-2-401;
- (5) by a beneficiary designation in life insurance policies;
- (6) by a beneficiary designation of an Individual Retirement Account, qualified retirement plan, or annuity;
- (7) in a trust created by the decedent's will; or
- (8) in a revocable inter vivos trust created by the decedent.

(b) A beneficial interest that passes or has passed to a surviving spouse under the decedent's will includes:

- (1) an interest as a beneficiary in a trust created by the decedent's will;
- (2) an interest as a beneficiary in property passing under the decedent's will to an inter vivos trust created by the decedent; and
- (3) an interest as a beneficiary in property contained at the decedent's death in a revocable inter vivos trust found to be illusory, as provided in Section 62-7-401(c).

(c)(1) For purposes of this provision, the value of the electing spouse's beneficial interest in property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, or, if the federal estate tax is not applicable at the decedent's death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009, must be computed at the full value of the qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property.

(2) The value of this qualifying property shall be the value at the date of death as finally determined in the decedent's estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the inventory and appraisal or as determined by the court. The personal representative must choose assets, in order of abatement pursuant to Section 62-3-902, to satisfy the elective share, using the fair market value at the date of distribution. The elective share is pecuniary in nature.

(3) The electing spouse who is the income beneficiary of a trust, the value of which is treated, or could be treated, as qualifying property, shall have the right to require a conversion of the income

trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act.

(d) In choosing assets to fund the elective share, remaining property of the probate estate is applied so that liability for the balance of the elective share of the surviving spouse is satisfied from the probate estate, with devises abating in accordance with Section 62-3-902.

REPORTER'S COMMENT

The 2013 amendment changes substantively the method of calculation of the elective share in South Carolina. Under the law prior to this amendment, nonprobate assets passing to the surviving spouse were not offset against the elective share. Under the amendment, the amount of the probate estate subject to the elective share is reduced by the value of nonprobate assets passing to the spouse at the death of the decedent. Including the value of nonprobate assets passing to the surviving spouse at the death of the decedent in the calculation of the elective share imposes on the personal representative the duty to ascertain the value of those nonprobate assets as well as the duty to verify that the assets in fact pass to the surviving spouse. Probate courts may require that nonprobate assets be identified sufficiently on the inventory and appraisal to enable the calculation to be made. The amendment makes clear that the nonprobate assets are applied first to satisfy the elective share before assets from the probate estate are applied in satisfaction. The amendment clarifies and makes certain that property passing directly to the surviving spouse in a revocable inter vivos trust, including a beneficial interest, will satisfy the elective share. The amendment eliminates the concern that property had to 'pass under the will' first in order to be applied in satisfaction of the elective share.

The amendment leaves unchanged the law that the value of the electing spouse's beneficial interest in any property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended (or, if the federal estate tax is not applicable at the decedent's death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009), must be computed at the full value of any such qualifying property. Two comments are relevant here. First, the future of the federal estate tax is at best uncertain. The federal estate tax law in effect on December 31, 2009, as it pertained to the qualification for the federal estate tax marital deduction, was settled law, familiar to laymen and practitioners alike. Consequently, incorporation of the qualification requirements

for the federal estate tax marital deduction then in effect, particularly with respect to the so called 'QTIP' marital trust, is the measure least likely to cause confusion and error. Next, in rejecting the 'augmented estate' while at the same time continuing to credit at full value the assets in an income only QTIP trust, this section takes into account the possibility that the consequences to a surviving spouse in the present and projected economy could be harsh as well as changes to South Carolina law since 1987, including adoption of the South Carolina version of the Uniform Prudent Investor Act (Section 62-7-933), predicated on Modern Portfolio Theory. Recognizing that simple, income only trusts may be disappointing and inadequate, the 2013 amendment provides that the electing spouse who is the beneficiary of an income trust, the value of which is treated (or could be treated) as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act.

The 2013 amendment clarifies that the value of such qualifying property shall be the value at the date of death as finally determined in the decedent's estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the inventory and appraisal or as determined by the court. Generally this is fair market value. The amendment makes clear, first, that in satisfying the elective share, probate assets will be valued at date of distribution values; second, the amendment provides that the elective share is pecuniary in nature and not fractional. This is less burdensome and requires revaluation only of assets in kind used to fund the elective share. Although the law prior to the 2013 amendment may have been unclear about whether the elective share was fractional or pecuniary, the treatment of the elective share as pecuniary will be clear prospectively from the effective date of the amendment.

The amendment leaves unchanged the order of abatement within the probate estate.

Part 3

Spouse and Children Unprovided for in Wills

Section 62-2-301. (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:

(1) it appears from the will that the omission was intentional; or
(2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902.

(c) The spouse may claim a share as provided by this section by filing in the court and serving upon the personal representative, if any, a summons and petition for such share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after the omitted spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will. The spouse shall give notice of the time and place set for the hearing on the omitted spouse claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

REPORTER'S COMMENT

Section 62-2-301 sets aside an intestate share for any surviving spouse who is married to a testator after the execution of a will which omits provision for the spouse, unless the omission was intentional or the spouse was otherwise provided for outside of and intentionally in lieu of a will's provisions. Compare the set aside for omitted afterborn children under Section 62-2-302. The testator's intentions may be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer.

Section 62-2-301 does not totally revoke the will; rather, Section 62-2-301 merely abates the will's devises to the extent necessary to satisfy the spouse's intestate share. Compare Section 62-2-507, effecting a partial revocation of a will's provisions to the extent that they benefit a spouse divorced from testator after execution of the will, and otherwise providing that no change of circumstances, e.g., marriage, revokes a will by operation of law.

The spouse's protection accorded by Section 62-2-301 presumably may be waived. See Section 62-2-801. The 2013 amendment revised the time limit within which an omitted spouse may claim a share of the estate.

Section 62-2-302. (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

- (1) it appears from the will that the omission was intentional; or
- (2) when the will was executed the testator devised substantially all his estate to his spouse; or
- (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If, at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes that child to be dead, the child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 62-3-902.

(d) The child, and his guardian or conservator acting for him, may claim a share as provided by this section by filing in the court and serving upon the personal representative, if any, a summons and petition for such share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after the omitted child is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of a decedent's will. The child, and his guardian or conservator acting for him, shall give notice of the time and place set for the hearing on the omitted child claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

REPORTER'S COMMENT

Section 62-2-302 sets aside an intestate share for any surviving child who either was unprovided for because he was thought to be dead at the execution of a will or is born to or adopted by a testator after the execution of a will which omits provision for the child; but, in the case of the afterborn child, he does not take a set aside if the omission was intentional, or if the child was otherwise provided for outside of and intentionally in lieu of a will's provisions. Compare the set aside for omitted spouses under Section 62-2-301. The testator's intentions may

be shown on the face of the will or by his statements concerning or from the amount of or from other evidence concerning the nontestamentary transfer.

The 2013 amendment addressed afterborn children by providing that a will devising substantially all of a testator's estate to his spouse is valid against the claim of a child omitted under such will regardless of whether the will was executed by the decedent before or after the child was born or adopted. It also revised the time limit under which an omitted child may claim a share of the estate.

Part 4

Exempt Property

Section 62-2-401. The surviving spouse of a decedent who was domiciled in this State is entitled from the estate to a value not exceeding twenty-five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, minor or dependent children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than twenty-five thousand dollars, or if there is not twenty-five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the twenty-five thousand dollar value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except claims described in Section 62-3-805(a)(1). These rights are in addition to any right of homestead and personal property exemption otherwise granted by law but are chargeable against and not in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by the elective share. Any surviving spouse or minor or dependent children of the decedent who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of this section.

REPORTER'S COMMENT

Section 62-2-401 sets aside an unencumbered twenty-five thousand dollars worth of exempt personal property to a domiciliary decedent's surviving spouse or minor or dependent children. Claimants must

survive the decedent by one hundred twenty hours in order to qualify under Section 62-2-401.

Section 62-2-401 sets aside the indicated amount free of the claims of both the unsecured creditors of the decedent's estate (a creditors' claim exemption) and the decedent's will's named beneficiaries, i.e., notwithstanding any provisions in the will to the contrary (a mandatory set aside).

While the mandatory set aside is chargeable against and not in addition to any provisions in the will or in intestacy in favor of the spouse or children, unless otherwise provided in the will, Section 62-2-401 provides that the mandatory set aside and creditors' claim exemption is to be in addition to and not chargeable against any right of homestead allowance, i.e., real property exemption, and personal property exemption, available to the decedent's survivors pursuant to Section 15-41-30 of the 1976 Code, and otherwise.

For a discussion of which of these exemptions apply to a decedent's estate, see (*Scholtec v. Estate of Reeves*, 327 S.C. 551, 490 S.E. 2d 603 (S.C. App. 1997)).

Section 62-2-402. (a) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to exempt property. Subject to this restriction, the surviving spouse, the guardians or conservators of the minor children, or children who are adults may select property of the estate as exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians or conservators of the minor children are unable or fail to do so within a reasonable time or if there are no guardians or conservators of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as exempt property. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may make application to the court for appropriate relief.

(b) The surviving spouse or the minor or dependent child, and the minor's guardian or conservator acting for him, as the case may be, may claim a share of exempt property as provided in this part by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death, or within six months after the probate of the decedent's will, whichever limitation last expires.

REPORTER'S COMMENT

Section 62-2-402 governs the administration of the exempt property provisions of Section 62-2-401.

The 2010 amendment revised subsection (a) by deleting "petition" and replacing it with "make application," so that the personal representative or any interested person as referred to in this section can make application to the probate court. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in §62-1-201(1).

Section 62-2-403. All monies paid for insurance, compensation, or pensions by the United States of America to the executors, administrators, or heirs-at-law of any deceased veteran who served during any 'period of war' as determined in reference to pension entitlement under 38 U.S.C. 1521, 1541 and 1542 and the regulations issued thereunder, and whose estate is administered in this State for insurance, compensation, or pensions is hereby declared to be exempt from the claims of any and all creditors of such deceased veteran.

REPORTER'S COMMENT

The 2013 amendment exempts monies paid for insurance, compensation, or pensions by the United States of America to the executors, administrators, or heirs-at-law of any deceased veteran who served during any 'period of war' as that term is defined under federal regulations. Prior to amendment the protection did not cover veterans of conflicts after World War II.

Part 5

Wills

Section 62-2-501. An individual who is of sound mind and who is not a minor as defined in Section 62-1-201(27) may make a will.

REPORTER'S COMMENT

Section 62-2-501 allows any individual of sound mind who is not a minor to make a will. An individual is not a minor if the individual is either (1) at least eighteen, (2) married, or (3) emancipated. An individual may make a will of his or her 'estate.' The estate which may be so devised is defined in item (11) of Section 62-1-201 as 'property', in turn defined in item (37) of Section 62-1-201 as both real and personal and 'anything that may be the subject of ownership.' No

distinction on the question of capacity to make a will is drawn by Section 62-2-501 between men and women or between citizens and aliens.

Section 62-2-501 is not meant to reverse the South Carolina law with respect to tenants in fee simple conditional, *Jones v. Postell*, 16 S.C.L. 92 (Harp. L.)(1824), and tenants in joint tenancies with express provisions for right of survivorship, *Davis v. Davis*, 223 S.C. 182, 75 S.E.2d 46 (1963). In both cases the law disabled such tenants from passing their estates by will. The spirit, if not the letter, of this Code's provisions is opposed to the grant of any such novel right to devise.

Tenants who hold real property in joint tenancies lacking express survivorship provisions may devise their interest in such real property. In the absence of a will such tenant's interest in such real property will pass in intestacy. See Section 62-2-804.

The elaborate body of case law developed in the application of former Sections 21-7-10, et seq., will continue to supply guidance in the application of Section 62-2-501. That case law concerns the matters of sufficient testamentary intent, *Madden v. Madden*, 237 S.C. 629, 118 S.E.2d 443 (1961), *C. & S. Nat. Bank of S. C. v. Roach*, 239 S.C. 291, 122 S.E.2d 644 (1961), including conditional wills, *S. Alan Medlin, The Law of Wills and Trusts* (S.C. Bar 2002) Section 305; and sufficient mental capacity, *Lee's Heirs v. Lee's Executor*, 15 S.C.L. 183 (4 McC. L.) (1827), *Hellams v. Ross*, 268 S.C. 284, 233 S.E.2d 98 (1977), *Medlin, supra* at Section 301.2; as well as the effect of undue influence, *Farr v. Thompson*, 25 S.C.L. 37 (Cheves L.) (1839); *Thompson v. Farr*, 28 S.C.L. 93 (1 Sp. L.) (1842); *O'Neill v. Farr*, 30 S.C.L. 80 (1 Rich. L.) (1844), *Mock v. Dowling*, 266 S.C. 274, 222 S.E.2d 773 (1976), *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982), *Medlin, supra* at Section 301.4; and the burdens of proof applicable and the presumptions of fact available with respect to mental capacity and undue influence, *Havird v. Schissell*, 252 S.C. 404, 166 S.E.2d 801 (1969), *Medlin, supra* at Sections 301.2, 301.4. The developed South Carolina case law also covers the matters of mistake in the execution of wills, *Ex Parte King*, 132 S.C. 63, 128 S.E. 850 (1925), *Medlin, supra* at Section 301.2; and fraud as it affects the making of wills.

Section 62-2-502. Except as provided for writings within Section 62-2-512 and wills within Section 62-2-505, every will shall be:

- (1) in writing;

(2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and

(3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

REPORTER'S COMMENT

Section 62-2-502 specifies the usual requirements for the valid formal execution of every will: a writing signed by the testator, or for him by another, and also signed by two witnesses, witnessing either the testator's signing or his acknowledgment of either his signature or the will. All of these formalities were required by prior South Carolina law, formerly Sections 21-7-20 and 21-7-50 of the 1976 code, which, however, further required that three witnesses sign and that they do so in the presence of the testator and of each other. The required number of witnesses is reduced from three to two with respect to all wills executed after June 27, 1984, the effective date of South Carolina's first statute recognizing the device of the self-proving will affidavit, formerly Section 21-7-615 of the 1976 code, embodied in Section 62-2-503 of this Code. That statute might have been read by some testators to allow for the valid execution and attestation of a will by only two witnesses. As the policy of this Code is to require just two witnesses at testation, it appears advisable to bring within the Code's protection any testators whose wills were attested by but two witnesses between June 28, 1984, and the effective date of this Code. Section 62-2-502 requires neither subscription of the testator's signature, i.e., that it appear at the end of the will, nor publication of the will, i.e., the testator's announcement to the witnesses that the document is his will, nor a specific request by the testator that the witnesses attest and sign. Each of these practices is, however, customary and unobjectionable.

This Code does not recognize the holographic method of execution of a will, i.e., dispensing with the witnesses but requiring that the whole will be cast in the testator's handwriting and that it be signed by him. Such a will is not valid in South Carolina, unless specifically by valid out-state execution or out-state probate, which special rules are to be found at Sections 62-2-505, 62-3-303(c) and (d), and 62-3-408 of this Code. Further, this Code recognizes neither soldiers' and mariners' wills of personalty nor nuncupative wills of personalty, i.e., oral wills.

The effect of Section 62-2-502 is that every will must be in an integrated writing, signed and witnessed as described, except only as

provided in Sections 62-2-505 (written wills duly executed elsewhere) and 62-2-512 (writings disposing of tangible personal property).

Section 62-2-503. (a) Any will may be simultaneously executed, attested, and made self-proved. The self-proof shall be effective upon the acknowledgment by the testator and the affidavit of at least one witness, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in the following form or in a similar form showing the same intent:

I, _____, the testator, sign my name to this instrument this ___ day of _____, 20___, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older (or if under the age of eighteen, am married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

We, _____ and _____, the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare, generally and to the undersigned authority, that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavit of at least one witness, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached, or annexed to the will in the following form or in a similar form showing the same intent:

The State of _____ County of _____ We, _____ and _____, the testator and at least one of the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and

that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and to the best of his knowledge the testator was at that time eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

(c) A witness to any will who is also an officer authorized to administer oaths under the laws of this State may notarize the signature of the other witness of the will in the manner provided by this section.

REPORTER'S COMMENT

Section 62-2-503 provides for an expediting feature for the proof of wills. The self-proved will is a will into which an affidavit has been incorporated, signed by the testator, the witnesses and a notary, declaring the due execution of the will, the testamentary capacity of the testator and the absence of undue influence worked upon the testator. Probate of a self-proved will is freed of the requirement of producing the available testimony of such witnesses to the due execution of the will, as otherwise required by Sections 62-3-405 and 62-3-406 of this Code as to formal testacy proceedings.

The testator's affidavit may be drafted into the testimonium clause of the will so that his one signature suffices for both the execution of the will and the execution of his affidavit. Similarly, the witnesses' affidavit may be drafted into their attestation clause, requiring each of them to sign only once. Section 62-2-503 (a). Alternatively, under Section 62-2-503(b), a will may be drafted with traditional testimonium and attestation clauses, requiring the signatures of the testator and the witnesses, respectively, with the affidavits of the testator and of the witnesses drafted as one, but separated from the testimonium and attestation clauses, and thus requiring each of such persons to sign a second time. The Section 62-2-503(b) form may be attached to a will executed simultaneously with the affidavit or, more to the point, a will executed at any time prior to the execution of the affidavit, even one executed prior to the enactment of this statute.

Section 62-2-503 makes a will self-proved if affidavits in 'substantially' the form of those set forth in the section are executed. Therefore, neither merely formal variations, nor the subscription of the will and of the affidavit by more than two witnesses, nor the failure of one or more of the witnesses to sign the affidavit should frustrate the self-proof of the will by way of the affidavit, that is, at least not insofar

as the proof of the will depends upon the testimony of the witnesses who do sign the affidavit.

Section 62-2-504. (a) A subscribing witness to any will is not incompetent to attest or prove the same by reason of any devise therein in favor of the witness, the witness's spouse, or the witness's issue. If there are two disinterested witnesses to a will in addition to the interested witness, then the devise is valid and effectual, if otherwise effective. If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent of the value of the excess property, estate, or interest so devised over the value of the property, estate or interest to which the witness, the witness's spouse, or the witness' issue would be entitled upon the failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with Section 62-2-101 et seq., provided the share of the interested witness, the witness's spouse, or the witness' issue shall not increase due to the devise passing by intestacy.

(b) A subscribing witness to any will is not incompetent to attest or prove the will by reason of any appointment within the will of the witness, the witness's spouse, or the witness's issue to any office, trust, or duty. The appointment of a witness, a witness's spouse, or a witness's issue is valid, if otherwise so, and the individual so appointed, in such case, is entitled by law to take or receive any commissions or other compensation on account thereof.

(c) A subscribing witness to any will is not incompetent to attest or prove the will by reason of any charge within the will of debts to any part of the estate in favor of the witness, the witness's spouse, or the witness's issue as creditor.

REPORTER'S COMMENT

The purpose of this section is to remove from the interested witness any benefit to the witness from the will that the witness would not otherwise receive so that the witness can be used to prove the will.

An 'interested witness' is an individual (1) who is named as a devisee in the testator's will; (2) whose spouse is named as a devisee in the testator's will, or (3) whose issue are named as devisees in the testator's will.

Section 62-2-505. A written will is valid if:

(a) it is executed in compliance with Section 62-2-502 either at the time of execution or at the date of the testator's death; or

(b) if its execution complies with the law at the time of execution of either (1) the place where the will is executed, or (2) the place where the testator is domiciled at the time of execution or at the time of death.

REPORTER'S COMMENT

Section 62-2-505 specifies the extraordinary requirements, alternative to the usual requirements of Section 62-2-502 of this Code, for the valid formal execution of a will: a writing executed in compliance with the law applicable at the time of the will's execution (not that at the time of the testator's date of death), of the place (whether South Carolina or elsewhere): (1) where the will is executed; (2) where the testator is domiciled at the time of the will's execution; or (3) where the testator is domiciled at the time of his death.

The policy of Section 62-2-505, the effectuation of the testator's intention to duly execute his will in accordance with the law as he may understand it at the date of the will's execution is furthered by the definition of the applicable law for purposes of Section 62-2-505 as that at the time of execution and as that of any of several different mentioned places.

The wills of all decedents, domiciliary or otherwise, are covered by this section and may benefit thereby.

One further alternative to this Code's provisions for valid in-state execution under Section 62-2-502 and valid out-state execution under Section 62-2-505 exists in its provisions for probate in South Carolina of a will already validly probated out-state; see Sections 62-3-303(c) and (d) and 62-3-408.

Section 62-2-506. (a) A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the testator's presence and by the testator's direction.

(b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(1) The testator is presumed to have intended a subsequent will to replace rather than to supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing

evidence, the previous will is revoked and only the subsequent will is operative on the testator's death.

(2) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will and each will is fully operative on the testator's death to the extent they are not inconsistent.

REPORTER'S COMMENT

Section 62-2-506 specifies the broad requirements for the valid intentional revocation of a will and of any part of a will: either (1) a subsequent will, defined in Section 62-1-201(52) of this Code, acting expressly or by implication on the will being revoked, or (2) a physical act affecting the will being revoked.

The elaborate body of case law developed in the application of former Section 21-7-210 will continue to supply guidance in the application of Section 62-2-506. *S. Alan Medlin, The Law of Wills and Trusts* (S.C. Bar 2002) Sections 310, 310.1. That case law stressed the necessity to meet the statute's requirements in order to effect a revocation, *Madden v. Madden*, 237 S.C. 629, 118 S.E.2d 443 (1961); distinguished intended revocations from the accidental inclusion of express language of revocation in subsequent wills, *Owens v. Fahnstock*, 110 S.C. 130, 96 S.E. 557 (1918), and the accidental destruction of wills, such accidents involving no revocation in the eyes of the law unless, perhaps, the accident was later confirmed as an intended revocation, *Davis v. Davis*, 214 S.C. 247, 52 S.E.2d 192 (1949). It distinguished unmistakable, unconditional revocations from cases of dependent relative revocation, i.e., mistaken revocations, not effective as revocations at law, *Pringle v. McPherson's Executors*, 4 S.C.L. 279 (2 Brev.) (1809), *Johnson v. Brailsford*, 2 Nott and McC. 272 (S.C. 1820) *Charleston Library Society v. C. & S. Nat. Bank*, 200 S.C. 96, 20 S.E.2d 623 (1942), *Stevens v. Royalls*, 223 S.C. 510, 77 S.E.2d 198 (1953). It allowed partial revocations by either one of the two broad methods of revocation, *Brown v. Brown*, 91 S.C. 101, 74 S.E. 135 (1912). It gave effect to revocations by implication from the inconsistency between the provisions of the will being revoked and the subsequent will and also determined whether any such inconsistency existed, *Starratt v. Morse*, 332 F. Supp. 1038 (D.S.C. 1971) and *Werber v. Moses*, 117 S.C. 157, 108 S.E. 396 (1921). It governed

revocations by physical act, including those accomplished 'by another person in his (the testator's) presence and by his direction,' *Means v. Moore*, 16 S.C.L. 314 (Harp. L.) (1824), and those rebuttably presumed to have occurred in cases of mutilated wills, *Johnson v. Brailsford*, supra, and in cases of missing wills, *Lowe v. Fickling*, 207 S.C. 442, 36 S.E.2d 293 (1945).

Section 62-2-507. (a) In this section:

(1) 'Disposition or appointment of property' includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) 'Divorce or annulment' means any divorce or annulment or declaration of invalidity of a marriage or other event that would exclude the spouse as a surviving spouse in accordance with Section 62-2-802. It also includes a court order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent's death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) 'Divorced individual' includes an individual whose marriage has been annulled.

(4) 'Governing instrument' means an instrument executed by the divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse including, but not limited to wills, revocable inter vivos trusts, powers of attorney, life insurance beneficiary designations, annuity beneficiary designations, retirement plan beneficiary designations and transfer on death accounts.

(5) 'Revocable' with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the divorced individual's former spouse, whether or not the divorced individual was then empowered to designate the divorced individual in place of the divorced individual's former spouse and whether or not the divorced individual then had the capacity to exercise the power.

(b) No change of circumstances other than those described in this section and in Section 62-2-803 effects a revocation.

(c) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the

marriage, divorce or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable:

(i) disposition or appointment of property or beneficiary designation made by a divorced individual to the divorced individual's former spouse in a governing instrument;

(ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse; or

(iii) nomination in a governing instrument, nominating a divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, trustee, conservator, agent, attorney in fact or guardian;

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship so that the share of the decedent passes as the decedent's property and the former spouse has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co-ownership with survivorship incidents.

(d) A severance under subsection (c)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving the property, as evidence of ownership.

(e) Provisions of a governing instrument and nomination in a fiduciary or representative capacity that are revoked by this section are given effect as if the former spouse predeceased the decedent.

(f) Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(g)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a

payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h)(1) A person who purchases property from a former spouse or any other person for value and without notice, or who receives from a former spouse or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

REPORTER'S COMMENT

The 2013 amendment expands this section to cover life insurance and retirement plan beneficiary designations, transfer on death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce or annulment. This section effectuates a decedent's presumed intent: without a contrary indication by the decedent, a former spouse will not receive any probate or nonprobate transfer as a result of the decedent's death.

Section 62-2-508. (a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 62-2-506(a)(2) the previous will remains revoked unless it is revived. The previous will is revived if it appears by clear and convincing evidence that the testator intended to revive or make effective the previous will.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 62-2-506(a)(2), a revoked part of the previous will is revived unless it appears by clear and convincing evidence that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

REPORTER'S COMMENT

Section 62-2-508 addresses the question whether the revival of a former and revoked will is intended and will be effected by the revocation of a subsequent and revoking will, either by physical act or by way of the execution of yet a third will revoking the subsequent will.

The 2013 amendment distinguishes between the revocation of a subsequent will that effects a complete revocation or a partial revocation of a previous will.

There is a presumption against revival where the subsequent will wholly revokes the previous will. The presumption against revival is intended to be heightened by the requirement of 'clear and convincing evidence' to rebut it.

There is a presumption in favor of revival (of the revoked part or parts of the previous will) where a subsequent will partially revoked

the previous will. The justification is that where the subsequent will only partially revoked the previous will, the subsequent will is only a codicil to the previous will and the testator should know that the previous will has continuing effect.

Section 62-2-509. Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

REPORTER'S COMMENT

Section 62-2-509 permits incorporation by reference in a will of a separate writing, in existence at the date of the execution of the will, if both the intent to incorporate and the identification of the writing appear in the language of the will. However, Section 62-2-509 does not require that the will describe the writing as existent and requires only that the writing be described 'sufficiently to permit its identification.'

Compare Section 62-2-512 which allows a writing not sufficiently incorporated by reference into a will, as under Section 62-2-509, to affect the will's dispositions in certain cases.

Section 62-2-510. (A) A devise made by a will to the trustee of a trust to a trust is valid so long as:

(1) the trust is identified in the testator's will and its terms are set forth in:

(a) a written instrument (other than a will) executed before, concurrently with, or after the execution of the testator's will but not later than the testator's death; or

(b) in the valid last will of another individual who has predeceased the testator;

(B) The trust is not required to have a trust corpus other than the expectancy of receiving the testator's devise.

(C) The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator.

(D) Unless the testator's will provides otherwise, the property so devised:

(1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given; and

(2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust,

including any amendments thereto made before or after the death of the testator.

(E) Unless the testator's will provides otherwise, a revocation or termination of the trust before the death of the testator causes the devise to lapse.

(F) Death benefits of any kind, including but not limited to proceeds of life insurance policies and payments under an employees' trust, or contract of insurance purchased by such a trust, forming part of a pension, stock-bonus or profit-sharing plan, or under a retirement annuity contract, may be paid to the trustee of a trust established by the insured, employee, or annuitant or by some other person if the trust is in existence at the death of the insured, employee, or annuitant, it is identified and its terms are set forth in a written instrument, and such death benefits shall be administered and disposed of in accordance with the provisions of the instrument setting forth the terms of the trust including any amendments made thereto before the death of the insured, employee, or annuitant and, if the instrument so provides, including any amendments to the trust made after the death of the insured, employee, or annuitant. It shall not be necessary to the validity of any such trust instrument, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive such death benefits.

(G) Death benefits of any kind, including but not limited to proceeds of life insurance policies and payments under an employees' trust, or contract of insurance purchased by such a trust, forming part of a pension, stock-bonus, or profit-sharing plan, or under a retirement annuity contract, may be paid to a trustee named, or to be named, in a will which is admitted to probate as the last will of the insured or the owner of the policy, or the employee covered by such plan or contract, as the case may be, whether or not such will is in existence at the time of such designation. Upon the admission of such will to probate, and the payment thereof to the trustee, such death benefits shall be administered and disposed of in accordance with the provisions of the testamentary trust created by the will as they exist at the time of the death of the testator. Such payments shall be deemed to pass directly to the trustee of the testamentary trust and shall not be deemed to have passed to or be receivable by the executor of the estate of the insured, employee, or annuitant.

(H) In the event no trustee makes proper claim to the proceeds payable as provided in subsections (F) and (G) of this section from the insurance company or the obligor within a period of one year after the date of the death of the insured, employee, or annuitant, or if

satisfactory evidence is furnished to the insurance company or other obligor within such one year period that there is or will be no trustee to receive the proceeds, payment must be made by the executors or administrators of the person making such designations, unless otherwise provided by agreement.

(I) Death benefits payable as provided in subsections (F) and (G) of this section shall not be subject to the debts of the insured, employee, or annuitant nor to transfer or estate taxes to any greater extent than if such proceeds were payable to the beneficiary of such trust and not to the estate of the insured, employee, or annuitant.

(J) Such death benefits payable as provided in subsections (F) and (G) of this section so held in trust may be commingled with any other assets which may properly come into such trust.

REPORTER'S COMMENT

This section allows a receptacle trust to be executed after the execution of the testator's will, and makes clear that the trust does not have to have a corpus other than the expectancy of receiving the testator's devise.

Section 62-2-511. A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

REPORTER'S COMMENT

Under Section 62-2-511, acts and events extraneous to a will are allowed to affect the will's dispositions if they have some significance apart from their effect upon the will's dispositions. The acts or events, including the execution or revocation of another person's will, might occur either before or after the dates of either the execution of the will or the testator's death and yet be given such effect.

Compare Section 62-2-512 which in certain cases allows an act extraneous to a will to affect the will's dispositions although the act has no independent significance.

Section 62-2-512. A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the

handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect upon the dispositions made by the will.

REPORTER'S COMMENT

Section 62-2-512 relaxes the normal application of the rules of incorporation by reference, Section 62-2-509, and of facts of independent significance, Section 62-2-511, all in favor of the special case of extraneous writings, either in the testator's handwriting or signed by the testator, referred to in the testator's will, and which dispose of certain items of tangible personal property. They are given effect, albeit they are neither required to be in existence at the date when the will is executed nor to have independent significance. They may be altered by the testator at any time.

Black's Law Dictionary defines 'tangible personal property' as including coin collections; therefore, coin collections may be items disposed of in a tangible personal property memorandum. Vehicles and boats are also tangible personal property.

Part 6

Construction

Section 62-2-601. (A) The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

(B) Notwithstanding subsection (A), the court may reform the terms of the will, even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.

REPORTER'S COMMENT

Section 62-2-601 states the first principle of the construction of wills, that the testator's intention as expressed in the will controls, a codification of South Carolina case law. See *King v. S.C. Tax Comm.*, 253 S.C. 246, 173 S.E.2d 92 (1970). Only in the absence of expression

in the will of the testator's intention do the rules of construction of this Part (6) control.

Subsection (B) tracks Uniform Probate Code Reformation to Correct Mistakes to give probate judges statutory authority to reform a will's terms when there is clear and convincing evidence of a mistake (for example, in husband/wife wills where the attorney mistakenly forgets to change the name of the devisee from wife to husband in wife's will). Additionally, subsection (B) mirrors Section 62-7-415 in the Trust Code.

Section 62-2-602. A will is construed to pass all property which the testator owns at the testator's death including property acquired after the execution of the will and all property acquired by the testator's estate after the testator's death.

REPORTER'S COMMENT

Section 62-2-602 establishes the general rule that an ambiguous will is construed to pass all property owned at the testator's date of death, if at all possible to do so. Thus is stated the South Carolina law's presumption against intestacy. See *MacDonald v. Fagan*, 118 S.C. 510, 111 S.E. 793 (1922).

Property specifically described in the will presents no problem; it is property not specifically described which raises the question answered by this section's rule. Provisions referring generally to classes of property of the decedent, without specification of the items of such property, are construed to refer to all items within the scope of their general reference, whether the items were acquired before or after the execution of the will. However, items of property not within the scope of reference of any general provision contained in the will do not pass under that will; they pass in intestacy, regardless of when they were acquired by the testator. *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d 421, 426 (1951).

This section also expresses the particular rule that after-acquired property is to be treated the same as property owned at the execution of the will even if that property is acquired by the testator's estate after the testator's death.

Section 62-2-603. (A) Unless a contrary intent appears in the will, if a devisee, who is a great-grandparent or a lineal descendant of a great-grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator take

in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation.

(B) One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

(C) Words of survivorship in a devise to an individual, such as, 'if he survives me,' or to 'my surviving children,' are, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of subsections (A) and (B).

REPORTER'S COMMENT

The anti-lapse rule of Section 62-2-603 applies unless the decedent's will provides otherwise and unless lifetime gifts to a devisee satisfy his devise under Section 62-2-610. The rule preserves some devises which otherwise would be void or would lapse because of the failure of the devisees to survive to take the devise. The rule saves only devises to persons who are related to the testator as or through the testator's great-grandparents, whether they are individually named in the devise, or merely described by class terminology, and whether they predecease the will's execution or the testator's date of death or they are merely treated as predeceasing his death, as under the Uniform Simultaneous Death Act, Sections 62-1-501 et seq., or as under Section 62-2-801 respecting devisees who renounce their succession rights, or as under Section 62-2-803 respecting devisees who feloniously and intentionally kill their testators. Those of the devisee's issue, defined by Section 62-1-201(24) who survive the testator take the devise in place of the devisee; they take among themselves per capita with per capita representation, as in intestate succession under Section 62-2-106 (see Reporter's Comments to Sections 62-2-106 and 62-2-103(1)).

Section 62-2-603 unifies in one anti-lapse rule the simplified and expanded protection of those related to the testator as or through his great-grandparents and it also clarifies and expands the coverage of the anti-lapse rule, applying it to class gifts as well as to void devises.

The 2013 amendment added a presumption that words of survivorship are sufficient indication that the testator does not intend the antilapse section to apply.

Section 62-2-604. (A) Except as provided in Section 62-2-603, if a devise other than a residuary devise fails for any reason it becomes a part of the residue.

(B) Except as provided in Section 62-2-603 if the residue is devised to two or more persons, the share of the residuary devisees that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

REPORTER'S COMMENT

The pro-residuary anti-failure rule of Section 62-2-604 applies to a failed devise unless the decedent's will provides otherwise, Section 62-2-601, as by substituting other takers for the failed devise, and unless the anti-lapse rule of Section 62-2-603 applies to preserve the otherwise failed devise.

The rule preserves from intestacy devises failing for any reason, e.g., because of the indefiniteness of the devise, illegality, a violation of any Rule Against Perpetuities, incapacity of the devisee, or the failure of the devisee to survive to take the devise, including treatment of such devisee as being predeceased, as under the Uniform Simultaneous Death Act, Sections 62-1-501 et seq., and under Sections 62-2-801 and 62-2-803. The rule passes the failed devise to such of the residuary devisees whose devises do not fail, if any, who take proportionately in place of the devisee with respect to whom the devise failed. The rule of Section 62-2-604 applies whether the failed devise is pre-residuary, subsection (A), or residuary, subsection (B).

Section 62-2-605. (A) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

- (1) as much of the devised securities as is a part of the testator's estate at the time of the testator's death;
- (2) any additional or other securities of the same organization owned by the testator by reason of action initiated by the organization or any successor, related or acquiring organization excluding any acquired by exercise of purchase options;
- (3) securities of another organization owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the organization or any successor, related or acquiring organization;
- (4) any additional securities of the organization owned by the testator as a result of a plan of reinvestment in the organization.

(B) Distributions in cash declared prior to death with respect to a specifically devised security not provided for in subsection (A) are not part of the specific devise.

REPORTER'S COMMENTS

Section 62-2-605 establishes the rule that a specific devise, i.e., not merely a devise of equivalent value, of securities, defined at Section 62-1-201(41), is construed to pass only certain related securities, owned by the testator at his death, and listed in Section 62-2-605(A), and not to pass any other related securities or distributions of record before the death of the testator not so listed, Section 62-2-605(B), unless the decedent's will provides otherwise, Section 62-2-601. For the generally applicable nonademption rule see Section 62-2-606. See Section 62-7-908(A) concerning distributions of record after the death of testator.

The specific devise carries out with it as much of the securities specifically referred to as remain owned by the testator at his death, Section 62-2-605(A)(1), codifying South Carolina case law. See *Gist v. Craig*, 142 S.C. 407, 141 S.E. 26 (1927) and *Watson v. Watson*, 231 S.C. 247, 95 S.E.2d 266 (1956) (identified specifically devised proceeds not adeemed).

Also carried out with the specific devise are additional securities of both entities other than the organization issuing the specifically devised securities, owned by the testator as a result of merger or the like, Section 62-2-605(A)(3), and of the organization itself, Section 62-2-605(A)(2), in either case owned by the testator by reason of actions initiated by the organization, Sections 62-2-605(A)(2) and (A)(3), and not initiated by testator himself. Additional securities received by the testator in mergers, name changes, stock splits and stock dividends, and spin-offs of subsidiaries, more representing change in the form of ownership of the specifically devised securities than change in the substance of that which is owned, and none at the initiative of the testator, are here bulked with and carried out with the specifically devised securities themselves, as is likely to be intended by the testator.

Not carried out with the specific devise are additional securities of the organization itself owned by the testator by reason of his exercise of purchase options, i.e., at the initiative of the testator, Section 62-2-605(A)(2), and thus not to be bulked with the specifically devised securities, the testator himself having failed to do so by the route, open to but not taken by him, of amending his will. This is consistent with South Carolina case law, *Rogers v. Rogers*, 67S.C. 168, 45 S.E. 176 (1903), notwithstanding the case of *Rasor v. Rasor*, 173 S.C. 365, 175 S.E. 545 (1934), a case not of a specific devise but rather of a devise of equivalent value of certain securities.

However, there are carried out with the specifically devised securities of an organization any additional securities resulting from a plan of reinvestment in the organization. These are owned also at the initiative of the testator, but are bulked with the specifically devised securities because the testator himself has practically done so by his assent to the plan of reinvestment.

The rule of Section 62-2-605(B) that distributions not provided for in Section 62-2-605(A) are not carried out with the specifically devised securities is, as the residual rule in this Code's scheme, consistent with the general rule of South Carolina case law, *Bailey v. Wagner*, 21 S.C. Eq. 1, 8, 10 (2 Strob. Eq.) (1848) (proceeds of sale of adeemed specific bequest not carried out); *Rogers v. Rogers*, supra, *Pinson v. Pinson*, 150 S.C. 368, 148 S.E. 211 (1928), and *Rikard v. Miller*, 231 S.C. 98, 107, 97 S.E.2d 257 (1957) (identified proceeds of collection or sale of adeemed specific bequests not carried out); and *Stanton v. David*, 193 S.C. 108, 7 S.E.2d 852 (1940), and *Taylor v. Goddard*, 265 S.C. 327, 218 S.E.2d 246 (1975) (nor unidentified proceeds).

The 2013 amendment substituted the word 'organization' for 'entity' because 'organization' is defined in the probate code at Section 62-1-201(30). The amendment also added 'successor, related, or acquiring organization' to contemplate multiple changes in title of securities between the testator's acquisition of the security and the testator's death. The amendment eliminated 'if it is a regulated investment company' from (A)(4). The amendment added the words 'in cash' to subsection (B) to clarify that distributions made in cash do not fall within subsection (A) while distributions of other securities do fall within subsection (A). Finally, the amendment added the word 'declared' to subsection (B) to clarify that the cash distributions declared before death do not pass as part of the devise regardless of whether they are paid before or after death.

Section 62-2-606. (a) A specific devisee has the right to the specifically devised property in the testator's estate at the testator's death and to:

- (1) any balance of the purchase price (together with any mortgage or other security interest) owed by a purchaser to the testator at the testator's death by reason of sale of the property;
- (2) any amount of a condemnation award for the taking of the property unpaid at the testator's death;
- (3) any proceeds unpaid at the testator's death on fire or casualty insurance or on other recovery for injury to the property;

(4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or a condemnation award or insurance proceeds or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of the specific devisee under subsection (b) is reduced by the value of any right he has under subsection (a).

(d) For purposes of references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty or recovery, it was adjudicated that the testator's disability ceased and the testator survived the adjudication for at least one year.

(e) For purposes of references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) 'incapacitated principal' means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

REPORTER'S COMMENT

Section 62-2-606 establishes the rule that a specific devise of any property, including securities also governed by Section 62-2-605, is construed to pass, not only as much of the specifically devised property as remains at testator's death, but also the proceeds of sale, subsection (a)(1), and condemnation, subsection (a)(2), of the property, and the proceeds of policies of insurance against fire or casualty to the property, subsection (a)(3), but only if such proceeds are yet unpaid to the testator at the testator's death, Section 62-2-606(a), or if such proceeds have been paid to an agent acting within the authority of a durable power of attorney or to a conservator, defined at Section 62-1-201(6), of the testator during the testator's life, provided less than one year separates the death of the testator and a prior adjudication that his disability had ceased, Section 62-2-606(b). Further, a specific devise of a secured obligation passes the products of foreclosure, or settlement in lieu of foreclosure, of such security, Section

62-2-606(a)(4). Section 62-2-606 applies unless the decedent's will provides otherwise, Section 62-2-601.

The 2013 amendment adds the provisions regarding an agent acting within the authority of a durable power of attorney

Section 62-2-607. A specific devise passes subject to any mortgage, pledge, security interest or other lien existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

REPORTER'S COMMENT

Section 62-2-607 establishes a rule of construction that specific devises pass not exonerated of but subject to any related security interests, unless the decedent's will provides otherwise, Section 62-2-601.

See Section 62-3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee.

For the rule as to exempt property, see Section 62-2-401.

Section 62-2-608. A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

REPORTER'S COMMENT

Section 62-2-608 follows the common law rule of construction that, unless the decedent's will provides otherwise, Sections 62-2-601 and 62-2-608, general dispositive provisions in a will do not pass property subject to the testator's powers of appointment.

Section 62-2-609. Half bloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.

REPORTER'S COMMENT

Section 62-2-609 establishes the meaning of terms of family relationship, as used in wills, as including the meaning which such terms have for purposes of intestate succession by certain persons under Part I of Article 2, unless the decedent's will provides otherwise, Section 62-2-601. Hence, references to 'children', 'issue', or 'heirs', and the like, are read to include or exclude half blood and adopted persons and persons born out of wedlock according to the rules of Sections 62-2-103(3) and 62-2-107, half bloods, 62-2-109(1), adopted persons, 62-2-109(2), persons born out of wedlock, 62-2-112, aliens, and 62-2-113, twice related persons, at least those who are otherwise implicated by mention in Section 62-2-609.

Half Blood:

Section 62-2-107 generally treats half bloods just as whole bloods in the event of intestacy; hence, Section 62-2-609 would generally treat them without discrimination in the construction of wills.

Adopted Persons:

Section 62-2-109(1) generally treats adopted persons as natural born members of their adoptive families in the event of intestacy, as would Section 62-2-609 generally treat them in the construction of wills.

Persons Born Out of Wedlock:

Section 62-2-109(2) treats persons born out of wedlock just as legitimate persons in the event of the intestacy of their mothers, as would Section 62-2-609 treat them in the construction of wills. Section 62-2-109 treats persons born out of wedlock just as legitimate persons in the event of the intestacy of their fathers, but only in cases of ceremonial marriage of the person's parents even if the attempted marriage was void, Section 62-2-109(2)(i), or in cases of adjudication of the father's paternity, Section 62-2-109(2)(ii), and so would Section 62-2-609 treat them in the construction of wills but for its additional proviso that the person born out of wedlock is treated as the child of the father only if the father himself openly and notoriously so treated him.

Section 62-2-610. (a) Property which a testator gave in the testator's lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if:

- (i) the will provides for deduction of the lifetime gift;
- (ii) the testator declared in a contemporaneous writing that the gift is to be deducted from the devise; or
- (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(b) For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 62-2-603 and 62-2-604, unless the testator's contemporaneous writing provides otherwise.

REPORTER'S COMMENT

Section 62-2-610 concerns the effect on testate succession of lifetime gifts made by the testator to persons who are also devisees under his will. The section establishes a rule of construction which charges such lifetime gifts, in satisfaction, against the will's devise, but only if either they are declared thus to be in satisfaction, either by the will or by the testator, contemporaneously in writing, or they are thus acknowledged by the devisee, again in writing. If the devisee predeceases the testator, but issue of the devisee survive as beneficiaries of the anti-lapse provision of this Code, Section 62-2-603, then Sections 62-2-610 and 62-2-603 read together charge the ancestor's lifetime gifts in satisfaction against the devise to the issue, again, however, only if the above-mentioned writing exists.

Section 62-2-610 values the satisfaction at the earlier of the devisee's actual receipt of the gift or the testator's date of death, resulting in most cases in a valuation at the date of the gift rather than at the date of death.

See Section 62-2-110 on advancements, for a rule analogous to the rule of satisfaction, but operative in the event of intestacy.

The 2013 amendment added subsection (c) to provide that if a devisee fails to survive the testator and the devisee's descendants take under 62-2-603 and if this devise is reduced with respect to the devisee, it shall automatically be reduced with respect to the devisee's descendants.

Consider Section 62-2-606 as it relates to ademption.

Section 62-2-611. A devise of land is construed to pass an estate in fee simple, regardless of the absence of words of limitation in the devise.

Section 62-2-612. The personal representative, trustee, or any affected beneficiary under a will, trust, or other instrument of a decedent who dies or did die after December 31, 2009, and before

January 1, 2011, may bring a proceeding to determine the decedent's intent when the will, trust, or other instrument contains a formula that is based on the federal estate tax or generation-skipping tax.

Part 7

Contractual Arrangements Relating to Death

Section 62-2-701. A contract to make a will or devise, or to revoke a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by (1) provisions of a will of the decedent stating material provisions of the contract; (2) an express reference in a will of the decedent to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

REPORTER'S COMMENT

Section 62-2-701 allows the proof of a contract binding a decedent and concerning the succession to his estate, testate or intestate, only by way of some signed writing, either (1) his written, signed will containing the material provisions of the contract; (2) his written, signed will containing an express reference to the contract (extrinsic evidence proving its terms); or (3) a writing other than a will but signed by the decedent and containing evidence of the contract (allowing extrinsic evidence to prove its terms). The section's requirement of a signed writing to prove such contracts is meant to apply only prospectively, leaving the prior South Carolina law in effect retrospectively.

Noting that the only concern of Section 62-2-701 is with the proof of contracts concerning succession, it should be recognized that the prior South Carolina law, concerning the formation of such contracts and the effects of such contracts' formation and the breach thereof, remains intact. See S. Alan Medlin, *The Law of Wills and Trusts* (S.C. Bar 2002) Sections 341, 342; W. Brown, Note: *Specific Performance of Oral Contracts to Devise*, 17 S.C.L. Rev. 540 (1965); and T. Stubbs, *Oral Contracts to Make Wills*, IX Selden Soc. Y.B. Part III, 10 (1948).

The policies basing Section 62-2-701 and Sections 62-2-502 (execution of wills), 62-2-506 (revocation of wills), and 62-2-509 (incorporation of other matter by reference in wills) are the same. All of these sections are aimed at protecting the integrity of the process of

succession to the estates of decedents in accordance with their own true wills. Each of these sections requires that the decedent's will be expressed either in some writing or by way of a physical act done to some writing; the writings are required in the expectation of increasing the reliability of the proof of the decedent's true will. See K. Walsh, Note: The Statute of Frauds' Lifetime and Testamentary Provisions: Safeguarding Decedents' Estates, 50 Ford. L. Rev. 239 (1981) (hereinafter Walsh).

Section 32-3-10(4) of the 1976 Code does require contracts concerning land to be 'in writing and signed by the party to be charged therewith.' Accordingly, contracts concerning the succession to land as an asset of a decedent's estate were, *Brown v. Golightly*, 106 S.C. 519, 91 S.E. 869 (1917), *White v. McKnight*, 146 S.C. 59, 143 S.E. 552 (1928), and will yet be required to be in writing and signed by the decedent, i.e., 'by the party to be charged therewith (only in the sense that to charge the personal representative or other successor or assign of the decedent is to charge the decedent himself).'

In addition, prior South Carolina case law was said to require that contracts concerning succession be proved by 'clear, cogent, and convincing evidence.' *Caulder v. Knox*, 251 S.C. 337, 346, 162 S.E.2d 262 (1968), *Brown v. Graham*, 242 S.C. 491, 131 S.E.2d 421 (1963). While Section 2-701 fails to codify the stated higher standard of proof per se, the provision's requirement of a signed writing is consistent with the spirit of the former higher standard of proof and perpetuates its intended effect.

Further, Section 62-2-701 provides that no presumption of the existence of a contract concerning succession arises from the mere execution of mutual wills or of a joint will. And while there is South Carolina authority, relying on the reciprocating nature of the terms of a joint will, together with surrounding family circumstances, for the satisfaction by implication of the clear, cogent, and convincing evidentiary standard as to the existence of a contract not to revoke the joint will, in a case in which the joint will failed to actually express an agreement of nonrevocability, *Pruitt v. Moss*, 271 S.C. 305, 247 S.E.2d 324 (1978), Section 62-2-701 seems to preclude the establishment of any such contract of nonrevocability where the material provision thereof, i.e., the promise not to revoke, is not expressed in the joint will and the joint will otherwise fails to expressly refer to the contract.

Extrinsic evidence is freely admissible under Section 62-2-701 to prove the important terms of a contract whose mere existence is proved by a signed writing. However, as a brake on the provision's liberality with respect to extrinsic evidence, Section 19-11-20 of the 1976 Code, the

'Dead man's' statute, will continue to limit the admissibility of that extrinsic evidence which is subject to its application, this notwithstanding the enactment of Section 62-2-701. See *Brown v. Golightly*, supra.

Section 62-2-701 avoids the problems, both that of the possibly uneven application of the stated higher standard of proof of contracts concerning succession and that of the questionable breadth of application of the several pre-existing Statutes of Frauds provisions as to contracts concerning succession, quite simply by establishing a signed writing requirement specifically applicable to all such contracts. Presumably Section 62-2-701 will be construed as preempting the field, rendering all other such statutory and case law provisions inapplicable to such contracts in the future.

However, it may be questioned whether Section 62-2-701 should not be subject, in its operation, to the familiar legal and equitable exceptions to the operation of the other Statutes of Frauds provisions. See Section 62-1-103 and *Walsh*, supra, at 258-270. These include the remedies of restitution of monies advanced and the imposition of a constructive trust to force the restitution of other specific assets advanced by the promisee on an oral contract, and the effects of part performance of the oral contract by the promisee as well as equitable and promissory estoppel, either matter binding the promisor to the oral contract notwithstanding any applicable Statute of Frauds. One case has reached such a conclusion after the enactment of Section 62-2-701. See *Satcher v. Satcher*, 351 S.C. 477, 570 S.E. 2d 535 (S.C. App. 2002). See also *White v. McKnight*, supra, *Turnipseed v. Serrine*, supra 57 S.C. at 578, *Riddle v. George*, 181 S.C. 360, 187 S.E. 524 (1936), *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900). See *W. Brown*, Note: Specific Performance of Oral Contracts to Devise, 17 S.C.L. Rev. 540 (1965).

For the enforcement of a contract concerning succession while the testator is still alive, see *Wright v. Trask*, 329 S.C. 170, 495 S.E. 2d 222 (S.C. App. 1997).

Part 8

General Provisions

Section 62-2-801. (a) This section applies to disclaimers of any interest in or power over property, whenever created, and, in addition to other methods, is the means by which a disclaimer may be made under the laws of this State.

(b) For purpose of this section:

(1) 'Disclaimer' means any writing which disclaims, renounces, declines, or refuses an interest in or power over property.

(2) 'Disclaimant' means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(3) 'Disclaimed interest' means the interest that would have passed to the disclaimant had the disclaimer not been made.

(4) 'Fiduciary' means a personal representative, trustee, agent acting under a power of attorney, guardian, conservator, or other person authorized to act as a fiduciary with respect to the property of another person.

(c)(1) A person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment.

(2) Unless barred, a disclaimer must be made within a reasonable time after the disclaimant acquires actual knowledge of the interest. A disclaimer is conclusively presumed to have been made within a reasonable time if made within nine months after the date of effectiveness of the transfer as determined under subsection (d)(3).

(3) To be effective, a disclaimer must be:

(i) in writing;

(ii) declare the writing as a disclaimer;

(iii) describe the interest or power disclaimed; and

(iv) be delivered to the transferor of the interest, the transferor's fiduciary, the holder of the legal title to or the person in possession of the property to which the interest relates, or a court that would have jurisdiction over such interest or subject matter. A disclaimer of a power must be delivered as if the power disclaimed were an interest in property. Delivery of a disclaimer may be made by personal delivery, first-class mail, or any other method that results in its receipt. A disclaimer sent by first-class mail shall be deemed to have been delivered on the date it is postmarked.

(4) A disclaimer is not a transfer, assignment, or release if made within a reasonable time after the disclaimant acquires actual knowledge of the interest and if not otherwise barred.

(5) A barred disclaimer is ineffective as a disclaimer under this section. A disclaimer is barred by any of the following conditions occurring before the disclaimer becomes effective:

(i) the disclaimant waived in writing the right to disclaim;

(ii) the disclaimant accepted the interest sought to be disclaimed;

(iii) the disclaimant voluntarily assigned, conveyed, encumbered, pledged, transferred, or directed the interest sought to be disclaimed or has contracted to do so; or

(iv) a judicial sale of the interest sought to be disclaimed has occurred.

(6) A disclaimer is not barred by a spendthrift provision or similar restriction on transfer or the right to disclaim imposed by the creator of the interest in or power over the property.

(7) A disclaimer is not barred by a disclaimant's financial condition, whether or not insolvent, and a disclaimer that complies with this section is not a fraudulent transfer under the laws of this State.

(8) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(9) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred unless the power is exercisable in favor of a disclaimant.

(10) Unless a disclaimer is barred, a disclaimer treated as a qualified disclaimer pursuant to Internal Revenue Code Section 2518 is effective as a disclaimer under this section.

(d)(1) If a disclaimant makes a disclaimer with respect to any transferor's transfer (including transfers by any means whatsoever, lifetime and testamentary, voluntary and by operation of law, initial and successive, by grant, gift, trust, contract, intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property, devise, bequest, beneficiary designation, survivorship provision, exercise and nonexercise of a power, and otherwise) to the disclaimant of any interest in, including any power with respect to, property, or any undivided portion thereof, the interest, or such portion, is considered never to have been transferred to the disclaimant.

(2) Unless the transferor has provided otherwise in the event of a disclaimer, the disclaimed interest shall be transferred (or fail to be transferred), as if the disclaimant had predeceased the date of effectiveness of the transfer of the interest. The disclaimer shall relate back to that date of effectiveness for all purposes, and any future interest which is provided to take effect in possession or enjoyment after the termination of the disclaimed interest shall take effect as if the disclaimant had predeceased the date on which he or she as the taker of the disclaimed interest became finally ascertained and the disclaimed interest became indefeasibly vested. Provided, that an interest disclaimed by a disclaimant who is the spouse of a decedent, the transferor of the interest, may pass by any further process of transfer to

such spouse, notwithstanding the treatment of the transfer of the disclaimed interest as if the disclaimant had predeceased.

(3) The date of effectiveness of the transfer of the disclaimed interest is (i) as to transfers by intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property allowance, and devise and bequest, the date of death of the decedent transferor, or that of the donee of a testamentary power of appointment (whether exercised or not exercised) with respect to, the interest, as the case may be, and (ii) as to all other transfers, the date of effectiveness of the instrument, contract, or act of transfer.

(e)(1) If and to the extent an instrument creates a fiduciary relationship and expressly grants the fiduciary the right to disclaim, the fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. If there is no instrument expressly granting the fiduciary the right to disclaim, the fiduciary's right to disclaim shall be determined by the laws of this State applicable to that fiduciary relationship.

(2) If a trustee disclaims an interest in property that otherwise would have become trust property, the disclaimed interest does not become trust property.

(3) A fiduciary may disclaim a power held in a fiduciary capacity. If the power has not been previously exercised, the disclaimer takes effect as of the time the instrument creating the power became irrevocable. If the power has been previously exercised, the disclaimer takes effect immediately after the last exercise of the power. The disclaimer of a fiduciary power may be made binding on any successor fiduciary if the disclaimer so provides.

(4) If no conservator or guardian has been appointed, a parent may disclaim on behalf of that parent's minor child and unborn issue, in whole or in part, any interest in or power over property which the minor child or unborn issue is to receive as a result of another disclaimer, but only if the disclaimed interest or power does not pass outright to that parent as a result of the disclaimer.

(f) A fiduciary or other person having custody of the disclaimed interest is not liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer or, if the disclaimer is barred pursuant to subsection (c)(5), for any otherwise proper distribution or other disposition made in reliance on the disclaimer, if the distribution or disposition is made without actual knowledge of the facts constituting the bar of the right to disclaim.

REPORTER'S COMMENTS

Section 62-2-801 provides for the state law effectiveness of the disclaimer of transfers by way of succession to the estates of decedents and otherwise. It affects transfers by will as well as transfers through intestate estates. Section 62-2-801 also regulates the method by which a disclaimer must be made in order to be effective, its nature, timeliness, formal execution and delivery, and also the effect of a disclaimer on the further disposition of the interest renounced.

The purpose of the enactment of Section 62-2-801 is to establish the state property law basis for the recognition of the effectiveness of such disclaimers. The antilapse statutes, Sections 62-2-603 and 62-7-606, apply to cases of disclaimers of gifts under wills and interests in revocable trusts unless the transferor provides otherwise.

Section 62-2-802. (a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(b) For purposes of Parts 1, 2, 3, and 4 of Article 2 [Sections 62-2-101 et seq., 62-2-201 et seq., 62-2-301 et seq., and 62-2-401 et seq.] and of Section 62-3-203, a surviving spouse does not include:

(1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or live together as husband and wife at the time of the decedent's death;

(2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person;

(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent's death; or

(4) an individual claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is commenced

after the death of the decedent, proof must be by clear and convincing evidence.

(c) A divorce or annulment is not final until signed by the court and filed in the office of the clerk of court.

REPORTER'S COMMENT

Section 62-2-802 provides, with respect to the capacity of a putative surviving spouse to take by way of succession to the estate of a decedent, whether testate or intestate, for the effects of (1) a divorce, (2) an annulment, (3) a decree of separate maintenance, and (4) an order terminating marital property rights, or confirming equitable distribution between spouses, in cases in which any such event affects the marriage of the decedent to the putative surviving spouse.

Valid Divorce and Annulment.

Under Section 62-2-802(a), a valid divorce or a valid annulment deprives the putative spouse of the status of surviving spouse of the decedent and the capacity to take as such in succession to the decedent's estate under this Code, i.e., by way of provisions in favor of a 'surviving spouse,' whether found in the decedent's will, Parts 5 and 6 of Article 2, or in the intestacy statute, Section 62-2-102, or in the provision for an elective share, Section 62-2-201 et. seq., or in the provision for an omitted spouse, Section 62-2-301, or in that for a spouse with respect to exempt property, Section 62-2-401. However, the issuance of a decree of separate maintenance, not terminating the marital status, has no such effect. It should be apparent that a valid divorce or annulment must always have deprived the former spouse of the status of spouse of the decedent for purposes of succession.

Marital Conditions Other than Divorce or Annulment.

Under Section 62-2-802(b), any one of the following, an order terminating marital property rights, or confirming equitable distribution between spouses, subsection (3), a divorce or an annulment not recognized as valid in South Carolina if the putative spouse obtained or consented to it, subsection (1), or subsequent to it he or she participated in a marriage ceremony with some third person, subsection (2), deprives the putative spouse of the status of surviving spouse of the decedent; but, under Section 62-2-802(b) itself, the deprivation is only for the purposes of succession to the decedent's estate in intestacy, as a spouse with respect to an elective share as an omitted spouse, as a spouse with respect to exempt property, and as a spouse in line for appointment as an administrator in intestacy, i.e., as under Parts 1, 2, 3, and 4 of Article 2 and under Section 62-3-203.

However, under Section 62-2-507, such an order, a divorce or annulment, whether valid or invalid as under Section 62-2-802(b) has the additional effect of revoking, by operation of law, so much of the decedent's will as affects the putative spouse. Section 62-2-507 refers to Section 62-2-802 for the definition of divorce and annulment.

Perhaps other marital conditions, not valid as divorces or annulments and not detailed in Section 62-2-802(b), will continue by the common law to estop a putative spouse from claiming as a surviving spouse. See Section 62-1-103. Further, matters of succession not within the coverage of Sections 62-2-802(b) and 62-2-507 will continue to be governed by the prior South Carolina law, e.g., recovery under the Wrongful Death Act, Section 15-51-20 of the 1976 Code. See *Folk v. U.S.*, 102 F. Supp. 736 (W.D.S.C. 1952), and see *Lytle v. Southern Ry.-Carolina Division*, 171, S.C. 221, 171 S.E. 42 (1933) and *Lytle v. Southern Ry.-Carolina Division*, 152 S.C. 161, 149 S.E. 692 (1929).

Both Sections 62-2-802 and 62-2-507 provide for the exceptional case of the subsequent marriage of the decedent to the putative spouse, those sections being rendered inapplicable to such a case.

The 2013 amendment clarifies that an individual who undergoes a divorce that is either invalid or not recognized in South Carolina will be considered a surviving spouse if the individual is living as husband and wife with the decedent at the time of decedent's death.

Section 62-2-803. (a) An individual who feloniously and intentionally kills the decedent is not entitled to any benefits under the decedent's will, trust of which the decedent is a grantor or under this article with respect to the decedent's estate, including, but not limited to, an intestate share, an elective share, an omitted spouse's share or child's share, a homestead allowance, and exempt property, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, retirement plan, annuity, or other contractual arrangement who feloniously and

intentionally kills the principal obligee or the individual upon whose life the policy is issued is not entitled to any benefit under the bond, policy, retirement plan, annuity, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section. A beneficiary whose interest is increased as a result of feloniously and intentionally killing shall be treated in accordance with the principles of this section.

(e) The felonious and intentional killing of the decedent revokes the nomination of the killer in a will or other document nominating or appointing the killer to serve in any fiduciary capacity or representative capacity, including, but not limited to, as personal representative, trustee, agent or guardian.

(f) A final judgment by conviction, or guilty plea establishing criminal accountability of felonious and intentional killing the decedent conclusively establishes that the convicted individual feloniously and intentionally killed the decedent for purposes of this section. In the absence of such final judgment the court, upon the petition of an interested person, must determine whether, upon the preponderance of the evidence standard, the individual would be found responsible for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be responsible for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(g) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer, for value and without notice, property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

(h) If an individual feloniously and intentionally kills the decedent, and if the killer dies within one hundred twenty hours of the decedent's death, then the decedent shall be deemed to have survived the killer for purposes of distributing the killer's estate, including, but not limited to, property passing by intestacy, the killer's will, any trust of which the killer is a grantor, joint tenancy with right of survivorship and benefits

payable under a life insurance policy, retirement plan, annuity or other contractual arrangement.

REPORTER'S COMMENT

Section 62-2-803, subsections (a) through (e), governs the effects of the proof of a putative successor's felonious and intentional killing of a decedent upon whose death some matter of succession depends. Under this Code, such a killer is disabled from taking the succession and the succession proceeds as if the killer had predeceased the decedent. Under Section 62-2-803(f), a final judgment of conviction or a guilty plea of felonious and intentional killing conclusively invokes the operation of Section 62-2-803, but the lack of a conviction is no bar to invocation of the provision where the killing is proved by the preponderance of the evidence.

At common law, according to the maxim that 'no one shall be permitted to profit by his own ... wrong,' *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506 (1930), those, who were by the preponderance of the evidence, *Smith v. Todd*, supra, proven to have feloniously, *Smith v. Todd*, supra; and *Keels v. Atlantic Coast Line R. Co.*, 159 S.C. 520, 157 S.E. 834 (1931), and intentionally, i.e., maliciously and not merely recklessly or involuntarily, *Leggette v. Smith*, 226 S.C. 403, 85 S.E.2d 576 (1955), but see *Fowler v. Fowler*, 242 S.C. 252, 254, 130 S.E.2d 568 (1963), killed another, were disabled from taking in succession to their victim, whether by their being named as the beneficiary of a policy of life insurance on their victim, *Smith v. Todd*, supra, or of employment death benefits with respect to their victim, *Keels*, supra, or by their taking in intestacy from their victim, or otherwise, *Leggette v. Smith*, supra. The maxim applied and the civilly proven killer was disabled from taking notwithstanding that on the criminal side he had been convicted of involuntary manslaughter, *Keels*, supra, or had been acquitted of crime, *Leggette v. Smith*, supra.

Former Section 21-1-50 of the 1976 Code was enacted, importantly, in supplementation of the common law maxim disabling a killer from taking in succession to his victim, and was enacted merely in order to establish a conclusive presumption of the disablement of the killer in the single specified case of his criminal court conviction of an unlawful killing, Sections 16-3-10 and 16-3-50 of the 1976 Code and *Rasor v. Rasor*, 173 S.C. 365, 175 S.E. 545 (1934), presumably because of the higher standard of proof bound to have been imposed in that proceeding; not including coroner's convictions, *Smith v. Todd*, supra, nor including, of course, complete acquittals, *Leggette v. Smith*, supra, nor involuntary manslaughter convictions, *Keels*, supra, Sections

16-3-50 and 16-3-60 of the 1976 Code, but, perhaps, including other reckless homicide convictions, Section 56-5-2910 of the 1976 Code, unlawful albeit unintended, i.e., nonmalicious and involuntary. See *Fowler v. Fowler*, supra, at 254 and C. Karesh, *Survey of South Carolina Law*, 8 S.C.L.Q. 150 (1955) and E. McCrackin, *Inheritance--Unintentional Killing*, 7 S.C.L.Q. 475 (1955).

The thrust of Section 62-2-803 is meant to encompass not only the intended unlawful killing cases covered by former Section 21-1-50 of the 1976 Code, but also the cases left to the common law maxim. See Section 62-2-803(d). Perhaps the common law maxim retains some validity, as under Section 62-1-103, with respect to cases of killings or of succession, not covered by Section 62-2-803, if any. For instance, perhaps the common law maxim will yet apply to deprive unintended but reckless homicides of the benefits of the Wrongful Death Act, Sections 15-51-10, 15-51-20 of the 1976 Code et seq. See *Fowler v. Fowler*, supra at 254 but compare *Leggette v. Smith*, supra.

Under Section 62-2-803, subsections (a) through (d), the effect of the proving of the killing is not only to disable the killer from taking in succession but also to redirect the succession so that the matter proceeds as if the killer had predeceased the decedent.

Section 62-2-803(g) provides for the protection, from the claims of the takers on the redirected succession, of obligors who pay benefits to a killer without notice of such claims and also for the protection, from such claims, of purchasers from a killer, for value and without notice, who purchase before the adjudication of such claims.

In protecting the killer's subsequent purchasers, for value and without notice, Section 62-2-803(g), having first established the theoretical base that the killer is deprived by his crime of all legal title in the property which the killer would have acquired except for this section, the interest then, however, accords to the killer's subsequent purchasers, for value and without notice, in whom presumably later mere equitable title arises, the kind of protection against the claims of the earlier legal title claimants, i.e., those who take the redirected succession under Section 2-803. Thus, Section 62-2-803(g) carves out a further statutory exception to the common law rule of priority.

Section 62-2-804. When any individual is seized or possessed of any real property held in joint tenancy at the time of the individual's death, the joint tenancy is deemed to have been severed by the death of the joint tenant and the real property is distributable as a tenancy in common unless the instrument which creates the joint tenancy in real property, including any instrument in which one individual conveys to

himself and one or more other persons, or two or more persons convey to themselves, or to themselves and another or others, expressly provides for a right of survivorship, in which case the severance does not occur. While other methods for the creation of a joint tenancy in real property may be utilized, an express provision for a right of survivorship is conclusively considered to have occurred if the will or instrument of conveyance contains the names of the devisees or grantees followed by the words 'as joint tenants with right of survivorship and not as tenants in common'.

REPORTER'S COMMENT

Section 62-2-804 is incorporated into Article 2 in order to integrate particularly with Sections 62-2-101 and 62-2-501 the South Carolina law on the effects of the establishment of a joint tenancy in real property, with and without express provision for right of survivorship, on the succession to a decedent joint tenant's interest in such real property by, respectively, the surviving joint tenants or the decedent's testate or intestate successors. The case law developed in South Carolina in the application of former Section 21-3-50 of the 1976 Code and its predecessor statutes, recodified as Section 62-2-804, continues to apply.

Section 62-2-805. (A) For purposes of this article, tangible personal property in the joint possession or control of the decedent and the surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not evidenced otherwise by a certificate of title, bill of sale, or other writing. This presumption does not apply to property:

- (1) acquired by either spouse before marriage;
- (2) acquired by either spouse by gift or inheritance during the marriage;
- (3) used by the decedent spouse in a trade or business in which the surviving spouse has no interest;
- (4) held for another; or
- (5) specifically devised in a will or devised in a written statement or list disposing of tangible personal property pursuant to Section 62-2-512.

(B) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.

Section 62-2-806. To achieve the testator's tax objectives, the personal representative or any interested person may file a summons and petition requesting the court, after notice and a hearing, to issue an order modifying the terms of a testator's will in a manner not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect.

REPORTER'S COMMENT

The 2013 amendment added this section with provisions similar to Section 62-7-416.

Part 9

Delivery and Suppression of Wills

Section 62-2-901. (a) After the death of a testator, a person having custody of a will of the testator shall deliver such will, within thirty days of actual notice or knowledge of the testator's death to the judge of the probate court having jurisdiction to admit the same or to a person named as personal representative in the will who shall deliver the will to the judge of the probate court. Upon receipt of the will, the judge of probate shall file the same in probate court and if proceedings for the probate are not begun within thirty days the judge shall publish a notice of such delivery and filing in one of the newspapers in the county of the probate court for once a week for three consecutive weeks.

(b) Any person who intentionally or fraudulently destroys, suppresses, conceals, or fails to deliver the will to the judge of the probate court having jurisdiction to admit it to probate is liable to any person aggrieved for any damages that may be sustained by such action or inaction.

(c) Any person who intentionally or fraudulently destroys, suppresses, conceals, or fails to deliver the will to the judge of the probate court having jurisdiction to admit it to probate, after being ordered by the court in a proceeding brought for the purpose of compelling delivery, is subject to a penalty for contempt of court.

REPORTER'S COMMENT

Section 62-2-901 requires a custodian of a will, who has actual notice or knowledge of the testator's death, to deliver the will to the probate court or to the personal representative named in the will.

Article 3

Probate of Wills and Administration

Part 1

General Provisions

Section 62-3-101. The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates, including the exercise of the powers of the personal representative. Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, subject to the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the personal representative under Sections 62-3-709, 62-3-710, and 62-3-711, and his personal property devolves, first, to his personal representative, for the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the personal representative under Sections 62-3-709, 62-3-710, and 62-3-711, and, at the expiration of three years after the decedent's death, if not yet distributed by the personal representative, his personal property devolves to those persons to whom it is devised by will or who are his heirs in intestacy, or their substitutes, as the case may be, just as with respect to real property.

REPORTER'S COMMENT

Real property devolves to the devisees or substitutes, under decedent's will, or to his heirs or substitutes, in an intestate estate, at the death of the owner whereas personal property devolves at the expiration of three years after decedent's death if not yet distributed by the personal representative.

As to devolution of real property, see Sections 62-3-711 and 62-3-715 concerning certain powers of the personal representative over real estate.

The devolution of personal property to devisees or heirs is expressly made subject to other provisions of this Code regarding exempt property, the rights of creditors, and the administration of estates. Further, the power (and fiduciary obligation) of the personal representative to apply personal property to the benefit of creditors and others interested in the estate is provided for in Section 62-3-711. Only if the property is not required to protect the rights of creditors or others does it devolve with no affirmative act of transfer of title by distribution being necessary. Thus, under the system of this Code and the provisions of this section, title to personal property devolves to devisees or heirs, but subject to exempt property provisions and the power to shift title to the personal representative where required in administration and to protect the rights of creditors or others.

Section 62-3-102. Except as provided in Section 62-3-1201 and except as to a will that has been admitted to probate in another jurisdiction which is filed as provided in Article 4, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the court or an adjudication of probate by the court.

REPORTER'S COMMENT

A duly executed, unrevoked will must be declared to be valid by order of informal probate or an adjudication of probate in order to be effective to prove the transfer of any property or to nominate an executor, with one exception, the affidavit procedures authorized for collection of estates worth less than twenty-five thousand dollars. Section 62-3-1201. The time limitations on probate proceedings to establish testacy are stated in Section 62-3-108.

Section 62-3-103. Except as otherwise provided in this article [Sections 62-3-101 et seq.] and in Article 4 [Sections 62-4-101 et seq.], to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court, qualify, and be issued letters. Administration of an estate is commenced by the issuance of letters.

REPORTER'S COMMENT

Before one acquires the status of personal representative, he must be appointed by the court, qualify, and be issued letters. Failure to secure appointment by one who possesses the goods of a decedent makes him

liable as executor in his own wrong, Sections 62-3-619, 62-3-620, 62-3-621.

The exceptions provided in Article 4 permit a personal representative appointed in another state to collect certain assets in this State, Sections 62-4-201 through 62-4-203, and to exercise the powers of a local personal representative, if no local administration or application is pending in this State, by filing authenticated copies of his appointment and any will and any bond, Sections 62-4-204, 62-4-205.

For 'qualification,' see Section 62-3-601; for 'letters,' see Section 62-1-305; for the time of accrual of duties and powers of personal representative, see Section 62-3-701.

Section 62-3-108 imposes time limitations on appointment proceedings.

Section 62-3-104. No claim may be filed against the estate of a decedent and no proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative, except as provided in Section 62-3-804(1)(b). After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [Sections 62-3-101 et seq.]. After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in Section 62-3-1004 or from a former personal representative individually liable as provided in Section 62-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

REPORTER'S COMMENT

This section requires creditors of decedents to assert their claims against a duly appointed personal representative. Notice to creditors, time limitations, payment of claims, and other provisions relating to creditors' claims are in Part 8 of Article 3. Creditors are interested persons who may seek appointment either in informal proceedings for appointment of a personal representative, Section 62-3-301, or in formal proceedings for appointment, Section 62-3-414. A creditor may seek appointment as personal representative and has priority for appointment if no other interested person has applied for appointment within forty-five days after death, Section 62-3-203, and may do so at any time within ten years of decedent's death, Section 62-3-108. If a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred and

unpaid, the creditor may recover from the distributees, Section 62-3-1004, or from the former personal representative individually liable for breach of fiduciary duty as provided in Sections 62-3-807 and 62-3-1003, subject to the limitations of Section 62-3-1005. A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article. The 2013 amendment to Section 62-3-104 relates to the process for a creditor seeking appointment as personal representative. Pursuant to Section 62-3-804(1)(b), a creditor seeking appointment must attach a written statement of its claim to the application or petition for appointment.

Section 62-3-105. Persons interested in decedents' estates may apply to the court for determination in the informal proceedings provided in this article [Sections 62-3-101 et seq.], and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this article.

Section 62-3-106. In proceedings within the jurisdiction of the court where notice is required by this Code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this State by notice in conformity with Section 62-1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

REPORTER'S COMMENT

The notice provisions of this section cover all proceedings within the exclusive jurisdiction of the probate court where notice is required by this Code or by rule. Notice provisions also apply to proceedings to construe probated wills or to determine heirs in an intestate estate which has not been and cannot be opened for administration due to time limitations. Thus, this section and the exceptions to the time limitations of Section 62-3-108 make it clear that proceedings to construe a probated will or to determine heirs of intestates may be commenced more than ten years after death. Notice may be given to

less than all interested persons but is binding upon only those who are given notice.

For the time and method of giving notice, see Section 62-1-401; and waiver of notice, Section 62-1-402.

Section 62-3-107. Unless administration under Part 5 [Sections 62-3-501 et seq.] is involved, (1) each proceeding before the court is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay, but, except as required for proceedings which are particularly described by other sections of this article [Sections 62-3-101 et seq.], no petition is defective because it fails to embrace all matters which might then be the subject of a final order; (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and (4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

REPORTER'S COMMENT

This section and the other provisions of this article are designed to establish a flexible system of administration of decedents' estates which permits interested persons to determine the extent to which matters relating to estates become the subjects of judicial orders.

Administration under Part 5, Sections 62-3-501, et seq., is a single proceeding for judicial determination of testacy, priority, and qualification for appointment as personal representative and administration and settlement of decedents' estates. Section 62-3-107 applies to all other proceedings except those which are particularly described in other sections of this article. With the exceptions stated, proceedings for probate of wills and adjudication of intestacy may be combined with proceedings for appointment of personal representatives. Jurisdiction over interested persons is facilitated by Sections 62-3-106 and 62-3-602. Venue is determined by Section 62-3-201.

Except in circumstances which permit appointment of a special administrator, Section 62-3-614, a personal representative may not be appointed unless the will to which the requested appointment relates has been formally or informally probated, Sections 62-3-308, 62-3-402, and 62-3-414.

Section 62-3-108. (A)(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than ten years after the decedent's death.

(2) Notwithstanding any other provision of this section:

(a) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding and if that previous proceeding was commenced within the time limits of this section;

(b) appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and

(c) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within eight months from informal probate or one year from the decedent's death, whichever is later.

(B) If no informal probate and no formal testacy proceedings are commenced within ten years after the decedent's death, and no proceedings under subsection (A)(2)(b) are commenced within the applicable period of three years, it is incontestable that the decedent left no will and that the decedent's estate passes by intestate succession. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In proceedings commenced under subsection (A)(2)(a) or (A)(2)(b), the date on which a testacy or appointment proceeding is properly commenced is deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code which relate to the date of death.

REPORTER'S COMMENT

This section establishes a time limitation of ten years after a decedent's death for commencement of any proceeding to determine whether a decedent died testate or for commencing administration of his estate, with the following exceptions:

(1) a proceeding to probate a will previously probated in testator's domicile;

(2) appointment proceedings relating to an estate in which there has been a prior appointment;

(3) if a previous proceeding was dismissed because of doubt about the fact of death, and if decedent's death in fact occurred prior to commencement of the previous proceeding, and if there has been no undue delay in commencing the subsequent proceeding;

(4) if the decedent was a protected person, as an absent, disappeared, or missing person for whose estate a conservator has been appointed, and if the proceeding is commenced within three years after the conservator is able to establish the death of the protected person; or

(5) a proceeding to contest an informally probated will and appointment if the contest is successful, may be commenced within the later of eight months from informal probate or one year from the decedent's death.

These limitations do not apply to proceedings to construe wills or to determine heirs of an intestate.

If no will is probated within ten years from death, or within the time permitted by one of the exceptions, this section makes the assumption of intestacy final.

If a will has been probated informally within ten years, this section makes the informal probate conclusive within one year from death or eight months from informal probate, whichever is later. The limitation period prescribed applies to all persons including those under disability.

Interested persons can protect themselves against changes within the period of doubt concerning whether a person died testate or intestate by commencing at an earlier date a formal proceeding, Sections 62-3-401, 62-3-402.

Protection to a personal representative appointed after informal probate of a will or informally issued letters of administration, but which is subject to change in a subsequent formal proceeding commenced within the limitations prescribed, is afforded under Section 62-3-703.

Distributees who receive distributions from an estate before the expiration of the period remain potentially liable to those determined to be entitled in properly commenced formal proceedings, Section 62-3-909, 62-3-1006.

Purchasers from the personal representative or a distributee may be protected without regard to whether the period has run, Sections 62-3-714, 62-3-910.

Creditors' claims are barred against the personal representative, heirs, and devisees after one year from date of death in any event. Section 62-3-803(a).

Section 62-3-109. The running of any statute of limitations on a cause of action belonging to a decedent which had not been barred as of the date of his death is suspended during the eight months following the decedent's death but resumes thereafter unless otherwise tolled.

REPORTER'S COMMENT

Any statute of limitations running on a decedent's cause of action surviving decedent, which had not been barred at decedent's death, is tolled for eight months after decedent's death. This section has the effect of extending the running of a statute of limitations with respect to a cause of action surviving decedent for eight months from the time when it would have run, if the action had not been barred at decedent's death.

For the tolling or suspension of any statute of limitations running on a cause of action against decedent for the eight months following decedent's death, see Section 62-3-802.

Part 2

Venue for Probate and Administration; Priority to Administrator; Demand for Notice

Section 62-3-201. (a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) in the county where the decedent had his domicile at the time of his death; or

(2) if the decedent was not domiciled in this State, in any county where property of the decedent was located at the time of his death.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 62-1-303 or (c) of this section.

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a

debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

REPORTER'S COMMENT

Venue for the first informal or formal testacy and appointment proceedings and subsequent proceedings is established in Section 62-3-201. For domiciliaries, venue is the county of domicile. For decedents not domiciled in this State, venue is in any county where property of the decedent was located.

If proceedings concerning the same estate are commenced in more than one court of this State, the court in which the proceeding was first commenced makes the finding of proper venue, Sections 62-3-201, 62-1-303. Upon finding that venue is elsewhere, the court in which the first proceeding was filed may transfer the proceeding to some other court, Section 62-3-201(c). Where a proceeding could be maintained in more than one court in this State, the court in which the first proceeding was commenced has the exclusive right to proceed or to transfer, Section 62-1-303.

Section 62-3-202. If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this State, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this State must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this State.

REPORTER'S COMMENT

Conflicting claims of domicile arising in a formal testacy or appointment proceeding in a court of this State and a testacy or appointment proceeding after notice pending in another state are resolved by the court in which the first proceeding was commenced.

Section 62-3-203. (a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent regardless of whether the decedent died intestate and determined as if the decedent died intestate (for the purposes of determining priority under this item, any heirs who could have qualified under items (1), (2), (3), and (4) of subsection (a) are treated as having predeceased the decedent);

(6) forty-five days after the death of the decedent, any creditor complying with the requirements of Section 62-3-804(1)(b);

(7) four months after the death of the decedent, upon application by the South Carolina Department of Revenue, a person suitable to the court.

(8) Unless a contrary intent is expressed in the decedent's will, a person with priority under subsection (a) may nominate another, who shall have the same priority as the person making the nomination, except that a person nominated by the testator to serve as personal representative or successor personal representative shall have a higher priority than a person nominated pursuant to this item.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that:

(1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value or, in default of this accord, any suitable person.

(c) Conservators of the estates of protected persons or, if there is no conservator, any guardian for the protected person or the custodial parent of a minor, except a court appointed guardian ad litem of a minor or incapacitated person may exercise the same right to be

appointed as personal representative, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(d) If the administration is necessary, appointment of one who has equal or lower priority may be made as follows within the discretion of the court:

(1) informally if all those of equal or higher priority have filed a writing with the court renouncing the right to serve and nominating the same person in his place; or

(2) in the absence of agreement, informally in accordance with the requirements of Section 62-3-310; or

(3) in formal proceedings.

(e) No person is qualified to serve as a personal representative who is:

(1) under the age of eighteen;

(2) a person whom the court finds unsuitable in formal proceedings;

(3) with respect to the estate of any person domiciled in this State at the time of his death, a corporation created by another state of the United States or by any foreign state, kingdom or government, or a corporation created under the laws of the United States and not having a business in this State, or an officer, employee, or agent of such foreign corporation, whether the officer, employee, or agent is a resident or a nonresident of this State, if such officer, employee, or agent is acting as personal representative on behalf of such corporation;

(4) a probate judge for an estate of any person within his jurisdiction; however, a probate judge may serve as a personal representative of the estate of a family member if the service does not interfere with the proper performance of the probate judge's official duties and the estate must be transferred to another county for administration. For purposes of this subsection, 'family member' means a spouse, parent, child, brother, sister, aunt, uncle, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild.

(f) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in this State and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(g) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

REPORTER'S COMMENT

The priorities of the right to appointment as personal representative or successor personal representative (but not special administrator, Sections 62-3-203(b), 62-3-615) are, in order, a person determined by a probated will, a spouse who is a devisee, other devisees, a spouse who is not a devisee, other heirs, and, after forty-five days after death, a creditor, Section 62-3-203(a). Objections to appointment can be made only in formal proceedings, Section 62-3-203(b). Conservators or guardians of protected persons may exercise the same right to nominate for or object to appointment which the protected person would have if qualified, Section 62-3-203(c). Persons disqualified include persons under age eighteen, those found unsuitable by the court, and foreign corporations not having a place of business in this State, Section 62-3-203(e).

The 2010 amendment revised subsection (d) to eliminate certain language as to 'priority resulting from renunciation or waiver,' and adding 'or informal' proceedings. The prior version of subsection (d) provided for only a formal proceeding. The 2010 amendment allows one who does not have priority to pursue either a formal proceeding (requiring summons and petition) or an informal proceeding (does not require summons and petition) for appointment. See Section 62-3-310 for informal appointments to one who does not have priority. See 2010 amendments for certain definitions in §62-1-201.

The 2013 amendment to Section 62-3-203(6) relates to the process for a creditor seeking appointment as personal representative. Pursuant to Section 62-3-804(1)(b), a creditor seeking appointment must attach a written statement of the claim to the application or petition for appointment.

Section 62-3-204. Any interested person desiring notice of any order or filing pertaining to a decedent's estate may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The demand for notice shall expire one year from the date of filing with the court. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, the personal representative must give a copy of the demanded filing to the

demandant or his attorney. If the demand is a demand for a hearing, then the personal representative must comply with Section 62-1-401. The validity of an order which is issued or filing which is accepted without compliance with this requirement is not affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and ceases upon the termination of his interest in the estate.

REPORTER'S COMMENT

Interested persons may file a demand for notice, requiring notice to be given to them or their attorneys. The 2013 amendment clarifies that a court may issue an order and accept a filing while a demand for notice is effective.

As to the method and time of giving the notice referred to, see Section 62-1-401.

Part 3

Informal Probate and Appointment Proceedings

Section 62-3-301. (a) Applications for informal probate or informal appointment shall be directed to the court, and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(i) a statement of the interest of the applicant;

(ii) the name, and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs (regardless of whether the decedent died intestate and determined as if the decedent died intestate) and devisees, and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(iii) if the decedent was not domiciled in the State at the time of his death, a statement showing venue;

(iv) a statement identifying and indicating the address of any personal representative of the decedent appointed in this State or elsewhere whose appointment has not been terminated;

(v) a statement indicating whether the applicant has received a demand for notice, or is aware of a demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this State or elsewhere; and

(vi) that the time limit for informal probate or appointment as provided in this article has not expired either because ten years or less has passed since the decedent's death, or, if more than ten years from death have passed, circumstances as described by Section 62-3-108 authorizing tardy probate or appointment have occurred.

(2) An application for informal probate of a will shall state the following in addition to the statements required by (1):

(i) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(ii) that the applicant, to the best of his knowledge, believes the will to have been validly executed;

(iii) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought.

(4) An application for informal appointment of an administrator in intestacy must state the name and address of the person whose appointment is sought and must state in addition to the statements required by item (1):

(i) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this State under Section 62-1-301 or a statement why any such instrument of which he may be aware is not being probated;

(ii) the priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under Section 62-3-203.

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy

status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Section 62-3-610, or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

(7) The court may probate a will without appointing a personal representative.

(b) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

REPORTER'S COMMENT

This section prescribes the contents of the application for the informal probate of a will or for the informal appointment of a personal representative. The proofs and findings required for issuance of any order of informal probate or informal appointment are contained in Sections 62-3-303 and 62-3-308. This section requires that the application be verified, 62-3-301(a) and (b). The application is a part of the public record. Persons injured by deliberately false representation may invoke remedies for fraud without any specified time limit (See Article 1).

This section allows the court to probate a will without appointing a personal representative. Further, it allows the court to appoint a personal representative without notice.

Section 62-3-302. Upon receipt of an application requesting informal probate of a will, the court, upon making the findings required by Section 62-3-303, shall issue a written statement of informal probate. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

REPORTER'S COMMENT

'Informal Probate' is designed to keep the vast majority of wills, which are simple and generate no controversy, from becoming involved in truly judicial proceedings. An order of informal probate makes the will operative and may be the only official action concerning its validity. The order is subjected to the safeguards which seem appropriate to this transaction.

Section 62-3-303. (a) In an informal proceeding for original probate of a will, the court shall determine whether:

- (1) the application is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in Section 62-1-201;
- (4) on the basis of the statements in the application, venue is proper;
- (5) an original, duly executed and apparently unrevoked will is in the court's possession;
- (6) any notice required by Section 62-3-204 has been given and that the application is not within Section 62-3-304;
- (7) it appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another county of this State or except as provided in subsection (d) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 62-2-502 or 62-2-505 have been met shall be probated without further proof. In other cases, the court may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will of a nonresident decedent which has not been probated and is not eligible for probate under subsection (a)(5) may nevertheless be probated in this State upon receipt by the court of a copy of the will authenticated as true by its legal custodian together with the legal custodian's certificate that the will is not ineligible for probate under the law of the other place.

REPORTER'S COMMENT

This section lists the proofs and findings required to be made by the court as a part of an order of informal probate.

The purpose of subparagraph (c) of the section is to permit the informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized or self-proved. If the will has been made self-proved under Section 62-2-503 it will of course 'appear' to be well executed and will include the recitals necessary for ease of probate under this section. This section does not require that the court examine one or both of the subscribing witnesses to the will. Any interested person who desires more rigorous proof of due execution may commence a formal testacy proceeding.

Note the provision of subparagraph (b) that informal probate is generally unavailable if there has been a previous probate of this or another will, unless, as under subparagraph (d), ancillary probate is desired.

Section 62-3-304. Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than a will and its codicils), the latest of which does not expressly revoke the earlier, shall be declined.

REPORTER'S COMMENT

The court is required to decline applications for informal probate in the circumstances specified in this section where a formal proceeding with notice and hearing would provide a desirable safeguard.

Section 62-3-305. If the court is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of Sections 62-3-303 and 62-3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

REPORTER'S COMMENT

This section confers upon the court the discretion to deny probate to an instrument even though all of the statutory requirements have arguably been met. The denial of an application for informal probate does not give rise to a right of appeal. The proponent of the will is left with the option of initiating a formal testacy proceeding.

Section 62-3-306. (a) The moving party must give notice as described by Section 62-1-401 of his application for informal probate to any person demanding it pursuant to Section 62-3-204, and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

(b) If an informal probate is granted, within thirty days thereafter the applicant shall give written information of the probate to the heirs (determined as if the decedent died intestate) and devisees. The information must include the name and address of the applicant, the date of execution of the will, and any codicil thereto, the name and location of the court granting the informal probate, and the date of the probate. The information must be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred if a personal representative is appointed who is required to give the written information required by Section 62-3-705. An applicant's failure to give information as required by this section is a breach of his duty to the heirs and devisees but does not affect the validity of the probate.

REPORTER'S COMMENT

The party seeking informal probate of a will (who may or may not be seeking informal appointment as personal representative) must give notice of his application for informal probate, presumably at the time he makes his application. The notice must be given to any personal representative of the decedent whose appointment has not been terminated, and to any other person who demands notice pursuant to Section 62-3-204. Section 62-3-204 prescribes that a person demanding notice under that section must have 'a financial or property interest.' The notice must be in conformity with Section 62-1-401, which provides that a notice may be given by certified, registered, or ordinary first class mail, by personal service, or if the address or identity of the person sought to be notified cannot be ascertained, by publication.

As to notice after informal probate is granted, the requirement in subsection (b) of giving written information of the probate to heirs and

devises is unnecessary if a personal representative is appointed who is required to give the written information required by Section 62-3-705. This latter section provides that every personal representative except any special administrator must give written information of his appointment to heirs and devisees. The information requirement of Section 62-3-306(b) is effectively limited to those circumstances where an informal probate is granted but no personal representative is appointed. The term 'heirs and devisees' appears to encompass not only those persons who take by virtue of a probated will, but also those persons who would have been the decedent's heirs had he died intestate.

Section 62-3-307. (a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in Section 62-3-614, the court, after making the findings required by Section 62-3-308, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a nonresident, the court shall delay the order of appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this State.

(b) The status of a personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in Sections 62-3-608 through 62-3-612, but is not subject to retroactive vacation.

REPORTER'S COMMENT

This section and those that follow establish the mechanism for informal appointment of a personal representative.

The thirty day waiting period in the case of a nonresident decedent is designed to permit the first appointment to be at the decedent's domicile and presumably, to allow the domiciliary personal representative to then seek appointment in this State.

Section 62-3-308. (a) In informal appointment proceedings, the court must determine whether:

(1) the application for informal appointment of a personal representative is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 62-1-201;

(4) on the basis of the statements in the application, venue is proper;

(5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(6) any notice required by Section 62-3-204 has been given;

(7) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(b) Unless Section 62-3-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in Section 62-3-610 has been appointed in this or another county of this State, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this State and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

REPORTER'S COMMENTS

Subsection (a) sets out those findings required of the court in an order of informal appointment of a personal representative. Of particular importance is the finding that any will to which the requested appointment relates has been formally or informally probated. As noted in the comment to Section 62-3-301, this Code allows the court to probate a will without appointing a personal representative. However, the effect of subsection (a) is that while the court may probate a will without appointing the personal representative designated in that will, it cannot informally appoint the personal representative without a prior formal or informal probate of the will to which the personal representative's appointment relates.

The court must enter a finding that the person appears to have priority entitling him to appointment. Section 62-3-203 establishes priority among persons seeking appointment as personal representative.

Subsection (b) sets out certain circumstances in which the application must be denied. The first such circumstance is where another personal representative has been appointed in this or another county of this State, except under the special situation of Section 62-3-612. The

second such circumstance is in the case of a nondomiciliary decedent. Here, the section is designed to prevent informal appointment of a personal representative in this State when a personal representative has been previously appointed at the decedent's domicile. Sections 62-4-201, 62-4-204, and 62-4-205 may make local appointment unnecessary.

Section 62-3-309. If the court is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of Sections 62-3-307 and 62-3-308 or, for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

REPORTER'S COMMENT

Because the appointment of a personal representative confers broad powers over the assets of the decedent's estate, the authority granted the court to deny the appointment for unclassified reasons is an important safeguard.

Section 62-3-310. The applicant must give notice of his intention to seek an appointment informally to any person having equal right to appointment not waived in writing and filed with the court. The notice shall state that, if no objection or nomination of another or no competing application or petition for appointment is filed with the court within thirty days from mailing of the application and notice, the applicant may be appointed informally as the personal representative. If an objection, nomination, application, or petition is filed within the thirty day period, the court shall decline the initial application pursuant to Section 62-3-309. The court may require a formal proceeding to appoint someone of equal or lesser priority.

REPORTER'S COMMENT

This section requires that the party seeking informal appointment must give notice to any person having equal right to appointment. It provides a forty-five day period in which a person with equal right of appointment may respond.

Section 62-3-311. If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this State, and

which is not filed for probate in this court, the court shall decline the application.

REPORTER'S COMMENT

This section is the counterpart of Section 62-3-304. Section 62-3-301(a)(4) requires that an applicant for informal appointment make certain representations concerning the existence of any unrevoked testamentary instrument. If any such instrument is not being offered for probate by the applicant, nor has been otherwise offered for probate, the court must decline the application for informal appointment. This section is a necessary safeguard against the abuse of the informal process.

Part 4

Formal Testacy and Appointment Proceedings

Section 62-3-401. A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding must be commenced by an interested person filing and serving a summons and a petition as described in Section 62-3-402(a) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with Section 62-3-402(b) for an order that the decedent died intestate.

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the court shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal

representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

REPORTER'S COMMENT

This section establishes the formal testacy proceeding and prescribes the effect of a formal proceeding on an informal probate proceeding. The word 'testacy' as used in this section encompasses any determination with respect to the testacy status of the decedent including that the decedent died without a will. See Section 62-1-201 (48). Although not specifically listed, the six uses for a formal testacy proceeding are: (1) an original proceeding to secure probate of a will; (2) a proceeding to corroborate a previous informal probate; (3) a proceeding to block a pending application for informal probate or to prevent informal application from occurring thereafter; (4) a proceeding to contradict a previous order of informal probate; (5) a proceeding to secure a declaratory judgment of intestacy or partial intestacy and a determination of heirs; (6) a proceeding to probate a will that has been lost, destroyed, or is otherwise unavailable.

The pendency of an action under this section automatically suspends any informal probate proceeding. Unless the petitioner requests confirmation of a previous informal appointment, a formal testacy proceeding suspends the personal representative's power of distribution but has no effect on the representative's other powers. If the petitioner seeks the appointment of a different personal representative, the court may further restrain the representative's powers, specifying the court's power over representatives. See also Sections 62-3-607 and 62-3-611. It should be noted that a 'distribution' does not include a payment of claims. See Section 62-1-121(10) for the definition of 'distributee' and Section 62-3-807 regarding payment of claims.

Under this section, any interested person may initiate a formal testacy proceeding. See Section 62-1-201 (23) for the definition of 'interested person.'

A formal testacy proceeding need not follow an informal proceeding and can be commenced without regard to whether a personal representative has been appointed.

The representative's power of distribution is automatically suspended upon the representative's receipt of notice of the proceeding. If there is

a contest over who should serve, the court has the discretion to restrict further the representative's power.

The 2010 amendment deleted 'may' and replaced it with 'must' and added 'and serving a summons' to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP.

Section 62-3-402. (a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(1) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(2) contains the statements required for informal applications as stated in the six subitems under Section 62-3-301(a)(1), and the statements required by subitems (ii) and (iii) of Section 62-3-301(a)(2);

(3) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of Section 62-3-301(a) and indicate whether administration under Part 5 [Sections 62-3-501 et seq.] is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subitem (ii) of Section 62-3-301(a)(4) above may be omitted.

REPORTER'S COMMENT

An interested person who petitions the court for a formal testacy proceeding must comply with the requirements of this section concerning the contents of the petition. Regardless of whether the formal testacy proceeding concerns a testate or intestate decedent, the

petitioner must request an order determining the decedent's heirs. Requiring the determination of heirship precludes later questions that might arise at the time of distribution. If formal probate of a will is requested, the petition must provide the court with information concerning the location of the original will. If the original is 'lost, destroyed, or otherwise unavailable, the petition must contain the terms of the missing will. The petition should indicate whether administration under Part 5 of this article is desired. Once a formal testacy proceeding has been initiated, notice must be given as specified in Section 62-3-403.

If a formal order of appointment is sought because of a dispute over who should serve, Section 62-3-414 describes the appropriate procedure.

Section 62-3-403. (a) Upon commencement of a formal testacy proceeding or at any time after that, the court shall fix a time and place of hearing. Notice must be given in the manner prescribed by Section 62-1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under Section 62-3-204. The following persons must be properly served with summons and petition: the surviving spouse, children, and other heirs of the decedent (regardless of whether the decedent died intestate and determined as if the decedent died intestate), the devisees, and personal representatives named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

(b) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the summons, petition, and notice of the hearing on the petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(3) by engaging the services of an investigator.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

REPORTER'S COMMENT

Section 62-3-403(a) specifies those persons to whom notice of a formal testacy proceeding must be given. If another will has been or is being offered for probate within the county, those persons named in that will must be notified. The petitioner is not required to determine whether another will has been probated or offered for probate in other counties, but if the petitioner has actual knowledge of such a will, the devisees and executors named therein must be notified.

If the notice which is given does not fully comply with the requirements of this section, that defect is not necessarily fatal to the validity of an order. Section 62-3-106 provides that an order is valid as to those given notice though less than all interested persons were given notice. Section 62-3-1001(b) allows the court to confirm or amend as it affects those persons who were not notified of the formal testacy proceeding.

Section 62-3-403(b) sets out the additional steps which must be taken if the fact of the decedent's death is in doubt. In addition to giving notice to the alleged decedent, the petitioner must make a 'reasonably diligent search' for that individual. The court is to determine whether the search has been sufficiently diligent in light of the circumstances. In the event the alleged decedent is in fact alive or if the court is not convinced of the death of the alleged decedent, the petitioner is responsible for the costs of the search. In the event the court finds the alleged decedent is dead, the estate of that decedent will bear the cost of the search.

The 2010 amendment revised subsection (a) to add 'or at any time after that,' to delete Notice at the beginning of the third sentence and replacing it with 'The following persons' and also including the requirement for a summons and petition. The 2010 amendment also revised subsection (b) to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Section 62-3-404. Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

REPORTER'S COMMENT

In order to object to the formal probate of a will, the objections must be stated in a pleading. The filing of such a response makes the proceeding a contested matter, and a hearing must be held in accordance with Section 62-3-406.

Section 62-3-405. If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of Section 62-3-409 have been met or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit (including an affidavit of self-proof executed in compliance with Section 62-2-503) or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

REPORTER'S COMMENT

If proper notice has been given and no objection has been stated in a pleading, the proceeding is an uncontested one. The court may enter relief on the pleadings alone and without a hearing if the court finds that the alleged decedent is dead, venue is proper, and the proceeding is a timely one. Even in the absence of an objection, the court may require a hearing and evidence concerning the execution of the will. In the latter case, the section provides that the affidavit or testimony of one or more witnesses is sufficient proof of such execution.

Section 14-23-330 establishes a mechanism for the judge to receive the deposition of an attesting witness who lives at a distance from the court. Under Section 62-3-405, the court is given more flexibility in considering evidence of proof of execution of the will in an uncontested proceeding.

Section 62-3-406. In a contested case in which the proper execution of a will is at issue:

(1) if the will is self-proved pursuant to Section 62-2-503, the will satisfies the requirements for execution, subject to rebuttal, without the

testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it;

(2) if the will is notarized pursuant to Section 62-2-503(c), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will;

(3) if the will is witnessed pursuant to Section 62-2-502, but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

REPORTER'S COMMENT

In the event an objection to a formal testacy proceeding has been received, the evidence necessary to prove the will depends upon whether the will is self-proved or notarized. If the will is not self-proved or notarized, testimony of at least one attesting witness is required. Compliance with the self-proving procedure of Section 62-2-503 gives rise to a rebuttable presumption that the will was properly executed, and the testimony of attesting witnesses is not required. The presumption does not extend to other grounds of attack, such as undue influence, lack of testamentary intent or capacity, fraud, duress, mistake, or revocation.

Section 62-3-407. In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it must be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it must be determined first whether the will is entitled to probate.

REPORTER'S COMMENT

In all contested formal testacy proceedings, the petitioner bears the burden of proving death and venue. If the petitioner is attempting to establish that the decedent died intestate, he must also prove heirship. Any person asserting that a will is valid bears the burden of proving due execution.

This section also specifies the order of proof when two wills are offered and the later will purports to revoke the earlier. Proof of the later will is considered first, and an earlier will cannot be probated unless the later will is found to be invalid.

Section 62-3-408. A final order of a court of another state determining testacy, or the validity or construction of a will made in a proceeding involving notice to and an opportunity for contest by all interested persons, must be accepted as determinative by the courts of this State if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

REPORTER'S COMMENT

This section makes it incumbent upon the local court to give full faith and credit to final orders of courts in another jurisdiction in the United States determining testacy or the validity or construction of a will regardless of whether the parties before the local court were personally before the foreign court. However, the foreign proceeding must have provided the requisite notice and opportunity for contest or construction for the resulting order to be binding locally.

This section does not apply unless the foreign proceeding has been previously concluded. If a local proceeding is concluded before completion of the foreign formal proceedings, local law will control.

If there is a contest concerning the decedent's domicile in formal proceedings commenced in different jurisdictions, Section 62-3-202 applies.

Local courts are bound by the foreign court's determination of the validity or construction of the will so long as this determination is part of a final order.

Section 62-3-409. Upon proof of service of the summons and petition, and after any hearing and notice that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed by Section 62-3-108, it shall determine the decedent's domicile at death, his heirs (regardless of whether the decedent died intestate and determined as if

the decedent died intestate), and his state of testacy. Any will found to be valid and unrevoked must be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 62-3-612. The petition must be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this State by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will is not ineligible for probate under the law of the other place.

REPORTER'S COMMENT

This section governs the scope and content of the formal testacy order. Every order must contain the court's findings regarding whether the alleged decedent is dead, the decedent's domicile at death, whether venue is proper, and whether the proceeding is a timely one. Regardless of whether the decedent is alleged to have died intestate, the order must contain a determination of heirs and testacy. If the court is not convinced of the alleged decedent's death, the court may dismiss the proceeding or it may permit amendment of the proceeding so as to make it a proceeding to protect the estate of a missing and therefore 'disabled' person under Article 5. Provision is made for proof of a will from a foreign jurisdiction which does not provide for probate of wills.

The 2010 amendment revised this section to delete 'After the time required for any notice has expired, upon' at the beginning and replace it with 'Upon' proof of 'service of the summons and petition' and also included the notice requirement for any hearing. The foregoing amendment was intended to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Section 62-3-410. (A) If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any

provisions of a particular instrument are affected by the other instrument.

(B) After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 62-3-412.

REPORTER'S COMMENT

An order in a formal testacy proceeding ends the time within which it is possible to probate after-discovered wills, though subject to the provisions for vacation or modification of that order under Sections 62-3-412 and 62-3-413. While a determination of heirs is not barred by the ten year limitation under Section 62-3-108, a judicial determination of heirs in a final order is conclusive unless the order is vacated or modified.

Under this section the court may admit more than one will to probate if the court in the exercise of its sound discretion determines that the instruments can be construed together.

Section 62-3-411. If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

Section 62-3-412. Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship

to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under either (1) or (2) above must be filed prior to the earlier of the following time limits:

(i) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate.

(ii) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 62-3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(iii) Twelve months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Section 62-3-403(b) was made. If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

REPORTER'S COMMENT

This section establishes the exceptions to the res judicata effect of a formal testacy order. If a decedent's will has been probated and a final order issued, the court may modify or vacate the order only if: (1) the proponents of a later-offered will had no knowledge of the existence of the will at the time of the proceeding; or (2) the proponents of the later will did not have actual knowledge of the earlier proceeding and were given no notice of it other than by publication. If the final order determined that all or a part of the estate was intestate, that order may be vacated or modified only if the petitioner can establish: (1) that one or more heirs were omitted and (2) that the omitted heir or heirs had no knowledge of their status as an heir, that they were unaware the

decedent had died, or that they were given no notice of the proceeding other than by publication.

Section 62-3-412(3) prescribes the time limits for filing a petition for vacation under this section. The petition must be filed prior to the earlier of the following: (1) in an estate where a personal representative has been appointed, the entry of an order approving final distribution; (2) the ten-year ultimate time limit under Section 62-3-108; or (3) twelve months from the entry of the formal testacy order. The individual submitting a petition for vacation bears the burden of proving that modification or vacation of the order is 'appropriate under the circumstances.'

This section also specifies the procedure to be followed when an alleged decedent is discovered to be alive subsequent to a final order finding the fact of death. In such a situation, the alleged decedent may recover assets retained by the personal representative. The heirs and distributees may be required to restore the 'estate or its proceeds' if it is 'equitable in view of all the circumstances.'

Section 62-3-413. For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

REPORTER'S COMMENT

This section deals with the modification or vacation of an order during the pendency of an appeal or within the time allowed for appeal. Broadly speaking, the power to vacate or modify an order under Section 62-3-412 provides the court with a means of dealing with facts not before the court during the proceeding. Section 62-3-413 gives the court the option of reconsidering its decision although it has no new evidence before it.

Section 62-3-414. (a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as a personal representative, or of one who previously has been appointed a personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 62-3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by Section 62-3-301(a)(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as

any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(b) After service of the summons and petition to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as a personal representative, the court shall determine who is entitled to appointment under Section 62-3-203, make a proper appointment, and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 62-3-611.

REPORTER'S COMMENT

If there is a question concerning the priority or qualifications of a personal representative, the issue may be combined with a request for the determination of testacy in a petition for a formal testacy proceeding. However, the formal appointment of a personal representative can be considered alone. If the proceeding under this section is combined with a formal testacy proceeding, the petition must not only comply with the requirements of a petition for formal testacy, but must also describe the issue regarding appointment. Once a proceeding has been initiated under this section alone, the court must receive a petition which complies with the requirements of Section 62-3-402 and describes the issue regarding appointment. Once initiated, a proceeding under this section stays any pending informal appointment proceedings. If a representative had been appointed prior to this proceeding, the filing of a petition under this section automatically restraints all of the representative's powers which are not necessary to preserve the estate. Under this section, service of the summons and petition must be given to all interested persons as defined in subparagraph (b).

Formal proceedings concerning appointment should be distinguished from administration under Part 5. The former includes any proceeding after notice involving a request for an appointment. Administration under Part 5 begins with a formal proceeding and may be requested in addition to a ruling concerning testacy or appointment, but it is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. A personal representative appointed in a formal

proceeding may or may not be subject to administration under Part 5. Procedures for securing the appointment of a new personal representative after a previous assumption as to testacy under Section 62-3-612 may be informal or related to pending formal proceedings concerning testacy.

When an order authorizing appointment is issued, the personal representative must then comply with Section 62-3-601 et seq., concerning bond requirements.

The 2010 amendment revised subsection (b) to delete 'notice' and replace it with 'service of the summons and petition' to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding concerning appointment of a personal representative as referred to in this section. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP.

Part 5

Administration Under Part 5

Section 62-3-501. Administration under Part 5 [Sections 62-3-501 et seq.] is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A personal representative under Part 5 [Sections 62-3-501 et seq.] is responsible to the court, as well as to the interested persons, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a personal representative under Part 5 [Sections 62-3-501 et seq.] has the same duties and powers as a personal representative who is not subject to administration under Part 5 [Sections 62-3-501 et seq.].

REPORTER'S COMMENT

This section and the following sections of this part describe an optional procedure for settling an estate in one continuous proceeding in the court. The proceeding is a single 'in rem' action designed to secure complete administration and settlement of a decedent's estate when it is desired to make sure that every step in probate is adjudicated with notice and hearing. If administration under Part 5 is not requested or

ordered, there may be no compelling reason to employ all the available formal proceedings in the administration of an estate.

Section 62-3-502. A petition for administration under Part 5 [Sections 62-3-501 et seq.] may be filed by any interested person or by a personal representative at any time, a prayer for administration under Part 5 [Sections 62-3-501 et seq.] may be joined with a petition in a testacy or appointment proceeding, or the court may order administration under Part 5 [Sections 62-3-501 et seq.] on its own motion. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for administration under Part 5 [Sections 62-3-501 et seq.] shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for administration under Part 5 [Sections 62-3-501 et seq.], even though the request for administration under Part 5 [Sections 62-3-501 et seq.] may be denied. After service of the summons and petition and upon notice to interested persons, the court shall order administration under Part 5 [Sections 62-3-501 et seq.] of a decedent's estate: (1) if the decedent's will directs administration under Part 5 [Sections 62-3-501 et seq.], it shall be ordered unless the court finds that circumstances bearing on the need for administration under Part 5 [Sections 62-3-501 et seq.] have changed since the execution of the will and that there is no necessity for administration under Part 5 [Sections 62-3-501 et seq.]; (2) if the decedent's will directs no administration under Part 5 [Sections 62-3-501 et seq.], then administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or (3) in other cases if the court finds that administration under Part 5 [Sections 62-3-501 et seq.] is necessary under the circumstances.

REPORTER'S COMMENT

Under this section any 'interested person' or the personal representative may request administration under Part 5, or the probate court may order it on its own motion. If the decedent's will directs such administration it must be ordered unless the court finds circumstances have changed since execution of the will. Likewise, where the will directs no such administration, it will be ordered only if the court finds it is necessary for protection of interested persons.

Even though it is possible that a request for administration under Part 5 may be made after a determination of testacy has been made, this section requires the petition for such administration to include matters necessary to put the issue of testacy before the court. The result is that the question of testacy will be adjudicated.

While administration under Part 5 compels a judicial settlement of an estate there are other sections which grant a judicial review and settlement. This fact leads to the conclusion that administration under Part 5 will be valuable primarily when there is some advantage in a single judicial proceeding which will adjudicate all major points involved in an estate settlement.

The 2010 amendment revised this section to add 'service of the summons and petition and upon' in the fourth sentence to clarify that a summons and petition and notice of any hearing are required for a formal proceeding for administration under Part 5. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Section 62-3-503. (a) The pendency of a proceeding for administration under Part 5 [Sections 62-3-501 et seq.] of a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for administration under Part 5 [Sections 62-3-501 et seq.] is as provided for formal testacy proceedings by Section 62-3-401.

(c) After service of the summons and petition upon the personal representative and notice of the filing of a petition for administration under Part 5 [Sections 62-3-501 et seq.], a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

REPORTER'S COMMENT

This section deals with the effect of administration under Part 5 on other proceedings. Primarily pendency of such administration does two things: (1) it stays action on any informal proceedings and (2) it prohibits the personal representative from exercising his power to distribute the estate. However, the filing of the petition does not otherwise affect the powers and duties of the personal representative unless the court restricts the exercise of such power.

In regard to the effect of such action on the personal representative's ability to create good title in a purchaser of estate assets, it should be noted that such a power is not hampered by the fact that the personal representative may breach a duty created by statute or otherwise. However, the personal representative may be held for contempt of court. In any event, the pendency of the proceeding could be recorded as is usual under a *lis pendens*.

The 2010 amendment deleted 'he has received' and added 'service of the summons and petition upon the personal representative and' to the first sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding under Part 5. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Section 62-3-504. Unless restricted by the court, a personal representative under Part 5 [Sections 62-3-501 et seq.] has, without interim orders approving exercise of a power, all powers of personal representatives under this Code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and any court certification thereof, and unless so endorsed is ineffective as to persons dealing in good faith with the personal representative.

REPORTER'S COMMENT

This section acknowledges that the powers of a personal representative in an administration under Part 5 are the same as in any other administration unless restricted by the court and endorsed on the letters of appointment. If not so endorsed, the restrictions are ineffective as to persons dealing with the estate in good faith. The practical effect of this provision is to require persons dealing with the personal representative to examine the representative's letters.

Section 62-3-505. Unless otherwise ordered by the court, administration under Part 5 [Sections 62-3-501 et seq.] is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under Section 62-3-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of an

administration under Part 5 [Sections 62-3-501 et seq.] on the application of the personal representative or any interested person.

REPORTER'S COMMENT

This section requires additional notice for a closing order. The requirement for notice of interim orders is left to the discretion of the court except to the extent such notice is required by other sections, see e.g. Section 62-3-204, which entitles any interested person to notice of any interim order.

Part 6

Personal Representative; Appointment, Control, and Termination of Authority

Section 62-3-601. Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

REPORTER'S COMMENT

This and related sections of this part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is subject to administration under Part 5. Section 62-1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 62-3-504 which directs endorsement on letters and any court certification of any restrictions of powers of an administrator under Part 5.

No formal oath is required of a personal representative.

Section 62-3-602. By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

REPORTER'S COMMENT

Except for personal representatives appointed pursuant to Section 62-3-502, appointees are not deemed to be officers of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 62-3-107.

In order to prevent a personal representative who might make himself unavailable to service within the State from affecting the power of the appointing court to enter valid orders affecting him, each appointee is required to consent in advance to the personal jurisdiction of the court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

Section 62-3-603. (A) Except as may be required pursuant to Section 62-3-605 or upon the appointment of a special administrator, a personal representative is not required to file a bond if:

- (1) all heirs and devisees agree to waive the bond requirement;
- (2) the personal representative is the sole heir or devisee;
- (3) the personal representative is a state agency, bank, or trust company, unless the will expressly requires a bond; or
- (4) the personal representative is named in the will, unless the will expressly requires a bond.

If, pursuant to Section 62-3-203(a), the court appoints as personal representative a nominee of a personal representative named in a will, the court may in its discretion decide not to require bond.

(B) Where a bond is required of the personal representative or administrator of an estate by law or by the will, it may be waived under the following conditions:

(1) the personal representative or administrator by affidavit at the time of applying for appointment as such certifies to the court that the gross value of the estate will be less than twenty thousand dollars, that the assets of the probate estate are sufficient to pay all claims against the estate, and that the personal representative or administrator agrees to be personally liable to any beneficiary or other person having an interest in the estate for any negligence or intentional misconduct in the performance of his duties as personal representative or administrator; and

(2) all known beneficiaries and other persons having an interest in the estate execute a written statement on a form prescribed by the court that they agree to the bond being waived. This form must be

filed with the court simultaneously with the affidavit required by item (1) above. A creditor for purposes of this item (2) is not considered a person having an interest in the estate.

The provisions of this subsection (B) are supplemental and in addition to any other provisions of law permitting the waiving or reducing of a bond. Any bond required by Section 62-3-605 may not be waived under the provisions of this section.

REPORTER'S COMMENT

A bond is required of any personal representative who is not named in a will, including an administrator in intestacy and a special administrator, whether in probate or in intestacy, whether resident or nonresident, but excluding corporate fiduciaries not required to be bonded. However, bond is not required for a personal representative who is the sole heir or devisee. Moreover, all heirs and devisees can agree to waive any bond requirement. A bond is not required of any personal representative who is named in a will, unless appointed as a special administrator or unless the will or some interested person under Section 62-3-605, requires a bond.

Section 62-3-604. If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the court indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal estate during the next year, and he shall execute and file a bond with the court, or give other suitable security, in an amount not less than the estimate. The court shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 62-6-101) in a manner that prevents their unauthorized disposition. Upon application by the personal representative or another interested person or upon the court's own motion, the court may increase or reduce the amount of the bond, release sureties, dispense with security or securities, permit the substitution of another bond with the same or different sureties or dispense with the bond.

REPORTER'S COMMENT

This section permits estimates of value needed to fix the amount of any required bond. A consequence of this procedure is that estimates of value of estates are not required to appear in the petition and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved.

Release of sureties was formerly interpreted to mean that the probate court might release a surety if he petitioned for relief and established that he reasonably believes himself to be in danger of suffering a loss on account of his suretyship. See *Bellinger v. United States Fidelity Co.*, 115 S.C. 469, 106 S.E. 470 (1921); and *McKay v. Donald*, 8 Rich. 311 (42 S.C.L. 331) (1855). Section 62-3-604 is more flexible and should not be construed so narrowly as to permit release of sureties only on the limited basis available at prior law.

The 2010 amendment deleted 'On petition of' at the beginning of the last sentence and added 'Upon application by' to allow the personal representative or another interested person to make application to the probate court regarding bond matters as outlined in this section. Unlike a petition, an application does not require a summons or petition. See §62-1-201(1). The 2010 amendment also added 'upon the court's own motion' in the last sentence.

Section 62-3-605. Any person apparently having an interest in the estate worth in excess of five thousand dollars, or any creditor having a claim in excess of five thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required in an amount determined by the court as sufficient to protect the interest of the person or creditor demanding bond, but the requirement ceases if the person or creditor demanding bond ceases to have an interest in the estate worth in excess of five thousand dollars or a claim in excess of five thousand dollars. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate or to pay the person or creditor demanding bond. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative unless good cause is shown for the delay.

REPORTER'S COMMENT

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 62-3-705 to give each beneficiary includes a statement concerning whether bond has been required. Section 62-3-605 is consistent with the general policy of this Code to minimize the formalities of estate administration unless interested parties ask for specific protection.

Section 62-3-606. (a) The following requirements and provisions apply to any bond required by this part:

(1) Bonds shall name the judge of the court as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

REPORTER'S COMMENT

This section provides for the terms and conditions of bonds to be furnished by personal representatives. It provides that the judge of the court is the obligee of the bond and that the sureties are jointly and severally liable if they consent to the jurisdiction of the court by executing the bond.

Section 62-3-607. (a) Upon application of any interested person, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten days or at such other times as the parties may agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the application.

REPORTER'S COMMENT

This section provides that a person who appears to have an interest in an estate may petition the court for an order to restrain a personal representative from performing acts of administration if it appears to the court that the personal representative may take some action which would jeopardize the interest of the applicant or some other interested person. The matter must be set for hearing on the restraining order within ten days or at such other time as the parties may agree. There is also a provision for notice which must be given to the personal representative, his attorney, and to any other parties named defendant in the petition.

The 2010 amendment deleted 'On petition' at the beginning of this section and replaced it with 'Upon application' so that any person who

appears to have an interest in the estate can make application to the probate court to restrain a personal representative. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in §62-1-201(1).

Section 62-3-608. Termination of appointment of a personal representative occurs as indicated in Sections 62-3-609 to 62-3-612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this Code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor, and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

REPORTER'S COMMENT

'Termination,' as defined by this Section and Sections 62-3-609 through 62-3-612 provide definiteness respecting when the rights and powers of a personal representative (who may or may not be discharged of duty and liability by court order) terminate. An order of the court entered under Sections 62-3-1001 may terminate the appointment of and discharge a personal representative.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

Section 62-3-609. The death of a personal representative or the appointment of a conservator or guardian for the person of a personal representative terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver

the estate assets to a successor or special personal representative upon his appointment and qualification.

REPORTER'S COMMENT

This section deals with the termination of a representative by death or disability. The personal representative of the disabled or deceased representative will sometimes succeed to the duties and powers of the office.

Section 62-3-610. (a) Unless otherwise provided, an order closing an estate as provided in Section 62-3-1001 terminates an appointment of a personal representative and relieves the personal representative's attorney of record of any further duties to the court.

(b) A personal representative may resign his position by filing a written statement of resignation with the court and providing twenty days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him. When the resignation is effective, the personal representative's attorney of record shall be relieved of any further duties to the court.

REPORTER'S COMMENT

Under subparagraph (a) a formal closing immediately terminates the authority of a personal representative. Subparagraph (b) allows resignation of a personal representative.

The more informal process for resignation coupled with the comparative ease of securing appointment of a successor, see Sections 62-3-613 through 62-3-618, *infra*, facilitates the substitution of personal representatives.

Section 62-3-611. (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 62-3-607, after service of the summons and petition upon the personal representative and receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate.

If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

(c) The termination of appointment under this section shall relieve the personal representative's attorney of record of any further duties to the court.

REPORTER'S COMMENT

This section deals with the termination of a personal representative by removal for cause. Any interested person may petition the court for the removal of a representative although notice and hearing are required.

The 2010 amendment added 'service of the summons and petition upon the personal representative and' in the fourth sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding to remove a personal representative. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP.

Section 62-3-612. Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in Section 62-3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty days after expiration

of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

REPORTER'S COMMENT

This section and Section 62-3-401 describe the relationship between formal or informal proceedings. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues in spite of formal or informal probate that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek a reappointment under the new assumption for Section 62-3-703 is broad enough to require him to administer the estate as intestate, or under the later probated will, if either status is established after he was appointed. Under Section 62-3-403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

Section 62-3-613. Parts 3 and 4 of this article [Sections 62-3-301 et seq. and Sections 62-3-401 et seq.] govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration

which the former personal representative would have had if his appointment had not been terminated.

REPORTER'S COMMENT

This section provides that all powers and authority of the initial representative pass to the successor personal representative unless the court provides otherwise.

Section 62-3-614. A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in Section 62-3-609;

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803; or

(c) to take appropriate actions involving estate assets;

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

REPORTER'S COMMENT

Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 62-3-715(19).

Section 62-3-615. (a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available and qualified.

(b) In other cases, any proper person may be appointed special administrator.

REPORTER'S COMMENT

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

Section 62-3-616. A special administrator appointed by the court in informal proceedings pursuant to Section 62-3-614(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under this Code necessary to perform his duties.

REPORTER'S COMMENT

Duties of the special administrator are provided throughout this particular section, although the power to distribute assets is specifically omitted.

Section 62-3-617. A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts, or on other terms as the court may direct.

REPORTER'S COMMENT

In formal proceedings in which a special administrator is appointed, the powers of a special administrator are the same as those of a personal representative except in the instance where the powers are limited by the court.

Section 62-3-618. The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in Sections 62-3-608 through 62-3-611.

REPORTER'S COMMENT

Appointment of a special administrator would terminate according to the provisions of the order of appointment.

Section 62-3-619. Any person who obtains, receives, or possesses property of whatever kind, belonging to the decedent, by means of fraud or without paying valuable consideration equivalent to the value of the property, shall be charged and chargeable as executor of his own wrong (executor de son tort) with respect to the goods and debts. The value of the property is charged to the executor de son tort. Likewise, the value of the property shall be deducted from any distribution or payment of any claim or commission to which the executor de son tort is entitled from the estate.

REPORTER'S COMMENT

This section defines as an executor de son tort any person who by fraud or without valuable consideration obtains assets of a decedent without appointment as his personal representative, charging him with liability therefor.

Section 62-3-620. Acting sua sponte or upon the petition of any interested person, the probate judge of the county in which a deceased person was domiciled at the time of his death may order the executor de son tort to account for the property in his possession. Upon a finding that the property has been converted, wasted or otherwise damaged through improper interference, the court may assess damages including attorney's fees and costs in the amount determined by the court not to exceed the value of the property charged to the executor de son tort.

REPORTER'S COMMENT

This section provides that the probate judge may cite before him the executor de son tort and require him to account for the deceased's property. It also enables the probate judge to enter a decree against the executor de son tort for any property of the deceased that he has wasted or has lost by his illegal interference.

Section 62-3-621. The rights of the probate court and interested parties set forth in Section 62-3-620 shall survive the death of the executor de son tort.

REPORTER'S COMMENT

This section provides that the estate of an executor de son tort may be liable for the waste or conversion committed by the executor de son tort.

Part 7

Duties and Powers of Personal Representatives

Section 62-3-701. The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named personal representative in a will may protect property of the decedent's estate and carry out written instructions of the decedent relating to his body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

REPORTER'S COMMENT

The authority of a personal representative relates back to death upon appointment and stems from his appointment. The personal representative may ratify acts done by others prior to appointment.

Section 62-3-702. A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

REPORTER'S COMMENT

This section provides that a person to whom letters are issued has exclusive authority until the appointment is terminated or modified. It also allows the personal representative to recover any property in the hands of a second erroneously appointed representative.

Section 62-3-703. (a) A personal representative is a fiduciary who shall observe the standards of care described by Section 62-7-804. A

personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. Upon expiration of the relevant claim period, an order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative has not received actual notice of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a proceeding for administration under Part 5. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this Code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.

REPORTER'S COMMENT

This section is especially important because it states the basic theory underlying the duties and powers of the personal representative. The personal representative is classified as a fiduciary and must adhere to the 'prudent person' rule provided for trustees by Section 62-7-804. In general the personal representative is required to settle and distribute the estate as fast and efficiently as possible for the best interest of the estate. The section holds the power of distribution as the most significant power the personal representative performs. Finally, the section grants a personal representative the same standing to sue and be sued in the courts of this State and any other jurisdiction as the

decedent had immediately prior to his death, except as to proceedings which do not survive the decedent's death.

The 2010 amendment, in subsection (a), changed the reference from Section 62-7-933 to Section 62-7-804, which was made necessary by the adoption of the South Carolina Trust Code.

Section 62-3-704. A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate under the supervision of the court, as follows:

(a) Immediately after his appointment he shall publish the notice to creditors required by Section 62-3-801.

(b) Within ninety days after his appointment he shall file with the court the inventory and appraisal required by Section 62-3-706.

(c) Upon the expiration of the relevant period, as set forth in Section 62-3-807, the personal representative shall proceed to allow or disallow claims and pay the claims allowed against the estate, as provided in Section 62-3-807.

(d) Upon the expiration of the relevant period, as set forth in Section 62-3-1001, the personal representative shall file the accounting, proposal for distribution, petition for settlement of the estate, proofs required by Section 62-3-1001, and proof of publication of notice to creditors.

(e) Within the time set forth in Section 62-3-806(a), serve upon all claimants a notice stating that their claim has been allowed or disallowed pursuant to that section.

(f) The time periods stated herein for completing the above requirements are not intended to supplant any other time periods stated elsewhere in this Code. The court may on its own motion, or on the motion of the personal representative or of any interested person, extend the time for completing any of the requirements of administration contained in Article 3 [Section 62-3-1001, et seq.] including any of the above requirements, and especially including the requirement to account, under Section 62-3-1001, in cases of estates which remain significantly unadministered as of the expiration of the relevant time period, either as to the marshalling of assets or as to the allowance of claims.

(g) If a personal representative or trustee neglects or refuses to comply with any provision of Section 62-3-706 he is subject to the contempt power of the court. The probate court, after a hearing and any notice the court may require, may issue its order imposing the sentence, fine, or penalty as it sees fit and remove the personal representative and appoint another personal representative.

REPORTER'S COMMENT

This section requires the personal representative to proceed expeditiously with the settlement and distribution of the estate. It further provides that the settlement and distribution are under the court's supervision. Where informal procedures are in effect, the section does not impose any burdens on the personal representative other than those of Part 5 and of any other pertinent provision of Article 3, requiring or permitting such direct court supervision.

Section 62-3-705. Not later than thirty days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs (regardless of whether the decedent died intestate and determined as if the decedent died intestate) and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information must be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information must include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers, or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

REPORTER'S COMMENT

This section requires the personal representative to inform of his appointment those persons who appear to have an interest in the estate as it is being administered. Such notice must be given within thirty days of his appointment. The notice may be sent through ordinary mail. The notice must include the personal representative's name and address, indicate that the information is being sent to all those who might have an interest in the estate and whether a bond was required

and where the papers relating to the estate are filed. The notice should not be confused with the notice requirements relating to litigation.

Section 62-3-706. (A) Within ninety days after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall:

(1) prepare an inventory and appraisal of probate property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item;

(2) file the original of the inventory and appraisal with the court; and

(3) mail a copy of the filed inventory and appraisal to interested persons who have filed a demand for notice of the filing of the inventory pursuant to Section 62-3-204.

(B) Within ninety days of a demand by an interested person for an inventory of nonprobate property, the personal representative shall:

(1) prepare a list of the property owned by the decedent at the time of his death that is not probate property, so far as is known to the personal representative which may, at the discretion of the personal representative, include the value and nature of the decedent's interest in the property on the date of the decedent's death;

(2) mail a copy of the list to each interested person who has requested the list; and

(3) file proof of the mailing with the probate court.

(C) The court, upon application of the personal representative, may extend the time for filing or making either the inventory and appraisal or list of nonprobate property provided for in this section.

REPORTER'S COMMENT

This section requires the personal representative within ninety days after his appointment to file an inventory and appraisal listing the fair market value of each probate asset as of the decedent's date of death. He must list the type and amount of any encumbrances. He is also required to mail copies to interested persons who request it.

The 2013 amendment requires the personal representative to provide a list of nonprobate property to any interested person who claims it. The list of nonprobate property does not have to include information about the value and nature of the property, although the personal

representative at his discretion may include information about the value and nature of the property.

The court may upon application extend the time for filing.

Section 62-3-707. The personal representative may obtain a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser must be indicated on the inventory and appraisal or by supplemental inventory and appraisal with the item or items he appraised. On application of any interested person, the court may require that one or more qualified appraisers be appointed to ascertain the fair market value of all or any part of the estate or may approve one or more qualified appraisers.

REPORTER'S COMMENT

This section allows the personal representative to employ expert appraisers and also authorizes the court to require the appointment of expert appraisers upon application by any interested person.

Section 62-3-708. If any property not included in the original inventory and appraisal comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall submit a supplementary, amended or corrected inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, the appraisers or other data relied upon, if any, and restating the unchanged information from the original inventory and appraisal and furnish copies to persons who receive the original inventory, and to interested persons who have requested or demanded the new information.

Section 62-3-709. Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an

heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

REPORTER'S COMMENT

Section 62-3-101 provides that title to real and personal property devolves on death or thereafter to heirs or devisees 'subject ... to administration.' Section 62-3-711 vests in the personal representative a power over title to real and personal property during administration. This section deals with the personal representative's duty and right to possess assets, real and personal. It proceeds from the assumption that it is desirable wherever possible to avoid disruption of the possession of the decedent's assets by his heirs or devisees. But if the personal representative considers it advisable he may take possession and his judgment is made conclusive. It is likely that the personal representative's judgment could be questioned in a later action but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

Section 62-3-710. The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

REPORTER'S COMMENT

This section authorizes the personal representative to recover any property transferred by the decedent in a transaction which would be void or voidable against creditors.

Section 62-3-711. (a) Until termination of his appointment or unless otherwise provided in Section 62-3-910, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. Except as otherwise provided in subsection (b), this power may be exercised without notice, hearing, or order of court.

(b) Except where the will of the decedent authorizes to the contrary, a personal representative may not sell real property of the estate except as authorized pursuant to the procedures described in Sections 62-3-911 or Sections 62-3-1301 et seq. and shall refrain from selling tangible or intangible personal property of the estate (other than securities regularly traded on national or regional exchanges and produce, grain, fiber, tobacco, or other merchandise of the estate for which market values are readily ascertainable) having an aggregate value of ten thousand dollars or more without prior order of the court which may be issued upon application of the personal representative and after notice or consent as the court deems appropriate.

(c) If the will of a decedent devises real property to a personal representative or authorizes a personal representative to sell real property (the title to which was not devised to the personal representative), then subject to Section 62-3-713, the personal representative, acting in trust for the benefit of the creditors and other interested persons in the estate, may execute a deed in favor of a purchaser for value, who takes title to the real property in accordance with the provisions of Section 62-3-910(B).

REPORTER'S COMMENT

This section grants a personal representative the same power over title to property that an absolute owner would have, in trust, however, for the benefit of creditors and others interested in the estate. This power over title is limited in two respects. First, except where the will provides to the contrary, an order from the probate court must be obtained before personal property having an aggregate value in excess of ten thousand dollars may be sold. Secondly, and again except where the will provides to the contrary, the representative cannot exercise the power to sell real property unless he follows the mechanism of Section 62-3-911 or Section 62-3-1301 et seq.

Under this section, Section 62-3-101, and Section 62-3-709, title to personal property (as well as real property) devolves at or soon after death to heirs and devisees, and not to the personal representative. Further, the representative can exercise power over the title to real property (as well as personal property) subject to limitations.

Section 62-3-712. If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and

others dealing with a personal representative shall be determined as provided in Sections 62-3-713 and 62-3-714.

REPORTER'S COMMENT

This section provides that the personal representative is liable for his acts and omissions and for any breach of duty to the same extent as the trustee of an express trust. The rights of purchasers and others dealing with the personal representative are governed by the next two sections. Additionally, this section should be read in conjunction with Sections 62-3-607 and 62-3-611, the first of which deals with an interested party obtaining an order restraining the personal representative from performing a specified act or exercising a specified power and the second of which deals with the right of an interested party to petition for the removal of the personal representative.

Section 62-3-713. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure unless:

- (1) the will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) the transaction is approved by the court after notice to interested persons.

REPORTER'S COMMENT

This section provides that certain actions of a personal representative are voidable. Exceptions to the general rule are provided in the event the will or a contract entered into by the decedent expressly authorizes the transaction or if the transaction is approved by the probate court after notice to interested parties. Presumptively, a broad authorization in the will of a decedent for his personal representative to deal with himself in both a fiduciary and an individual capacity would not fall under the first exception which is limited to 'the transaction' and must, therefore, be held to require authorization for a specific transaction.

The general principles of law pertaining to a bona fide purchaser for value will protect the title to property in the hands of such a purchaser who obtained it without notice of the conflict of interest or act of self-dealing.

Section 62-3-714. A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of personal representatives under Part 5 [Sections 62-3-501 et seq.] which are endorsed on letters as provided in Section 62-3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

REPORTER'S COMMENT

This section is designed to provide protection to persons who deal with a personal representative. Persons dealing with representatives generally are not charged with the duty to inquire into any restrictions pertaining to the exercise of powers by such personal representative. Any person dealing with a representative under Part 5 will be charged with knowledge of the restrictions upon exercise of power set forth in the letters.

For example, a bona fide purchaser for value dealing with a representative will be completely protected with respect to claims by interested parties. However, the personal representative will be liable to persons interested in the estate if his dealings with such bona fide purchaser were inconsistent with directions set forth in the will or other restrictions imposed by order of the probate court. However, if such a purchaser had actual knowledge of any such restrictions, then this section will not provide protection to such purchaser; instead, he is subject to having title to the property acquired from the personal representative declared void upon the petition of some interested party.

Section 62-3-715. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the restrictions imposed in Section 62-3-711(b) and to the priorities stated

in Section 62-3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance for cash payment of all sums remaining due on the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

Execution and delivery of a deed pursuant to this subsection affects title to the subject real property to the same extent as execution and delivery of a deed by the personal representative in other cases authorized by this Code;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including monies received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) subject to the restrictions imposed in Section 62-3-711(b), acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing, or erect new party walls or buildings;

(8) satisfy and settle claims and distribute the estate as provided in this Code;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, but not for a term extending beyond the period of administration and, with respect to a lease with option to purchase, subject to the restrictions imposed in Section 62-3-711(b);

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) vote stocks or other securities in person or by general or limited proxy;

(12) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(13) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(14) insure the assets of the estate against damage, loss, and liability and himself against liability as to third persons;

(15) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien, or other security interest upon property of another persons, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(16) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(17) sell, or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(18) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(19) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(20) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(21) subject to the restrictions imposed in Section 62-3-711(b), sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(22) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will; (ii) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(23) make payment in cash or in kind, or partly in cash and partly in kind, upon any division or distribution of the estate (including the satisfaction of any pecuniary distribution) without regard to the income tax basis of any specific property allocated to any beneficiary and value and appraise any asset and distribute such asset in kind at its appraised value;

(24) with the approval of the probate court or the circuit court, compromise and settle claims and actions for wrongful death, pain and suffering or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State, any state of the United States, the United States, or any foreign country;

(25) donate a qualified conservation easement or fee simple gift of land for conservation on any real property of the decedent in order to obtain the benefit of the estate tax exclusion allowed under Internal Revenue Code Section 2031(c) as defined in Section 12-6-40(A), and the state income tax credit allowed under Section 12-6-3515, if the personal representative has the written consent of all of the heirs, beneficiaries, and devisees whose interests are affected by the donation. Upon petition of the personal representative, the probate court may consent on behalf of any unborn, unascertained, or incapacitated heirs, beneficiaries, or devisees whose interests are affected by the donation after determining that the donation of the

qualified real property interest shall not adversely affect them or would most likely be agreed to by them if they were before the court and capable of consenting. A guardian ad litem must be appointed to represent the interest of any unborn, unascertained, or incapacitated persons. Similarly, and for the same purposes and under the same conditions, *mutatis mutandis*, a trustee may make such a donation for the settlor;

(26) the personal representative has the power to access the decedent's files and accounts in electronic format, including the power to obtain the decedent's user names and passwords.

REPORTER'S COMMENT

The purpose of this section is to grant personal representatives a broad array of powers reasonably necessary for the proper administration of an estate. The purpose of this section is to set forth in some detail the powers which a personal representative may exercise with respect to the estate and without the necessity of obtaining an order from the probate court in order to do so. Note the introductory provision that the representative may exercise his powers, including the power of sale, only within the restrictions of Section 62-3-711(b) (see the comments to that section, *supra*).

Section 62-3-716. A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

REPORTER'S COMMENT

This section provides that a successor personal representative has the same powers and duties imposed upon the original personal representative except any such powers or duties which are expressly made personal to the original personal representative named in the will.

Section 62-3-717. If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate. When a corepresentative has been delegated to act for the

others, written notice of the delegation signed by the others and setting forth the duties delegated must be filed with the court. Persons dealing with a corepresentative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the persons with whom they dealt had been the sole personal representative.

REPORTER'S COMMENT

This section provides that all corepresentatives are required to unanimously consent to any matter pertaining to the administration and distribution of the estate except when any corepresentative receives and receipts for property due the estate, when an emergency arises and action is necessary in order to preserve the estate or when the corepresentatives have delegated the right to act to one or more of their number.

This section absolves any person dealing with one corepresentative for any excesses committed by such corepresentative in the exercise of his duty to the extent that such person dealing with the corepresentative is unaware that the existence of other corepresentatives or has been advised by such corepresentative that he has the authority to so act. The thrust of this section is to protect such a person dealing with a corepresentative and to eliminate the need for such person to inquire into the validity of the actions taken by such corepresentative. However, the rules pertaining to administration under Part 5 would have the effect of at least requiring a person dealing with a personal representative to determine whether or not the letters granted by the probate court restrict the actions of the representative. That being the case, it would seem that a person exercising due diligence in determining whether or not there is an administration under Part 5 would necessarily come across the fact that more than one representative has been appointed by the probate court to represent the estate. That leads to the inescapable fact that a person dealing with the representative of an estate who exercises due diligence would necessarily come across the existence of additional corepresentatives and would, therefore, not be able to rely upon the protections purportedly granted to him as stated above, unless such corepresentative represents in some fashion that he has the authority to act for all other corepresentatives. See the third sentence of Section 62-3-714 in connection with the purchaser's implicit duty to inquire into the authority of a representative to act on behalf of the estate.

Section 62-3-718. Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated and, if one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office.

REPORTER'S COMMENT

This section merely provides that remaining corepresentatives will have full authority to act if one or more of their number loses the capacity to so act by reason of death or other termination of appointment as a personal representative.

Section 62-3-719. (a) Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser. The minimum commission payable is fifty dollars, regardless of the value of the personal property of the estate.

(b) Additionally, a personal representative may receive not more than five percent of the income earned by the probate estate in which he acts as fiduciary. No such additional commission is payable by an estate if the probate judge determines that a personal representative has acted unreasonably in the accomplishment of the assigned duties, or that unreasonable delay has been encountered.

(c) The provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or where the will otherwise directs, or where the personal representative qualified to act before June 28, 1984.

(d) A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

(e) If more than one personal representative is serving an estate, the court in its discretion shall apportion the compensation among the personal representatives, but the total compensation for all personal representatives of an estate must not exceed the maximum compensation allowable under subsections (a) and (b) for an estate with a sole personal representative.

(f) For purposes of this section, 'probate estate' means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy. This subsection is intended to be declaratory of the law and governs the compensation of personal representatives currently serving and personal representatives serving at a later time.

REPORTER'S COMMENT

Unless provided otherwise by contract, by the will or by the personal representative's renunciation, his compensation is limited to sums equal to five percent of personal property and five percent of sold real property, in the normal course, plus five percent of income on invested monies, unless the probate court disapproves. The probate court may set fees for less than the stated limits. The probate court may set fees higher than the stated limits if the court determines the personal representative provided extraordinary service.

Section 62-3-720. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

REPORTER'S COMMENT

If any personal representative in good faith prosecutes or defends an action, he is entitled to reimbursement from the estate for reasonable expenses as well as reasonable attorney fees.

Section 62-3-721. (a) After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [Sections 62-3-501 et seq.], the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

(b) Upon the settlement of their accounts by personal representatives the court shall allow each appraiser appointed by the court a reasonable daily fee for each day spent on appraising the

property of the estate and also mileage at the same rate that members of state boards, commissions, and committees receive for each mile actually traveled in going to and from the place where the property ordered to be appraised is situated. In determining the reasonableness of the fee to each appraiser the court shall consider the value of the estate, the actual time consumed by the appraisers in the performance of their duties, and other such circumstances and conditions surrounding the appraisal as the court deems appropriate.

REPORTER'S COMMENT

This section allows a personal representative to seek prior approval of the probate court before an agent or advisor is hired.

Part 8

Creditors' Claims

Section 62-3-801. (a) Unless notice has already been given under this section, a personal representative upon his appointment must publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within one year of the decedent's death, or within sixty days from the mailing or other delivery of such notice, whichever is earlier, or be forever barred. Written notice is the notice described in (a) above or a similar notice.

(c) The personal representative is not liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

(d) Notwithstanding subsections (a) and (b), notice to creditors under this section is not required if a personal representative is not appointed to administer the decedent's estate during the one year period following the death of the decedent.

REPORTER'S COMMENT

This section provides for the publication of notice and for the delivery of notice to creditors at the discretion of the personal representative. The notice is published once a week for three successive weeks in a

paper of general circulation in the county. There is no requirement that demands be duly attested.

Section 62-3-802. (a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.

(b) The running of any statute of limitations measured from some other event than death or the giving of notice to creditors is suspended during the eight months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow.

(c) For purposes of any statute of limitations, the proper presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim.

REPORTER'S COMMENT

This section provides for waiver of and the suspension of the running of any statute of limitations, measured from some event other than death and notice to creditors, during the eight months following the decedent's death, resuming thereafter.

Section 62-3-803. (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following:

- (1) one year after the decedent's death; or
- (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication.

(b) A claim described in subsection (a) which is barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent,

liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative within eight months after performance by the personal representative is due; or

(2) any other claim, within the later of eight months after it arises, or the time specified in subsection (a)(1).

(d) Nothing in this section shall be construed as placing a limitation on the time for:

(1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate;

(2) to the limits of the insurance protection only, commencing a proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(3) collecting compensation for services rendered to the estate or reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

REPORTER'S COMMENT

Under this section, claims encompass those that are due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis. The claims are then divided into those which arose before the death of the decedent and those which arise at or after the death of the decedent.

Claims arising before death, unless barred by other statutes of limitation, are barred unless presented as follows: (1) for those creditors not barred by publication within the earlier of one year following date of death or sixty days from any actual notice; and (2) for those creditors barred by publication within the earlier of one year from date of death or eight months from any publication. Also, if a claim is barred by the nonclaim statute of the decedent's domicile before the first publication for claims in this State, it is also barred in this State.

Claims arising at or after death must be presented as follows: (1) if against the personal representative, within eight months after his performance is due; (2) otherwise, within eight months after the claim arises.

The limitations of Section 62-3-803 do not apply to proceedings to enforce mortgages, pledges, or other liens upon property of the estate, or proceedings to establish liability of the decedent or the personal representative for which there is liability insurance.

Section 62-3-804. Claims against a decedent's estate must be presented as follows:

(1)(a) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and must file a written statement of the claim, in the form prescribed by rule, with the probate court in which the decedent's estate is under administration. The claim is considered presented upon the filing of the statement of claim with the court. If a claim is not yet due, the date when it will become due must be stated. If the claim is contingent or unliquidated, the nature of the uncertainty must be stated. If the claim is secured, the security must be described. Failure to describe fully the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(b) In addition to the requirements in subsection (1)(a), a creditor seeking appointment as personal representative pursuant to Section 62-3-203(a)(6) must attach the written statement of the claim to the application or petition for appointment. For purposes of Section 62-3-803, the claim is considered to be presented when the application or petition for appointment is filed with the written statement of the claim attached.

(2) Subject to subsection (5), once a claim is presented in accordance with subsection (1), a claimant may at any time thereafter commence a legal proceeding against the personal representative by the filing of a summons and petition for allowance of claim or complaint in any court where the personal representative may be subjected to jurisdiction, seeking payment of the claim by the decedent's estate, and serving the same upon the personal representative. If the legal proceeding is not commenced in the probate court, the claimant must provide written notice to the probate court in which the decedent's estate is under administration that a legal proceeding has commenced for allowance of the claim, setting forth the court in which the legal proceeding is pending. Thereafter, the probate court shall not authorize the closing of the decedent's estate until the legal proceeding has ended.

(3) In lieu of the procedure provided in subsections (1) and (2), and subject to subsection (6), a claimant may commence a legal proceeding against the personal representative, by the filing of a summons and petition for allowance of claim or complaint in any court where the personal representative may be subjected to jurisdiction, seeking payment of his claim by the estate, and serving the same upon the

personal representative. The commencement of the legal proceeding under this subsection must occur within the time limit for presenting the claim as set forth in Section 62-3-803. If the legal proceeding is not commenced in the probate court, the claimant must file a written statement of the claim with the probate court in which the decedent's estate is under administration providing substantially the same information as the statement in subsection (1), along with a statement that a legal proceeding to enforce the claim has commenced, and identifying the court where the proceeding is pending. Thereafter, the probate court shall not permit the closing of the decedent's estate until the legal proceeding has ended.

(4) Notwithstanding any other provision of this section, no presentation of a claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death.

(5) Notwithstanding any other provision of this section, no proceeding for enforcement or allowance of a claim or collection of a debt may be commenced more than thirty days after the personal representative has mailed a notice of disallowance or partial disallowance of the claim in accordance with the provisions of Section 62-3-806. However, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the thirty day period, or to avoid injustice the court, on petition presented to the court prior to the expiration of the thirty-day period, may order an extension of the thirty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

(6) Notwithstanding any other provision of this section, no claim against a decedent's estate may be presented or legal action commenced against a decedent's estate prior to the appointment of a personal representative to administer the decedent's estate.

(7)(a) A legal proceeding pending on the date of a decedent's death in which the decedent was a necessary party shall be suspended until a personal representative is appointed to administer the decedent's estate, unless a court otherwise orders.

(b) Pursuant to Section 62-3-104, this subsection does not apply to a proceeding by a secured creditor of a decedent to enforce the secured creditor's right to its security. It does apply to a proceeding for a deficiency judgment against a decedent or the estate of a decedent.

REPORTER'S COMMENTS

This section establishes the mechanism for presenting claims. The claim may be delivered to the personal representative and must be filed with the court. Certain information must be included for claims not yet due, contingent, unliquidated, and secured claims. In lieu of presenting a claim, a proceeding may be commenced against a personal representative in any appropriate court, but the commencement must occur within the time for presenting claims. No claim is required in matters which were pending at the time of decedent's death. Actions on claims must be commenced within the thirty days after the personal representative has mailed a notice of disallowance, but the personal representative or the court may consent prior to the expiration of the thirty-day period to extensions that do not run beyond the applicable statute of limitations. The 2013 amendment requires a creditor seeking appointment to attach a written statement of its claim to the application or petition for appointment. Allowing a creditor to present a claim in this manner creates an exception to the general rule of Section 62-3-104 and Section 62-3-804(6), otherwise precluding the presentation of a claim prior to the appointment of a personal representative. The 2013 amendment further clarifies that, as earlier stated in Section 62-3-104, an *in rem* proceeding by a secured creditor is not suspended until a personal representative is appointed, unless that proceeding includes an action for a deficiency judgment against a decedent or his estate.

Section 62-3-805. (a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) costs and expenses of administration, including attorney's fees, and reasonable funeral expenses;
- (2) debts and taxes with preference under federal law;
- (3) reasonable and necessary medical expenses, hospital expenses, and personal care expenses of the last illness of the decedent, including compensation of persons attending the decedent prior to death;
- (4) debts and taxes with preference under other laws of this State, in the order of their priority, including medical assistance paid under Title XIX State Plan for Medical Assistance as provided for in Section 43-7-460;
- (5) all other claims.

(b) Except as is provided under subsection (a)(4), no preference shall be given in the payment of any claim over any other claim of the

same class, and a claim due and payable shall not be entitled to a preference over claims not due.

(c) Any person advancing or lending money to a decedent's estate for the payment of a specific claim shall, to the extent of the loan, have the same priority for payment as the claimant paid with the proceeds of the loan.

REPORTER'S COMMENT

This section sets up the classification of claims where the assets of the estate are insufficient to pay all claims in full. Claims due and payable are not entitled to a preference over claims not due.

Section 62-3-806. (a) As to claims presented in the manner described in Section 62-3-804(1) within the time limit prescribed in Section 62-3-803, within sixty days after the presentment of the claim, or within fourteen months after the death of the decedent, whichever is later, the personal representative must serve upon the claimant a notice stating the claim has been allowed or disallowed in whole or in part. Service of such notice shall be by United States mail, personal service, or otherwise as permitted by rule and a copy of the notice shall be filed with the probate court along with proof of delivery setting forth the date of mailing or other service on the claimant. A notice of disallowance or partial disallowance of a claim must contain a warning that the claim will be barred to the extent disallowed unless the claimant commences a proceeding for allowance of the claim in accordance with Section 62-3-804(2) within thirty days of the mailing or other service of the notice of disallowance or partial disallowance. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant commences a proceeding for allowance of the claim in accordance with Section 62-3-804(2) not later than thirty days after the mailing or other service of the notice of disallowance or partial disallowance by the personal representative. For good cause shown, the court may reasonably extend the time for filing the notice of allowance or disallowance of a properly filed claim.

(b) The personal representative of a decedent's estate may commence a proceeding to obtain probate court approval of the allowance, in whole or part, of any claim or claims presented in the manner described in Section 62-3-804(1), within the time limit prescribed in Section 62-3-803, and not barred by subsection (a). The proceeding may be commenced by the filing of a summons and petition with the probate court, and service of the same upon the claimant or

claimants whose claims are in issue; and such other interested parties as the probate court may direct by order entered at the time the proceeding is commenced. Notice of hearing on the petition shall be given to interested parties in accordance with Section 62-1-401.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim. Upon obtaining such a judgment a claimant must file a certified copy of its judgment with the probate court in which the decedent's estate is being administered.

(d) Unless otherwise provided in any judgment in another court entered against the personal representative and except for claims under 62-3-803, allowed claims bear interest at the legal rate (as determined according to Section 34-31-20(A)) for the period commencing upon the later of fourteen months after the date of the decedent's death or the last date upon which the claim could have been properly presented under Section 62-3-803, unless based on a contract making a provision for interest, in which case the claim bears interest in accordance with the terms of the contract.

(e) Allowance of a claim is evidence the personal representative accepts the claim as a valid debt of the decedent's estate. Allowance of a claim may not be construed to imply the estate will have sufficient assets with which to pay the claim.

REPORTER'S COMMENT

This section provides the procedure by which the personal representative acts on claims and claimants react to disallowed claims. Within thirty days after the mailing of notice of disallowance, if the notice warns of the impending bar, a claimant must commence a proceeding against the personal representative. This relates to claims allowed in whole or in part. A claimant has thirty days to react to a disallowed claim. A judgment in a proceeding in another court to enforce a claim constitutes an allowance of a claim.

Unless otherwise provided, or unless interest is based upon contract, allowed claims bear interest at the legal rate commencing thirty days after the time for original presentation of the claims has expired.

The personal representative or the claimant may begin an action in the court for allowance of the claim. This gives the court jurisdiction over any claim or claims presented to the personal representative or filed with the court.

The 2010 amendment added 'service of' and 'summons and' in the first sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for

allowance of claims. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP. The 2010 amendment also added ‘of hearing’ after ‘Notice’ in the last sentence to clarify the notice of hearing requirements referred to in §62-1-401.

The 2013 amendment defines allowance and imposes an affirmative duty on the personal representative to either allow or disallow a claim within time frames imposed by the code.

Under the 2013 amendment, unless the court approves an extension of time, the personal representative must either allow or disallow all properly presented claims and serve notice of the allowance or disallowance of the claim on the claimant within the later of sixty days from the presentment of the claim and fourteen months from the date of the decedent’s death.

Service of the notice of allowance or disallowance can be made by mail or some other form of delivery. If a notice of disallowance is sent by mail, the thirty day period for filing a petition for allowance of claim, starts to run on the date of mailing.

A claim can be allowed, disallowed, or allowed in part and disallowed in part. The code does not establish a penalty for failure of the personal representative to comply with the requirement to notify the claimant, but instead relies on the authority of the probate court to remove a personal representative for failure to perform his duties under the code.

The 2013 amendment imposes on a person obtaining a judgment against an estate in a court other than the probate court an obligation to provide the probate court with a certified copy of the judgment.

The 2013 amendment modifies the interest rules in regard to the properly presented claims against the decedent’s estate. Interest on a claim begins to run upon the later of fourteen months after the decedent’s death or the last day upon which the claim could be properly presented, unless the claim is based on a contract providing for interest.

The 2013 amendment requires that interested persons be notified of hearings on petitions for allowance of claim.

Section 62-3-807. (a) Prior to the closing of the estate and no later than fourteen months after the decedent’s death, the personal representative must proceed to pay the claims allowed against the estate in the order of priority prescribed, and after making provision for the homestead, for exempt property under Section 62-2-401, for claims already presented which have not been allowed or whose disallowance

is the subject of a legal proceeding, or the time to file such a proceeding has not expired, and for unbarred claims which may yet be presented, including costs and expenses of administration. Upon application of the personal representative and for good cause shown, the probate court may extend the time for payment of creditor claims.

(b) Upon the expiration of the applicable time limitation provided in Section 62-3-803 for the presentation of claims, any claimant whose claim has been allowed, or partially allowed, under Section 62-3-806 may petition the probate court, or file an appropriate motion if the administration is under Part 5, for an order directing the personal representative to pay the claim, to the extent allowed, and to the extent assets of the estate are available for payment without impairing the ability of the personal representative to fulfill the other obligations of the decedent's estate.

(c) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if:

(1) the payment was made before the expiration of the time limit set forth in Section 62-3-803 for the presentation of a claim, and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(2) the payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

REPORTER'S COMMENT

This provides a remedy for a claimant whose claim has been allowed but has not been paid. Under Section 62-3-807(c), a personal representative is liable for claims paid out of order.

Section 62-3-808. (a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity or identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

REPORTER'S COMMENT

This section clarifies that the personal representative is not individually liable for contracts properly entered into in his fiduciary capacity on obligations arising from ownership or control of the estate. He is liable for torts committed in the course of his administration only if he is personally at fault.

It also provides for a variety of appropriate proceedings to determine the issues of liability between the estate and the personal representative.

Section 62-3-809. Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise, payment is upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, upon the amount of the claim allowed less the fair market value of the security as agreed by the parties, or as determined by the court; or

(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.

REPORTER'S COMMENT

This provides for payment of allowed secured claims in full if the security is surrendered by the creditor.

Where the creditor exhausts his security before receiving payment, he receives the claim allowed less the fair market value of security as agreed or determined by the court.

If the security has not been exhausted, the creditor is paid the amount of the claim less the value of the security if covered.

Section 62-3-810. (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage or other security interest, obtaining a bond or security from a distributee, or otherwise.

REPORTER'S COMMENT

This provides various arrangements by which the personal representative can secure future payment of claims which are not due, contingent, or unliquidated.

Section 62-3-811. In allowing a claim, the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate, a court shall reduce the amount allowed by the amount of any counterclaims allowed and, if such counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

REPORTER'S COMMENT

This provides for the reduction of a claim against the estate by any counterclaim, liquidated or unliquidated.

Section 62-3-812. No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, liens, or

other security interests upon real or personal property in an appropriate proceeding.

REPORTER'S COMMENT

This prohibits executions and levies against property of the estate under judgments against the decedent or the personal representative, but excepts enforcement of mortgages, pledges, and liens in appropriate proceedings.

Section 62-3-813. When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

REPORTER'S COMMENT

This section gives the personal representative the authority to compromise claims in the best interests of the estate. The consent of the probate judge is not necessary.

Section 62-3-814. If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew, or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

REPORTER'S COMMENT

This gives the personal representative essential authority to deal with encumbered assets.

Section 62-3-815. (a) All assets of estates being administered in this State are subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this State or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances, and charges, each claimant whose claim has been allowed either in this State or elsewhere in administrations of

which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this State, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges, and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this State is not the state of the decedent's last domicile, the claims allowed in this State shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this State the amount to which they are entitled, local assets shall be marshaled so that each claim allowed in this State is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this State from assets in other jurisdictions.

REPORTER'S COMMENT

This section deals with various matters related to the payment of claims where there is administration in more than one state. As to the order of priorities of payment of claims, local creditors are not preferred over creditors in the decedent's domicile.

Section 62-3-816. The estate of a nonresident decedent being administered by a personal representative appointed in this State shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless: (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this State without reference to the local law of the decedent's domicile; (2) the personal representative of this State, after reasonable inquiry is unaware of the existence or identity of a domiciliary personal representative; or (3) the court orders otherwise in a proceeding for a closing order under Section 62-3-1001 or incident to the closing of an administration under Part 5 [Sections 62-3-501 et seq.]. In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article [Sections 62-3-101 et seq.].

REPORTER'S COMMENT

The estate of a nonresident decedent being administered in this State is, upon conclusion of the local administration, paid over to the domiciliary personal representative.

Part 9

Special Provisions Relating to Distribution

Section 62-3-901. In the absence of administration, the devisees are entitled to the estate in accordance with the terms of a probated will and the heirs in accordance with the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and subject to the rights of others resulting from abatement, retainer, advancement, ademption, and elective share.

REPORTER'S COMMENT

This section governs the rights of heirs and devisees when the administrator of an estate is not able to proceed for one reason or another or in the absence of administration. This section provides that in the absence of administration the rights of the heirs or devisees will be established by the laws of intestate succession or by the terms of a probated will. Without an administration, heirs and devisees take the property subject to charges, such as charges incident to administration and creditors' claims. In addition, successors in title are 'subject to the rights of others' which may result from 'abatement, retainer, advancement, ademption and elective share.'

Section 62-3-902. (a) Except as provided in subsection (b), and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the

failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), as, for instance, in case the will was executed before the effective date of this Code, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

REPORTER'S COMMENT

The purpose of Section 62-3-902 is to provide a defined order in which assets of an estate are used or applied for the payment of debts, in the absence of intent by the testator that an alternate order of abatement be used. The design of this section is to insure that the testator's intent, whether expressed or implied by the terms of the will, would be given first priority in the order of abatement. The section is to be used only to resolve doubts as to the testator's intent, rather than defeating his purpose.

Under this section, there is no distinction made with regard to the character of the assets. A devise encompasses any testamentary passage of property, whether real estate or personalty. Within classifications, abatement will be prorata.

Section 62-3-903. The amount of a liquidated indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

REPORTER'S COMMENT

This section provides that if the amount of liquidated indebtedness of a successor to the estate is due, then the personal representative is to offset any devise to that successor by the amount of the liquidated indebtedness. In the event the indebtedness is liquidated but not yet due, the representative can use the present value of the indebtedness to offset that amount against the devise to the successor.

Section 62-3-905. A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Section 62-3-906. (a) Unless a contrary intention is indicated by the will, such as the grant to the personal representative of a power of sale, the distributable assets of a decedent's estate must be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section 62-2-401 shall receive the items selected.

(2) Any devise payable in money may be satisfied by value in kind provided:

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution; and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under item (2), securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The personal property of the residuary estate must be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. Subject to the provisions of Section 62-3-711(b), in other cases, personal property of the residuary estate may be converted into cash for distribution.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution, notifying such persons of the pending termination of the right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

(c) When a personal representative or a trustee is empowered under the will or trust of a decedent to satisfy a pecuniary devise or transfer in trust, in kind with assets at their value for federal estate tax purposes, the fiduciary, in order to implement the devise or transfer in trust, shall, unless the governing instrument provides otherwise, distribute assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution in satisfaction of the pecuniary devise or transfer.

(d) Personal representatives and trustees are authorized to enter into agreements with beneficiaries and with governmental authorities, agreeing to make distribution in accordance with the terms of Section 62-3-906 for any purpose which they consider to be in the best interests of the estate, including the purpose of protecting and preserving the federal estate tax marital deduction as applicable to the estate, and the guardian or conservator of a surviving beneficiary or the personal representative of a deceased beneficiary is empowered to enter into such agreements for and on behalf of the beneficiary or the deceased beneficiary.

(e) The provisions of Section 62-3-906 are not intended to change the present laws applicable to fiduciaries, but are statements of the fiduciary principles applicable to these fiduciaries and are declaratory of these laws.

REPORTER'S COMMENT

Section 62-3-906(a) establishes a preference for distributions 'in kind.' Section 62-3-906(a) sets out the rights of the three classes of successors specific devisees (62-3-906(a)(1)), general pecuniary devisees (62-3-906(a)(2)), and residuary devisees (62-3-906(a)(3)). As to specific devisees, Section 62-3-906(a)(1) provides that the specific devisee is entitled to the thing devised to him. Section 62-3-906(a)(2) authorizes the personal representative to make 'in kind' distributions to satisfy devises payable in money (general pecuniary devises) provided (1) the devisee has not demanded payment

in cash, (2) the property is fairly valued as of the date of distribution under Section 62-3-906(a)(3) and, (3) a residuary devisee has not requested that the asset remain part of the residue estate.

Residuary devisees are to receive 'in kind' distribution provided (1) there is no objection to the proposed distribution and (2) it is practicable to distribute undivided interests.

Section 62-3-906(b) provides that the personal representative may submit a proposal for distribution to all parties in interest. This section effectively eliminates the interested party's right to object to the distribution if he fails to object to the plan in writing within thirty days from receipt of the proposal.

The 2013 amendment added to 62-3-906(b) the requirement of notice of deadline to object to proposed distribution.

Section 62-3-907. (A) If distribution in kind is made, the personal representative must execute a deed of distribution with respect to real property and such other necessary or appropriate instrument of conveyance with respect to personal property, assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

(B) If the decedent dies intestate or devises real property to a distributee, the personal representative's execution of a deed of distribution of real property constitutes a release of the personal representative's power over the title to the real property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62-3-711(a). The deed of distribution affords the distributee and his purchasers or encumbrancers the protection provided in Sections 62-3-908 and 62-3-910.

(C) If the decedent devises real property to a personal representative, either in a specific or residuary devise, the personal representative's execution of a deed of distribution of the real property constitutes a transfer of the title to the real property from the personal representative to the distributee, as well as a release of the personal representative's power over the title to the real property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62-3-711(a). The deed of distribution affords the distributee, and his purchasers or encumbrancers, the protection provided in Sections 62-3-908 and 62-3-910.

(D) The personal representative's execution of an instrument or deed of distribution of personal property constitutes a transfer of the

title to the personal property from the personal representative to the distributee, as well as a release of the personal representative's power over the title to the personal property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62-3-711(a).

REPORTER'S COMMENT

This section provides that evidence of distribution 'in kind' will be in the form of an instrument or deed of distribution which the personal representative will give to the distributees. This instrument serves as a transfer of the interest an estate had in an asset or assets. Sections 62-3-907 should be read in conjunction with Sections 62-3-908 through 62-3-910 to determine rights of distributees and purchasers therefrom. In addition the personal representative may use this instrument as a release under Section 62-3-709 where the representative determines that certain assets of the decedent's estate should be left in the possession of the party who would ultimately receive these assets by way of distribution 'in kind.'

The 2013 amendments revised subsection (a) to provide that, while a deed of distribution is required for real property, with respect to personal property the personal representative may execute an appropriate instrument evidencing the conveyance of title.

Section 62-3-908. Proof that a distributee has received an instrument or deed of distribution of assets in kind whether real or personal property, or payment in distribution, from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. An improper distribution includes, but is not limited to, those instances where the instrument or deed of distribution is found to be inconsistent with the provisions of the will or statutes governing intestacy.

REPORTER'S COMMENT

Section 62-3-908 contemplates that all actions for overpayment to a devisee be funneled through the personal representative.

Section 62-3-909. Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly

received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

REPORTER'S COMMENT

This section provides that an innocent distributee does not have the protection of a bona fide purchaser. The purpose of Section 62-3-909 is to shift questions concerning propriety of distribution from fiduciary to distributees. It should be remembered that a distribution under Section 62-3-703 may be 'authorized at the time' but may still be improper under this section.

The provisions of Sections 62-3-909 and 62-3-910 establish the proposition that liability follows the property.

Section 62-3-910. (A) If property distributed in kind (whether real or personal property) or a mortgage or other security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested persons, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any instrument described in this section on which the deed recording fee prescribed by Chapter 24, Title 12, has been paid, and which has been recorded is prima facie evidence that the sale was made for value.

(B) If a will devises real property to a personal representative or authorizes a personal representative to sell real property (the title to which was not devised to the personal representative), a purchaser for value who receives a deed from the personal representative takes title to the real property free of rights of any heirs or devisees or other

interested person in the estate and incurs no personal liability to the estate or to any heir or devisee or other interested person in the estate. The purchaser is protected whether or not the sale was proper and regardless of whether the heirs or devisees to whom title devolved pursuant to Section 62-3-101 executed or consented to the deed; however, creditors, and others interested in the estate have a right of recourse against the personal representative under Section 62-3-712 if the sale constitutes a breach of the personal representative's fiduciary duty. This section protects a purchaser of real property from a personal representative who has title to the real property or who has sold real property to the purchaser pursuant to an authorization in the will. To be protected under this provision, a purchaser need not inquire whether a personal representative acted properly in making the sale, even if the personal representative and the purchaser are the same person, or whether the authority of the personal representative had terminated before the sale. Any instrument described in this section on which the deed recording fee prescribed by Chapter 24, Title 12 has been paid, and which has been recorded is prima facie evidence that the sale was made for value.

REPORTER'S COMMENT

Section 62-3-910 provides that an instrument of distribution (as defined in Section 62-3-907) is an essential element in the chain of title to ensure that purchasers or lenders from or to a distributee would have good title.

Section 62-3-911. For purposes of this section, 'interested heirs or devisees' means those heirs or devisees who are entitled to an interest in the real or personal property that is subject to partition pursuant to this section. When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the personal representative or one or more of the interested heirs or devisees may petition the court prior to the closing of the estate, to make partition. After service of summons and petition and after notice to the interested heirs or devisees, the court shall partition the property in the manner provided in this section.

(1) The court shall partition the property in kind if it can be fairly and equitably partitioned in kind.

(2) If the property cannot be fairly and equitably partitioned in kind, the court shall direct the personal representative to sell the property and distribute the proceeds subject to the following provisions of this item.

(a) The court shall provide for the nonpetitioning interested heirs or devisees who wish to purchase the property to notify the court of that interest no later than ten days prior to the date set for a hearing on the partition. The nonpetitioning interested heirs or devisees shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

(b) In the circumstances described in subitem (a) of this section, and in the event the interested heirs or devisees cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the heirs or devisees in the property described in the petition for partition.

(c) In the event that the interested heirs or devisees object to the value of the property interests as determined by the appointed appraisers, those heirs or devisees shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value of the interest or interests. An evidentiary hearing limited to the proposed valuation of the property interests of the interested heirs or devisees shall be conducted, and an order as to the valuation of the interests of the interested heirs and devisees shall be issued.

(d) After the valuation of the interests in the property is completed as provided in subitems (b) or (c) of this item, the interested heirs or devisees seeking to purchase the interests of the other interested heirs or devisees shall have forty-five days to pay the price set as the value of those interests to be purchased, in such shares and proportions, and in such manner, as the court shall determine. Upon the payment, the court shall direct the personal representative to execute and deliver the proper instruments transferring title to the purchasers.

(e) In the event that the interested heirs or devisees seeking to purchase the partitioned property fail to pay the purchase price as provided in subitem (d) of this item, the court shall proceed according to the traditional practices of circuit courts in partition sales.

REPORTER'S COMMENT

This section makes provision for the probate court to partition personal property.

The 2010 amendment added ‘service of summons and petition and after’ in the second sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for purpose of distribution and to make partition. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

Under the 2013 amendment Section 62-3-911 has been rewritten to provide a method of partition in probate court comparable to the procedure in circuit court pursuant to Section 15-61-25.

Section 62-3-912. Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents’ estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

REPORTER’S COMMENT

Section 62-3-912 sanctions settlement agreements among successors allowing them to vary the distributions of an estate, whether testate or intestate, without the necessity of seeking court approval.

Section 62-3-913. (a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in Section 62-7-813.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

REPORTER'S COMMENT

This section gives the right to the personal representative to require a trustee to register where the state law allows for registration. In addition this section permits the representative to require that a trustee post a bond unless the trust document provides otherwise.

This section grants powers to the representative to withhold distributions to a trust where the representative feels that the beneficiaries may not be informed of the existence of the trust or when the representative has doubts as to the capability and competency of the trustee or of the trustee's intention to hold the funds without profit to himself.

Under this section, testamentary trustees would enjoy the status of a devisee, distributee, and successor.

Section 62-3-914. (a) If after the expiration of eight months from the appointment of the personal representative of a decedent it appears to the satisfaction of the court by whom the appointment was granted that the personal representative of the estate is unable to ascertain the whereabouts of a person entitled to be heir or devisee of the estate or whether a person who, if living, would be entitled as heir or devisee of this estate is dead or alive, the court may issue a notice addressed to all persons interested in the estate as heirs or devisees calling on the person whose whereabouts or the fact of whose death is unknown, his personal representatives, or heirs or devisees, to appear before the court on a certain day and hour as specified in this notice and to show cause why the personal representative should not be ordered to distribute the estate as if the person whose whereabouts or the fact of whose death is unknown had died before the decedent, and notifying all persons entitled to the estate as heir or devisee, or otherwise, to appear on a designated day and time before the court to intervene for their interest in the estate. The day fixed in the notice, on which cause must be shown, must not be less than one month after the date of the first publication of the notice.

(b) The notice must be published once a week for three successive weeks in a newspaper published in the county in which the court is held. The court has the right, in its discretion, to order the notice to be published once a week for three successive weeks in one other

newspaper published in another place most likely to give notice to interested persons.

(c) The publication of the notice as prescribed in subsection (b) must be proved by filing with the court copies of the newspapers containing the publication of the notice or the affidavit of the publishers or printers of the respective newspapers.

(d) At the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if no person appears as required, the court must decree distribution of the estate to be made as if the person whose whereabouts or the fact of whose death is unknown had died before the decedent. Distribution by the personal representative is a full and complete discharge to the personal representative.

(e) At the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if the person whose whereabouts or the fact of whose death was unknown appears, all further proceedings must be discharged.

(f) If the identity of the person appearing is disputed by the personal representative, an heir or devisee of the decedent or the legal representatives of an heir or devisee, the court must proceed to hear and determine the controversy. If the controversy is determined against the person appearing, distribution of the estate must be made as prescribed in subsection (d); but if the controversy is determined in favor of the party appearing, he is considered to be the person whose whereabouts or the fact of whose death was unknown. The determination in either case is subject to appeal as provided in Section 62-1-308.

(g) At the expiration of the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if a person appears claiming to be heir, devisee, or personal representative of the person whose whereabouts or the fact of whose death is unknown or to be otherwise entitled to his estate and claiming a distributive share in the decedent's estate, the court shall proceed to hear and determine whether the person whose whereabouts or the fact of whose death is unknown died before or after the decedent, and if the determination is that the person whose whereabouts or the fact of whose death is unknown died before the decedent, distribution of the decedent's estate must be made accordingly; but if the court determines that the person whose whereabouts or the fact of whose death is unknown died after the death of the decedent, the distributive share of the person must be paid and delivered by the personal representative to the person legally entitled to

receive it, the determination in either case, is subject to appeal as provided in Section 62-1-308.

(h) Instead of the procedure required in this section, an unclaimed devise or intestate share of five thousand dollars or less may be paid or transferred by the personal representative to the South Carolina State Treasurer.

REPORTER'S COMMENT

Section 62-3-914 provides that the distributive share to a missing heir, devisee, or claimant must be paid to the conservator of the missing person or, if there is no conservator, to the State Treasurer, to become part of the escheat fund. This section sets aside the assets belonging to a missing person.

The 2013 amendment revised subsection (c) to permit proof of publication by either filing with the court copies of the newspaper itself or an affidavit of the publisher or printer of the newspaper. The de minimus amount in subsection (h) now includes an intestate share and has been increased to \$5000.

Section 62-3-915. A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator or any other person authorized by this Code or otherwise to give a valid receipt and discharge for the distribution.

REPORTER'S COMMENT

Section 62-3-915 provides that the personal representative will be absolved if he distributes to a conservator of a disabled or incompetent distributee.

Section 62-3-916. (a) For purposes of this section:

(1) 'Estate' means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this State.

(2) 'Person' means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(3) 'Persons interested in the estate' means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

(4) 'State' means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(5) 'Tax' means the federal estate tax and the basic and any additional estate tax imposed by the State of South Carolina and interest and penalties imposed in addition to the tax.

(6) 'Fiduciary' means personal representative or trustee.

(b)(1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to item (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this item:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(3) Any tax not apportioned in items (1) or (2) shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If pursuant to items (1) and (2) the decedent's will or revocable trust directs a method of apportionment of tax different from the method described in this Code, the method described in the will or revocable trust controls.

(c)(1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence

of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Code, the determination of the court in respect thereto shall be prima facie correct.

(5) The expenses reasonably incurred by the fiduciary and by any other person interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in subsection (b) and charged and collected as a part of the tax apportioned. If the court finds it is inequitable to apportion the expenses as provided in subsection (b), it may direct apportionment thereof equitably.

(d)(1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this section.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e)(1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interest includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b) hereof, and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(f) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(g) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action, the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

REPORTER'S COMMENT

Section 62-3-916(b) establishes a true apportionment of estate taxes among all takers, whether they be probate or nonprobate, unless a will or revocable trust states otherwise.

The 2013 amendment incorporates into the South Carolina Probate Code the Uniform Estate Tax Apportionment Act as revised in 2003 (UETAA or new UETAA). The new UETAA replaces the Uniform Probate Code's former estate tax apportionment provision (Section 3-916), which incorporated into the Uniform Probate Code the former UETAA. The new UPC apportionment statute is actually 15 sections (although a couple are blank, marked 'reserved') and with comments extending for more than 20 pages.

Before the 2013 amendment, this statute did not specifically allow a variance from the statutory apportionment by revocable trust, only by will. The 2013 amendment requires a specific and unambiguous direction for the payment and allows it in a will or in a revocable trust. Per the UPC comments, a general direction to pay debts from the residue does not meet this standard.

Part 10

Closing Estates

Section 62-3-1001. (a) Within the later of: (i) the expiration of the applicable time limitation for any creditor to commence a proceeding contesting a disallowance of a claim pursuant to Section 62-3-806(a); (ii) the time when all legal proceedings commenced for allowance of a claim have ended in accordance with Sections 62-3-804 and 62-3-806; and (iii) if a state or federal estate tax return was filed, within ninety days after the receipt of a state or federal estate tax closing letter, whichever is later, a personal representative shall file with the court:

(1) a full accounting in writing of his administration, unless the accounting is waived pursuant to subsection (e);

(2) a proposal for distribution of assets not yet distributed, unless the proposal for distribution of assets is waived pursuant to subsection (e);

(3) an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate; and

(4) proof that a notice of right to demand hearing and copies of the accounting, the proposal for distribution, and the application for settlement of the estate have been sent to all interested persons including all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred, unless the notice of right to demand hearing is waived pursuant to subsection (e).

(b) If the personal representative does not timely perform his duties pursuant to subsection (a), and all interested persons have not waived the requirement pursuant to subsection (e), an interested person may petition for an order compelling the personal representative to perform his duties pursuant to subsection (a). After notice and hearing in accordance with Section 62-1-401, the court may issue an order requiring the personal representative to perform his duties pursuant to subsection (a).

(c) After thirty days from the filing by the personal representative of proof that a notice of right to demand hearing has been sent to all persons entitled to the notice pursuant to subsection (a), or at any time after the filing of the application of settlement if notice of right to demand hearing has been waived pursuant to subsection (e), the court may enter an order or orders approving settlement and directing or approving distribution of the estate, terminating the appointment of the personal representative, and discharging the personal representative from further claim or demand of any interested person. However, if an interested person files with the court a written demand for hearing within thirty days after the personal representative files proof that a notice of right to demand hearing has been sent to all persons entitled to the notice pursuant to subsection (a), the court may enter its order or orders only after notice to all interested persons in accordance with Section 62-1-401 and hearing.

(d) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate pursuant to this section, and after notice of hearing to the omitted

or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding constitutes prima facie proof of due execution of a will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

(e) Notwithstanding the provisions of this section, a personal representative shall not be required to file an accounting in writing of his administration, a proposal for distribution of assets not yet distributed, or a notice of right to demand hearing if and to the extent these filings are waived by all interested persons.

REPORTER'S COMMENT

Section 62-3-1001 describes procedures for obtaining orders of complete settlement of an estate.

The closing process under Section 62-3-1001(a) requires notice to all interested parties including unpaid creditors. The court upon application may order or approve an accounting, may interpret the terms of the will, direct or approve distribution of estate assets, discharge the personal representative, and close the estate. Such a discharge of the personal representative terminates his authority. The personal representative or any other interested person may petition for an order of complete settlement under this section after the claim period has expired, but a devisee may not seek such an order until a year has elapsed from the issuance of the appointment of the representative.

The 2010 amendment revised subsections (3) and (4) to conform to current practice allowing the personal representative to pursue informal proceedings to close the estate by filing an application rather than a petition. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in S.C. Code §62-1-201(1). The 2010 amendment also revised subsection (4)(c) to delete 'on appropriate conditions, determining testacy, determining the persons entitled to distribution of the estate, and, as circumstances require,' and adding 'in accordance with Section 62-1-401 in the last sentence to clarify procedure. The 2010 amendment added 'of hearing' in subsection (d) to clarify the notice of hearing requirements referred to in §62-1-401.

The 2013 amendment clarifies that all interested persons may waive the filings otherwise required by Section 62-3-1001(a)(1), (2), or (4).

Section 62-3-1002. No final accounting of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of such court finds, that all taxes imposed by the provisions of Chapter 6, Title 12 upon such fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the South Carolina Department of Revenue and the receipt for the amount of the tax therein certified shall be conclusive as to the payment of the tax to the extent of such certificate.

REPORTER'S COMMENT

Section 62-3-1002 precludes the court's approval of a final accounting by a fiduciary without a finding that the taxes imposed by Chapter 6, Title 12, have been paid.

Section 62-3-1003. No final accounting of a personal representative in any probate proceeding who is required to file a federal estate tax return may be allowed and approved by the court before whom the proceeding is pending unless the court finds that any tax imposed on the property by Chapter 16, Title 12, including applicable interest, has been paid in full or that no such tax is due.

REPORTER'S COMMENT

Section 62-3-1002 precludes the court's approval of a final accounting by a fiduciary without a finding that the taxes imposed by Chapter 16, Title 12, have been paid.

Section 62-3-1004. After assets of an estate have been distributed and subject to Section 62-3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

REPORTER'S COMMENT

Section 62-3-1004 allows a creditor of an estate to pursue assets distributed against one or more distributees. A distributee's liability to a claimant is for amounts received as distributions in excess of exempt property but no more than the value of the property received, valued as of the time of the distribution.

A distributee has a right of contribution against other distributees if he gives timely notice to the distributees so that they can participate in the proceedings under which the claimant is asserting his claim.

Section 62-3-1005. Unless previously barred by adjudication and except as provided in any accounting, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the application for settlement of the estate, required by Section 62-3-1001. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

REPORTER'S COMMENT

The 2013 amendment conforms this section to changes to 3-1001, allowing waiver of accounting and proposal for distribution.

Section 62-3-1006. Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (i) if a claim by a creditor of the decedent, at one year after the decedent's death, and (ii) any other claimant and any heir or devisee, at the later of three years after the decedent's death or one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

REPORTER'S COMMENT

Section 62-3-1006 creates a statute of limitations for claims against distributees by creditors or other persons claiming to be entitled to distribution from the estate. The time limitation provided for heirs and

devisees or claimants other than creditors is three years after the decedent's death or, for creditors, one year after the time of the distribution thereof.

As in Section 62-3-1005, this section does not create a time bar for any action to recover property received as a result of fraud.

Section 62-3-1007. After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the court that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

REPORTER'S COMMENT

Under Section 62-3-1007, after termination of the personal representative's appointment, and upon the filing of an application showing that no action is pending concerning the estate, the personal representative or his sureties may obtain from the court a certificate to the effect that the personal representative appears to have fully administered the estate. A certificate issued by the court affects a release of any security given in connection with the personal representative's bond, but does not prevent an action against the personal representative or his surety.

Section 62-3-1008. If other property of the estate is discovered after an estate has been settled and the personal representative discharged or for other good cause, the court upon application of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently opened estate. If a new appointment is made, unless the court orders otherwise, the provisions of this Code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

REPORTER'S COMMENT

Section 62-3-1008 provides a procedure for reopening an estate following discharge of the personal representative. Such a supplemental or subsequent administration of a decedent's estate would

be required if other property of the estate is discovered after the personal representative's discharge. Upon petition of an interested party and upon notice as required by the court, the court may reappoint the former personal representative or a different person to administer the subsequently discovered assets.

In administering the subsequently discovered assets, the procedure of this Code would apply as appropriate, except that previously barred claims could not be asserted in the subsequent administration.

The 2010 amendment deleted 'petition' and replaced it with 'application' to allow any interested person to make application for a subsequent administration. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in §62-1-201.

Part 11

Compromise of Controversies

Section 62-3-1101. A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved by the court after hearing, is binding on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62-5-433.

REPORTER'S COMMENT

Section 62-3-1101 provides that compromises of controversies regarding estates can be made binding on interested parties by court confirmation.

Such controversies would include disagreements regarding the admission to probate of an instrument as the will of the decedent, the construction, validity, and effect of a probated will, the rights of successors to decedent's estate, and the personal representative's administration of the estate.

Approval of the compromise agreement is by order of the probate court following a formal proceeding. The order confirming the agreement is

binding upon parties to the proceeding, and is binding upon unborn or unascertained persons and upon persons who could not be located.

After court confirmation, the agreement is binding even though the agreement affects a trust contained in an instrument separate from decedent's will, and even though it affects an unalienable right.

The agreement as confirmed by the court is not binding on creditors of the estate or trust estate, or on taxing authorities, unless they are parties to the agreement.

The 2010 amendment deleted 'in a formal proceeding in' and replaced the foregoing with 'by' and deleted 'for that purpose' and replaced it with 'after hearing.' The intention of the amendment was to require court approval in an informal proceeding after hearing. See § 62-3-1102 regarding application procedure for approval of compromise and certain agreements.

Section 62-3-1102. The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) Upon application to the court and after notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

REPORTER'S COMMENT

Section 62-3-1102 provides the procedure by which agreements for compromise of estate controversies are confirmed by the probate court. Subsection (1) requires the agreement be in written form setting forth all of the terms of the compromise. The agreement must be signed by all persons having a beneficial interest in or claim against the estate, whose interest or claim is affected by the agreement. If an interested party is a minor, the agreement may be executed on his behalf by his parent.

Execution of the agreement is not required by unknown parties or by parties whose whereabouts are unknown or cannot reasonably be ascertained. The agreement should clearly specify the effect of the compromise on the minors, on unknown parties, and on unlocated parties. Subsection (2) would imply that the agreement is not to be signed by the personal representative or trustees of the affected testamentary trust prior to submission of the agreement to the probate court, but the agreement should specify the proposed effect on the personal representative and affected trusts.

Subsection (2) requires submission of the agreement to the probate court for approval. The application for approval may be made by an interested party or by the personal representative. The application would request approval of the agreement and would request an order directing or permitting the personal representative and the trustee of an affected testamentary trust to execute the agreement.

Pursuant to subsection (3), a hearing after notice to all interested parties is conducted by the probate judge. In addition to parties to the agreement, the personal representative and trustees of affected trusts must be notified of the hearing.

The advocates of the agreement must prove to the court that a controversy existed in good faith among the interested parties. This requirement is to avoid sham arrangements designed to prejudice unknown parties or parties whose addresses are unknown but would be bound by an order confirming the agreement.

The advocates of the agreement must prove that the effect of the agreement on persons, including minors and incompetents represented by fiduciaries or other representatives, is fair, equitable, and reasonable.

Upon such proof to the court, the court will by order approve the agreement and will direct the personal representative and all fiduciaries subject to the court's jurisdiction to execute the agreement.

The agreement as confirmed by the court will govern further disposition of the decedent's estate in accordance with the terms of the

agreement. Subsection (3) further provides that minor children who are represented only by their parents may be bound only if their parents executed the agreement with other competent persons. In the event this requirement cannot be met, execution of the agreement on behalf of the minor could be made binding if by a court appointed guardian.

The 2010 amendment revised subsection (3) to delete 'After' at the beginning and replaces it with 'Upon application to the court and after' to allow application to the probate court to secure court approval of a compromise. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in §62-1-201.

Part 12

Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

Section 62-3-1201. (a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or the instrument evidencing the debt, obligation, stock, or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor. Before this affidavit may be presented to collect the decedent's personal property, it must:

(1) state that the value of the entire probate estate (the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy), wherever located, less liens and encumbrances, does not exceed twenty-five thousand dollars;

(2) state that thirty days have elapsed since the death of the decedent;

(3) state that no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction;

(4) state that the claiming successor, which for the purposes of this section includes a person who remitted payment for reasonable funeral expenses, is entitled to payment or delivery of the property;

(5) be approved and countersigned by the probate judge of the county of the decedent's domicile at the time of his death, or if the decedent was not domiciled in this State, in the county in which the property of the decedent is located, and only upon the judge's

satisfaction that the successor is entitled to payment or delivery of the property; and

(6) be filed in the probate court for the county of the decedent's domicile at the time of his death, or, if the decedent was not domiciled in this State, in the county in which property of the decedent is located.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

REPORTER'S COMMENT

Section 62-3-1201 provides for a simplified handling of small estates of twenty-five thousand dollars or less through the use of an affidavit. The small estate affidavit may be used starting thirty days after the death of the decedent if the entire estate of the decedent, wherever located, after deduction of liens and encumbrances, does not exceed twenty-five thousand dollars. The affiant must state that the value of the estate does not exceed twenty-five thousand dollars, that thirty days have elapsed since the decedent's death, that no person has applied for appointment as, or has been appointed as, personal representative in any jurisdiction, and that the affiant as successor to the decedent is entitled to payment or delivery of the property.

Upon presentment of such an affidavit, holders of property of the decedent, or persons obligated to the decedent, must transfer the property, or discharge their debt, to the successor. Stock transfer agents in subparagraph (6) are directed to transfer stock based on such affidavits.

The small estate affidavit cannot be used to transfer title to real estate and it cannot be used by creditors of the estate to reach assets of the estate.

The 2013 amendment increases the size of the estate in which a small estate affidavit can be utilized to twenty-five thousand dollars, establishes that a person who advances reasonable funeral expenses is a successor for purposes of this section regardless of his status as an heir or devisee, and clarifies which probate court must approve and record the affidavit.

Section 62-3-1202. The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire

into the truth of any statement in the affidavit. Any person who receives or is presented with a valid affidavit executed pursuant to Section 62-3-1201 and who has not received actual written notice of its revocation or termination must not fail to deliver the property identified in the affidavit, provided it contains the following provision: 'No person who may act in reliance on this affidavit shall incur any liability to the estate of the decedent.' Any person to whom payment, delivery, transfer, or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

REPORTER'S COMMENT

Section 62-3-1202 discharges and releases any person who transfers personal property of a decedent or who pays his debt to the decedent pursuant to the small estate affidavit pursuant to Section 62-3-1201 to the same extent he would have been released from liability had he dealt with a court-appointed personal representative of the decedent. The person so released is not required to inquire into the accuracy of the affidavit nor to insure the proper application of the personal property by the successor.

This section creates a liability in the recipient of property through the use of an affidavit to any personal representative of the estate and to any person having a superior right, including creditors of the decedent or of the estate, or other successors of the decedent.

The 2013 amendment requires the person receiving or presented with the affidavit to deliver the property identified in the affidavit if the affidavit contains the quoted language, unless that person has received actual written notice of the affidavit's revocation or termination.

Section 62-3-1203. (a) If it appears from the inventory and appraisal that the value of the entire probate estate (the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy), less liens and encumbrances, does not exceed twenty-five thousand dollars and exempt property, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, after publishing notice to creditors pursuant to Section 62-3-801, but without giving additional notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 62-3-1204.

(b) If it appears from an appointment proceeding that (1) the appointed personal representative, individually or in the capacity of a fiduciary, is either the sole devisee under the probated will of a testate decedent or the sole heir of an intestate decedent, or (2) the appointed personal representatives, individually or in their capacity as a fiduciary, are the sole devisees under the probated will of a testate decedent or the sole heirs of an intestate decedent, the personal representative, after publishing notice to creditors as under Section 62-3-801, but without giving additional notice to creditors may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 62-3-1204.

REPORTER'S COMMENT

Sections 62-3-1203 and 62-3-1204 provide for an expedited administration by a personal representative. Under Section 62-3-1203, if the personal representative determines after inventory and appraisal that: (1) the estate assets, after deduction of liens and encumbrances, do not exceed the total of twenty-five thousand dollars, plus exempt property, plus costs and expenses of administration, reasonable funeral expenses, and medical and hospital expenses of the decedent's last illness, or (2) that the sole personal representative is also the sole heir or devisee of the decedent or that corepresentatives are all of the only heirs or devisees of the decedent, then the personal representative may immediately pay the administration, funeral, medical, and hospital expenses and distribute the balance to distributees. Other than the publication of notice under Section 62-3-801, additional notice to creditors of this election is not required. Following the disbursement of the assets, the personal representative would file the closing statement required by Section 62-3-1204.

Section 62-3-1204. (a) Unless prohibited by order of the court and except for estates being administered under Part 5 (Sections 62-3-501 et seq.), after filing an inventory with the court, and paying any court fees due, the personal representative may close an estate administered under the summary procedures of Section 62-3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) either

(i) to the best knowledge of the personal representative, the value of the entire probate estate (the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy), less liens and encumbrances, did not exceed twenty-five

thousand dollars and exempt property, costs, and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent; or

(ii) the estate qualifies for summary administration according to the provisions of subsection (b) of Section 62-3-1203;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto;

(3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware and whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no unresolved claims, actions or proceedings involving the personal representative are pending in any court one year after the date of the decedent's death, the appointment of the personal representative terminates.

REPORTER'S COMMENT

Section 62-3-1204 provides the procedure for closing the estate following the disbursement and distribution of assets pursuant to Section 62-3-1203. The procedure would not be used if prohibited by the probate court or if the estate was in administration under Part 5.

The personal representative would file with the probate court his verified statement stating that: (1) to the best of his knowledge the estate assets do not exceed the limitations in or would qualify as a summary administrator according to the requirements described in Section 62-3-1203; (2) he has disbursed and distributed the assets to the proper persons, he has sent a copy of the closing statement to the distributees, unpaid creditors, and claimants whose claims are not barred, and he has sent to all distributees a written account of his administration of the estate.

If no action regarding the estate is pending one year after the date of the decedent's death, the court will terminate the appointment of the personal representative who filed the closing statement.

Part 13

Sale of Real Estate by Probate Court

Section 62-3-1301. The provisions of this Part are hereby declared to be the only procedure for the sale of lands by the court, except where the will of the decedent authorizes to the contrary.

Section 62-3-1302. The court may, as herein provided, authorize the sale of the real property of a decedent.

REPORTER'S COMMENT

Section 62-3-1302 establishes the circumstances under which the probate court has the power to sell the land of the decedent.

Section 62-3-1303. At any time after the qualification of the personal representative, on petition to the court by an interested person requesting the sale of real property of the decedent, a summons shall be issued to the personal representative (if not the petitioner), the heirs at law of the decedent (if the decedent died intestate or the time to challenge a will admitted to probate has not expired), the devisees under the decedent's will (if any), any person who has properly presented a claim against the estate which remains unresolved, any interested person effected by the proceeding, and any other person as required by the court in its discretion.

REPORTER'S COMMENT

Section 62-3-1303 specifies the process by which an action for the sale of real estate is commenced. The action is commenced by a petition filed after qualification of the personal representative. The petition may be filed by an interested person.

Upon filing of the petition, Section 62-3-1303 provides that a summons will be issued to the specified interested persons.

Section 62-3-1304. The form of such summons must be in like form as summonses for civil actions in the circuit courts.

Section 62-3-1305. To such summons a copy of the petition must be attached and copies of the summons and petition served on the personal representative (if not the petitioner), the heirs at law of the decedent (if the decedent died intestate or the time to challenge a will admitted to probate has not expired), the devisees under the decedent's

will (if any), any person who has properly presented a claim against the estate which remains unresolved, any interested person effected by the proceeding, and any other interested person as required by the court in its discretion, in like manner as summonses and complaints are served in civil actions in the circuit courts. If there are minors the court shall appoint guardians ad litem who must be served with copies of the summons and petition and the appointment, and who must acknowledge acceptance of their appointment as guardians ad litem to the probate court prior to being served with the summons and petition. Nothing herein precludes the parties interested in the proceeding from accepting service of the summons and petition and consenting to the sale as prayed for in the petition.

REPORTER'S COMMENT

This section provides for the manner of service of the summons and petition and incorporates by reference the methods of service of summons and complaints in civil actions in the circuit courts. This section further provides for appointment of guardian ad litem to represent minors and specifies that the guardian ad litem will be served with copies of the summons and petition. A copy of the order appointing the guardian ad litem and a statement of the guardian to serve must be endorsed on the petition. This section further provides that any of the parties may accept service of the summons and petition and may also consent to the sale prayed for in the petition.

Section 62-3-1306. The sheriffs of the several counties in this State are required to serve all processes which may be issued, if so ordered by the court under the provisions of this Part, for which they shall receive the same fees as are allowed them by law for similar services, which must be paid from the proceeds of sale or by the petitioner.

REPORTER'S COMMENT

Section 62-3-1306 provides for service of the summons and petition within the State of South Carolina by the sheriffs of the various counties in which interested parties are located. This section specifies that the sheriffs' fees for service shall be as in other circumstances and are to be paid by the petitioner or from the proceeds of the sale.

Section 62-3-1307. If there is any party who resides beyond the limits of this State or whose residence is unknown and who does not consent in writing to the sale, the court may authorize publication of

the summons as provided by this Code and if such party does not appear and show sufficient cause within the time named in the summons the court shall enter of record his consent as confessed and proceed with the sale.

REPORTER'S COMMENT

This section provides for service of the summons and petition by publication on interested parties who are not residents of South Carolina or whose addresses are unknown. If the party consented to the sale, service would not be required. If the party after such service did not appear or answer, the probate judge will enter of record his consent by default.

Section 62-3-1308. Upon the filing of the petition, the petitioner shall file in the office of the clerk of the circuit court a notice of pendency of action authorized by Sections 15-11-10 to 15-11-50 and upon the filing of such notice it has the same force and effect as notice of pendency of action filed in an action in the circuit court.

REPORTER'S COMMENT

This section prescribes the filing of a notice of pendency of action, or *lis pendens*, by the probate judge in the office of the clerk of court for the county in which the land is located, at the time the petition is filed, pursuant to Sections 15-11-10 to 15-11-50. Such filing will eliminate from consideration by the court any party who acquires subsequent to the filing of the notice a lien upon or an interest for value in the land.

Section 62-3-1309. The time to answer a summons and petition for sale of real property of a decedent is the same as the time to answer in any civil litigation case. Interested persons who wish to file an answer or return to the petition must do so in writing in the same manner as an answer to a complaint in other civil litigation cases. In addition the court may hear motions and accept such subsequent pleadings as would be heard or accepted in other civil litigation cases. After the filing and service of the summons and petition and the time for filing responsive pleadings has elapsed, the court will convene a hearing on the merits of the petition. If based on the evidence presented at the hearing the court finds the real property should be sold it shall then, in its discretion, either (a) order the personal representative to sell the same at private sale upon such terms and conditions as the court may impose; or (b) proceed to sell the same upon the next or some subsequent convenient sales day after publishing a notice of such sale three weeks prior

thereto in some paper published in the county. Upon the sale being made, after the payment of the costs and expenses thereof, the proceeds of the sale will be paid over to the personal representative. The personal representative shall administer such proceeds in like manner as proceeds of personal property coming into his hands. Nothing in this part may be construed to abridge homestead exemptions. Notice of hearings in regard to the petition will be provided to interested persons in accordance with Section 62-1-401.

REPORTER'S COMMENT

Section 62-3-1309 incorporates the rules of civil litigation to determine the time limits to file an answer or return to the petition. Following this period, the probate judge would schedule a hearing of the case.

If the probate judge determines that the land should be sold in accordance with the petition, he would either order a private sale or schedule a public auction of the land. The notice of the sale must be published once a week for three weeks during the three weeks preceding the sale in a newspaper published in the county of the probate court.

Following the sale, the net proceeds of the sale will be paid over to the personal representative for distribution in accordance with law as if it were personal property originally belonging to the estate.

Section 62-3-1309 further provides that the proceedings are not to abridge the rights of homestead exemption in the land.

The 2010 amendment revised this section to delete 'for return' in the first sentence and replace it with 'to answer or otherwise respond by motion to the summons and petition, delete 'make a return' and replace it with 'answer or otherwise respond by motion,' add 'subsequent pleadings,' and delete 'return' and replace it with 'motions' in the second sentence. The foregoing 2010 amendment is intended to clarify that an answer or other response to a summons and petition must be served in an action to sell real estate, which is a formal proceeding as referred to in §62-1-201(17).

The amendments to this section in 2013 were largely clarifying revisions, and did not change substantive law. All answers to the petition must be in writing and served on the petitioner and other parties in the same manner as an answer to a complaint in circuit court, and within the same time limits as would apply in circuit court. Further, the same rules apply as to motions in the case of a petition for sale of real property of a decedent as apply in circuit court to answers. Consequently, as in circuit court, answers may not be due while certain

motions are pending, and the same rules for amending petitions and answers would apply.

The 2013 amendments added the requirement that all interested persons be served with notice of hearings regarding a petition to sell real property of a decedent in accordance with Section 62-1-401.

Section 62-3-1310. The regular bond of the personal representative must protect the creditors, heirs, devisees, or other interested persons, if any, in the handling of the proceeds of sale by the personal representative, but in case no such bond has been given, the court may require the giving of a bond by such personal representative as provided in Sections 62-3-603, 62-3-604, and 62-3-605.

REPORTER'S COMMENT

Section 62-3-1310 provides that the regular bond of the personal representative protects claimants to the proceeds of the sale. If no bond has been filed previously, the personal representative may be required to file one pursuant to Sections 62-3-603 and 62-3-605. If a bond has previously been filed, the personal representative may be required to increase the amount of the bond.

The 2013 amendment gives the court discretion to require bond.

Section 62-3-1311. The court shall file and keep the original petition with due proof of service thereon and all original papers connected with the sale and shall require from such personal representative his final account showing the distribution of the funds received by him.

REPORTER'S COMMENT

Section 62-3-1311 requires the filing and preserving in the probate court of all original documents relating to the action for the sale of the land including the petition, proofs of service, and order.

This section further requires the personal representative file a final accounting to document the distribution of the proceeds of sale of the land.

Section 62-3-1312. In case any lands of the deceased subject to the lien of any judgment, mortgage, or other lien is sold under the provisions of this Part the court may enter a release of the lands so sold upon the records in the office of the clerk of court or register of deeds of the county from the lien of such judgment, mortgage, or other lien and in case such mortgage, judgment, or other lien debt has been paid

in full out of the proceeds of the sale of such lands the court may have cancellation of the same entered on the record thereof. The foregoing does not relieve any judgment, mortgage, or other lien creditor of the duty, as provided otherwise by law, of releasing or canceling such liens. Each release satisfaction or cancellation provided for herein must refer by proper notation to the file number of such estate in the court. The provisions of this section do not apply when the order of sale directs the sale of any lands which must be sold subject to any existing mortgage, judgment, or other lien, but only when such lands are sold freed and discharged from all such liens.

REPORTER'S COMMENT

This section provides that the probate judge must file in the offices of the clerk of court and of the register of mesne conveyances releases of the land sold from the lien of any mortgage, judgment, or other lien on said land. If the lien claim is paid in full from the proceeds of sale, the probate judge will file a cancellation of the lien. Such filing of releases by the probate judge will not be required if such releases are timely filed by the lien claimants. Such releases by the probate judge must make reference to the probate court file number for the estate.

This section specifies that releases must also be filed by the lien claimants even if a release has been filed by the probate judge.

This section further provides that the probate judge may sell the land subject to any existing lien on the land, and, in which case, no release from the lien would be required.

Article 4

Local and Foreign Personal Representatives; Ancillary Administration

Part 1

Definitions

Section 62-4-101. In this article [Sections 62-4-101 et seq.]:

(1) 'Local administration' means administration by a personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.].

(2) 'Local personal representative' includes any personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.] and

excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 62-4-205.

(3) 'Resident creditor' means a person domiciled in, or doing business in, this State who is, or could be, a claimant against an estate of a nonresident decedent.

REPORTER'S COMMENT

Section 62-4-101 defines 'local administration' and 'local personal representative' in order to distinguish 'local' matters from that matter covered by Article 4, the 'foreign personal representative' and his administrative acts in South Carolina undertaken on the strength of his 'foreign administration,' without his appointment in South Carolina pursuant to Article 3 of this Code. Section 62-1-201 includes definitions of 'foreign personal representative', 'personal representative', and 'non-resident decedent'.

Part 2

Powers of Foreign Personal Representatives

Section 62-4-201. At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

- (1) the date of the death of the nonresident decedent;
- (2) that no local administration, or application or petition therefor, is pending in this State;
- (3) that the domiciliary foreign personal representative is entitled to payment or delivery.

REPORTER'S COMMENT

Sections 62-4-201, 62-4-202, and 62-4-203 must be read, together with Section 62-4-206, as providing a means, less cumbersome than those provided by Sections 62-4-204 and 62-4-205 and by Section 62-4-207, for the unification and simplification of the administration of multi-state estates in the hands of the domiciliary foreign personal

representatives of nonresident decedents. These sections allow the domiciliary foreign personal representative to collect estate assets in South Carolina without requiring local appointment (Section 62-4-201), while protecting debtors of the estate against double payment (Section 62-4-202) and also protecting resident creditors of the estate from nonpayment (Section 62-4-203). See Section 62-5-431 for a provision similarly allowing the collection of the assets of a nonresident protected person by his domiciliary foreign conservator.

Sections 62-4-201 and 62-4-202 preserve the domiciliary foreign personal representative's power to collect estate assets in South Carolina from debtors willing to make voluntary payment on the strength of his foreign appointment, and also preserve the corresponding effect, the full discharge of the debtor, resulting from the payment.

These sections by their terms apply only to estates of nonresident decedents and allow for payment only to the domiciliary, not to any ancillary, foreign personal representative. Presumably, an ancillary personal representative is empowered to collect assets only in the state of his appointment. The debtor's good faith reliance on the foreign personal representative's proof of appointment and affidavit, inaccurately showing that the decedent was a nonresident of South Carolina and that the personal representative was appointed as a domiciliary personal representative, should protect the debtor under Section 62-4-202. These sections apply even if local administration is actually pending or applied for, as long as the foreign personal representative supplies the documentation detailed in Section 62-4-201 and the debtor has no actual notice of the pending local administration. Section 62-4-202 requires only good faith of the debtor who receives that documentation; his release then depends solely on his making payment to the foreign personal representative. See Section 62-4-206.

These sections apply even though interested persons, including estate creditors, are domiciled in, or doing business in, South Carolina. Such creditors are protected under Section 62-4-203.

These sections apply to the collection of all debts owed to and tangible and intangible personal property owned by the estate. Section 62-3-201(d) refers to the location of tangible personal property and intangible personal property which may be evidenced by an instrument. Transfers of securities are covered by these sections as well as by Sections 35-7-10, et seq. the Uniform Act for Simplification of Fiduciary Security Transfers.

Section 62-4-201 provides for a waiting period of sixty days from the death of the decedent before payment can be made with the expectation

of an immediate discharge of the debtor. Presumably, having made payment before the expiration of the period, a debtor will be discharged at the expiration of the period if he would have been discharged had he then paid, but, for example, not if, in the meantime, a local administration has come to the attention of the debtor.

See Section 12-16-1150 for estate tax duties and liabilities imposed on personal representatives.

Section 62-4-202. Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action to the same extent as if payment or delivery had been made to a local personal representative.

REPORTER'S COMMENT

See Comment to Section 62-4-201.

Section 62-4-203. Payment or delivery under Section 62-4-201 may not be made if a resident creditor of the nonresident decedent has given written notice to the debtor of the nonresident decedent or the person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

REPORTER'S COMMENT

For the context of Section 62-4-203, see comment to Section 62-4-201. Section 62-4-203 provides a means by which a resident creditor of the decedent can attempt to protect himself from nonpayment of his debt, resulting from assets of the estate being removed from South Carolina by a domiciliary foreign personal representative. The creditor simply notifies the debtors of the decedent not to pay their debts under Sections 62-4-201 and 62-4-202. The notice must be in writing, thereby excluding constructive notice. Section 62-4-203 provides for a mechanism protective of resident creditors, while Section 62-4-202 deprives of such protection resident creditors who fail to give notice under Section 62-4-203.

Section 62-4-204. If no local administration or application or petition therefor is pending in this State, a domiciliary foreign personal representative may file with a court in this State in a county in which

property belonging to the decedent is located, authenticated copies of his appointment and of the will, if any. The filing of a bond shall not be required unless the court in its discretion orders it.

REPORTER'S COMMENT

Sections 62-4-204 and 62-4-205 must be read, together with Section 62-4-206, as providing a means, additional to those of Sections 62-4-201 through 62-4-203 and of Section 62-4-207, for the unification and simplification of the administration of multi-state estates, without requiring the local appointment of a personal representative. Predicated on no local administration having been instituted, the domiciliary foreign personal representative, who files with the court the documents required by Section 62-4-204, obtains under Section 62-4-205 all of the powers of a local personal representative. See Article 3 for the powers of local personal representatives.

Section 62-4-205. A domiciliary foreign personal representative who has complied with Section 62-4-204 may exercise as to assets (including real and personal property) in this State all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

REPORTER'S COMMENT

See comment to Section 62-4-204.

Section 62-4-206. The power of a domiciliary foreign personal representative under Section 62-4-201 or 62-4-205 shall be exercised only if there is no administration or application therefor pending in this State. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 62-4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this State.

REPORTER'S COMMENT

Section 62-4-206 limits the powers of foreign personal representatives, under both Sections 62-4-201, et seq., and 62-4-204, et seq., to cases in which no local administration is pending, with provision, however, for court approved exercise of limited powers to preserve the estate, for protection of any person acting in reliance upon these sections and without actual notice of a pending local administration, and for subjection of the local personal representative to the obligations accrued by the foreign personal representative under these sections. See Article 3 for provisions concerning local administration.

Section 62-4-207. In respect to a nonresident decedent, the provisions of Article 3 [Sections 62-3-101 et seq.] govern (1) proceedings, if any, in a court of this State for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration. The initiation of a proceeding under Article 3 (Sections 62-3-101 et seq.) is the appropriate procedure for an ancillary administration relating to the real property of a nonresident decedent located in this State and is an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

REPORTER'S COMMENT

The purpose of this section is to direct attention to Article 3 for sections controlling ancillary, i.e., local administration of estates of nonresident decedents. See in particular Sections 62-3-101, 62-3-201, 62-3-202, 62-3-203, 62-3-307(a), 62-3-308, 62-3-611(b), 62-3-803(a), 62-3-815, and 62-3-816. Section 62-4-207 and Article 3 must be read as providing an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

Part 3

Jurisdiction Over Foreign Personal Representatives

Section 62-4-301. A foreign personal representative submits personally to the jurisdiction of the courts of this State in any proceeding relating to the estate by (1) filing authenticated copies of his appointment as provided in Section 62-4-204, (2) receiving

payment of money or taking delivery of personal property under Section 62-4-201, or (3) doing any act as a personal representative in this State which would have given the State jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

REPORTER'S COMMENT

Sections 62-4-301 and 62-4-302 assert the South Carolina courts' jurisdiction over foreign personal representatives, not appointed in South Carolina pursuant to Article 3. Jurisdiction is asserted in the circumstances, under Section 62-4-301, of the foreign personal representative's acting (1) under Section 62-4-204 of this Code, (2) under Section 62-4-201 of this Code, or (3) within the state in a manner which would have subjected him, as an individual, to the state's jurisdiction, and, under Section 62-4-302, (4) of the decedent's having been subject to the courts' jurisdiction immediately prior to his death. The words 'courts of this state' are sufficient under federal legislation to include a federal court having jurisdiction in South Carolina.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration. See Section 62-3-203(g). Once appointed as local personal representative, he remains subject to the jurisdiction of the appointing court under Section 62-3-602.

Section 62-4-302. In addition to jurisdiction conferred by Section 62-4-301, a foreign personal representative is subject to the jurisdiction of the courts of this State to the same extent that his decedent was subject to jurisdiction immediately prior to death.

REPORTER'S COMMENT

For the context of Section 62-4-302, see comment to Section 62-4-301. Section 62-4-302 subjects the foreign personal representative to jurisdiction on the basis of his decedent's immediate pre-death condition or activities, whether the decedent was domiciled, doing business, or maintaining his principal place of business in South Carolina (see Section 36-2-802 Code) of the 1976 Code or engaged in conduct encompassed in South Carolina's 'long-arm' statutes (see Sections 36-2-803, 15-5-130, 15-5-140, and 15-9-350, et seq.). As to survival of causes of action, see Sections 15-5-90, 15-51-10, et seq., and 35-1-1520 of the 1976 Code.

Uniform Commercial Code Section 36-2-801 might be read to subject a personal representative 'whether or not a citizen or domiciliary of this

State,' including a foreign personal representative, to the jurisdiction of the South Carolina courts. Section 62-4-302 settles any doubt as to the foreign personal representative's immunity from suit.

Section 62-4-302 should be read with Sections 15-5-130 and 15-5-140 as augmenting and simplifying the process available to persons involved in South Carolina in automobile accidents also involving deceased nonresident motorists. Section 62-4-302 allows for suit directly against the foreign personal representative.

Section 62-4-303. (a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this State on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a), he shall be allowed thirty days within which to appear or respond.

REPORTER'S COMMENT

Section 62-4-303 provides for service of process upon a foreign personal representative, first, either by registered or by certified mail, with return receipt requested, if available under postal regulations; second, by ordinary first class mail, where registered or certified mail is unavailable; and, third, by any means available under other laws of South Carolina for service on the decedent (or on the foreign personal representative himself) immediately prior to the decedent's death. For service on the decedent, see Sections 36-2-804, et seq., for service of process in support of personal jurisdiction under the 'long-arm' provisions of the Uniform Commercial Code, Sections 36-2-801, et seq. See Sections 15-9-350, et seq., for substituted service of process in South Carolina on the statutorily designated agents of nonresident motorists, motor carriers, aircraft operators, vessel operators, certain traveling shows, nonresident directors of domestic corporations, nonresident trustees of inter vivos trusts, and nonresident individual fiduciaries.

See Sections 62-1-401 through 62-1-403 of this Code for the general notice provisions of this Code.

Part 4

Judgments and Personal Representatives

Section 62-4-401. An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication; provided, however, that notice and the opportunity to defend must be given to the local representative in order that the judgment be collectible.

REPORTER'S COMMENT

For the determinative effect of domiciliary foreign orders determining testacy or the validity of a will and of domiciliary certificates of the efficacy of a will, see Section 62-3-408 and 62-3-409."

Articles 6 and 7 revised

SECTION 2. Articles 6 and 7 of the 1976 Code are amended to read:

"Article 6

Nonprobate Transfers

Part 1

Definitions and General Provisions

Section 62-6-101. In this subpart:

(1) 'Account' means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangements.

(2) 'Agent' means a person authorized to make account transactions for a party.

(3) 'Beneficiary' means a person named as one to whom sums on deposit in an account are payable on request after the death of all parties or for whom a party is named as the trustee.

(4) 'Financial institution' means any organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(5) 'Multiple-Party account' means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned including, but not limited to, joint accounts or POD accounts.

(6) 'Net contribution of a party' means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(7) 'Party' means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(8) 'Payment' of sums on deposit includes withdrawal, payment to a party, or third person pursuant to a check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(9) 'Proof of death' includes a death certificate or record or report which is prima facie proof of death under Section 62-1-507.

(10) 'P.O.D. designation' means the designation of: (i) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

(11) 'Receive' as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(12) 'Request' means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution. However, for purposes of this subpart, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment.

(13) 'Sums on deposit' means the balance payable on an account including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of the death of a party.

(14) 'Terms of the account' includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

REPORTER'S COMMENT

This and the sections that follow are designed to reduce certain questions concerning many forms of multiple-person accounts. A 'payable on death' designation and an 'agency' designation are also authorized for both single-party and multiple-party accounts. An agent (paragraph (2)) may not be a party. The agency designation must be signed by all parties, and the agent is the agent of all parties. See Section 62-6-105 (designation of agent).

A 'beneficiary' of a party (paragraph (3)) may be a POD beneficiary. See paragraph (10) ('POD designation' defined). The definition of 'beneficiary' refers to a 'person,' who may be an individual, corporation, organization, or other legal entity. Thus, a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

The term 'multiple-party account' (paragraph 5) is used in this part in a broad sense to include any account having more than one owner with a present interest in the account. Thus, an account may be a 'multiple-party account' within the meaning of this part regardless of whether the terms of the account refer to it as 'joint tenancy' or as 'tenancy in common,' regardless of whether the parties named are coupled by 'or' or 'and,' and regardless of whether any reference is made to survivorship rights, whether expressly or by abbreviation such as JTWROS or JT TEN. Survivorship rights in a multiple-party account are determined by the terms of the account, by statute and by the intent of the party, and survivorship is not a necessary incident of a multiple-party account. See Section 62-6-202 (rights at death).

'Net contribution' as defined in paragraph (6) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account. See Section 62-6-201 (ownership during lifetime).

Under paragraph (7), a 'party' is a person with a present right to payment from an account. Therefore, present owners of a multiple-party account are parties, as is the present owner of an account with a POD designation. The beneficiary of an account with a POD designation is not a party, but is entitled to payment only on the death

of all parties. An agent with the right of withdrawal on behalf of a party is not itself a party. A person claiming on behalf of a party such as a guardian or conservator, or claiming the interest of a party such as a creditor, is not itself a party, and the right of such a person to payment is governed by general law other than this part.

Various signature requirements may be involved in order to meet the payment requirements of the account. A 'request' (paragraph (12)) involves compliance with these requirements. A party is one to whom an account is presently payable without regard to whose signature may be required for a 'request.'

Section 62-6-102. This article does not apply to: (i) an account established for a partnership, joint venture, or other organization for a business purpose, (ii) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or (iii) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

REPORTER'S COMMENT

The reference to a fiduciary or trust account in item (iii) includes a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, and a fiduciary account arising from a fiduciary relation such as attorney-client.

Section 62-6-103. (a) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to Section 62-6-202(c), either a single-party account or a multiple-party account may have a POD designation, an agency designation, or both.

(b) An account established after January 1, 2014, whether in the form prescribed in Section 62-6-104 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this subpart, and is governed by this article.

REPORTER'S COMMENT

In the case of an account established after the effective date of this part that is not in substantially the form provided in Section 62-6-104, the account is governed by the provisions of this part applicable to the type

of account that most nearly conforms to the depositor's intent. See Section 62-6-104 (forms).

Thus, a tenancy in common account established before or after the effective date of this part would be classified as a 'multiple-party account' for purposes of this part. See Section 62-6-101(5) ('multiple-party account' defined). On death of a party there would not be a right of survivorship since the tenancy in common title would be treated as a multiple-party account without right of survivorship. See Section 62-6-202(c). It should be noted that a POD designation may not be made in a multiple-party account without right of survivorship. See Sections 62-6-101(10) ('POD designation' defined), 62-6-104 (forms), and 62-6-202 (rights at death).

Section 62-6-104. (a) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this subpart applicable to an account of that type:

'UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One or More Parties]:

OWNERSHIP [Select One And Initial]:

SINGLE-PARTY ACCOUNT

MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

If Single-Party Account is chosen above, choose one of following:

SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH)
DESIGNATION

[Name One Or More Beneficiaries]:

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

If Multiple-Party Account is chosen above, choose one of following:

 MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties. The last surviving party owns the entire account. (Note: This can be overridden by clear and convincing evidence of a contrary intent.)

 MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

 MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

DESIGNATION OF AGENT FOR ACCOUNT [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

_____ AGENCY DESIGNATION SURVIVES DISABILITY OR
INCAPACITY OF PARTIES

_____ AGENCY DESIGNATION TERMINATES ON DISABILITY
OR INCAPACITY OF PARTIES'

(b) A contract of deposit that does not contain provisions in substantially the form provided in subsection (a) is governed by the provisions of this article applicable to the type of account that most nearly conforms to the depositor's intent.

REPORTER'S COMMENT

This section provides short forms for single- and multiple-party accounts which, if used, bring the accounts within the terms of this part. A financial institution that uses the statutory form language in its accounts is protected in acting in reliance on the form of the account. See also Section 62-6-306 (discharge).

The forms provided in this section enable a person establishing a multiple-party account to state expressly in the account whether there are to be survivorship rights between the parties. The account forms permit greater flexibility than traditional account designations.

An account that is not substantially in the form provided in this section is nonetheless governed by this part. See Section 62-6-103 (types of account; existing accounts).

Section 62-6-105. By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party. Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated. Death of the sole party or last surviving party terminates the authority of an agent. The designated agent on an account is authorized to make all transactions on the account that the party can make, including, but not limited to, closing the account. An agent serving under a durable power of attorney can change, modify, or revoke an agent designated on an account.

REPORTER'S COMMENT

An agent has no beneficial interest in the account. See Section 62-6-201 (ownership during lifetime). The agency relationship is

governed by the general law of agency of the state, except to the extent this part provides express rules, including the rule that the agency survives the disability or incapacity of a party.

A financial institution may make payments at the direction of an agent notwithstanding disability, incapacity, or death of the party, subject to receipt of a stop notice. Section 62-6-306 (discharge); see also Section 62-6-304 (payment to designated agent).

The rule of subsection (b) applies to agency designations on all types of accounts, including nonsurvivorship as well as survivorship forms of multiple-party accounts.

Section 62-6-106. The provisions of Part 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. Part 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Part 2

Ownership as Between Parties and Others

Section 62-6-201. (A) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(B) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(C) An agent in an account with an agency designation has no beneficial right to sums on deposit.

REPORTER'S COMMENT

This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.

The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For

example, under subsection (b) it is presumed that the beneficiary of a POD designation has no present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was intended.

It is important to note that the section is limited to ownership of an account while parties are alive. Section 62-6-202 prescribes what happens to beneficial ownership on the death of a party.

The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 62-6-301 and 62-6-306 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.

The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

Section 62-6-202. (a) Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 62-6-201, and the right of survivorship continues between the surviving parties.

(b) In an account with a POD designation:

(1) on death of one of two or more parties, the rights in sums on deposit are governed by subsection (a);

(2) on death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(c) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(d) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

REPORTER'S COMMENT

The effect of subsection (a) is to make an account payable to one or more of two or more parties a survivorship arrangement unless a nonsurvivorship arrangement is specified in the terms of the account.

The account characteristics described in this section must be determined by reference to the form of the account and the impact of Sections 62-6-103 and 62-6-104 on the admissibility of extrinsic evidence tending to confirm or contradict intention as signaled by the form.

Section 62-6-203. (a) Rights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective the notice must be received by the financial institution during the party's lifetime.

(b) A right of survivorship arising from the express terms of the account under Section 62-6-202 may be altered by clear and convincing evidence, including but not limited to express provisions in a will.

(c) A multiple-party account of husband and wife is presumed to be joint with right of survivorship unless clear and convincing evidence shows survivorship was not the intent of the party.

REPORTER'S COMMENT

Under this section, rights of parties and beneficiaries are determined by the type of account at the time of death. It is to be noted that only a 'party' may give notice blocking the provisions of Section 62-6-202 (rights at death). 'Party' is defined by Section 62-6-101(7). Thus, if there is an account with a POD designation in the name of A and B with C as beneficiary, C cannot change the right of survivorship because C has no present right to payment and hence is not a party.

Section 62-6-204. A transfer resulting from the application of Section 62-6-202 is effective by reason of the terms of the account involved and this part and is not testamentary or subject to Articles 1 through 4 (estate administration) unless there is clear and convincing evidence that the deceased party did not intend for the account to be joint with right of survivorship.

REPORTER'S COMMENT

The purpose of classifying the transactions contemplated by this part as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers on death is not to be determined by the requirements for wills.

Section 62-6-205. Subject to the provisions contained in Section 62-3-916, no multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, if other assets of the estate are insufficient. A surviving party or beneficiary who receives payment from a multiple-party account after the death of a deceased party is liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability may be commenced unless the personal representative has received a written demand by a creditor of the decedent, and no proceeding may be commenced later than one year following the death of the decedent. Sums recovered by the personal representative must be administered as part of the decedent's estate. This section does not affect the right of a financial institution to make payment on multiple-party accounts according to the terms of the account or make it liable to the estate of a deceased party unless, before

payment, the institution has been served with an order of the probate court.

REPORTER'S COMMENT

Section 62-6-205, in derogation of the survivorship rights established in Sections 62-6-202 through 62-6-204, establishes in the estate of a deceased party a limited beneficial ownership of the funds on deposit in a multiple-party account, limited, however, to the payment of debts, taxes, and the expenses of administration of the estate of the deceased party, and existing only if other assets of that estate are insufficient to that purpose, only up to the amount to which the deceased party was beneficially entitled prior to death, and only if a creditor's claim proceeding is brought within one year of the deceased party's death.

Part 3

Protection of Financial Institutions

Section 62-6-301. A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

REPORTER'S COMMENT

Section 62-6-301 is substantially the same as prior law under former S.C. Code Section 62-6-108, with the additional reference to POD and agency designations. The provisions governing payment on request of one or more parties, previously covered in former S.C. Code Section 62-6-108, is now found in S.C. Code Section 62-6-302.

The provisions of this subpart relate only to protection of a financial institution that makes payment as provided in the subpart. Nothing in this subpart affects the beneficial rights of persons to sums on deposit or paid out. Ownership as between parties, and others, is governed by Subpart 2. See Section 62-6-106 (applicability of subpart).

Section 62-6-302. A financial institution, on request, may pay sums on deposit in a multiple-party account:

(1) to one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party;

(2) to the personal representative of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under Section 62-6-202; or

(3) in accordance with a court order directing the payment of the sums on deposit.

REPORTER'S COMMENT

Section 62-6-302 expands upon former 62-6-108 and recognizes multiple party accounts may be paid on request to one or more parties. Subsection (2) is a departure from prior law in that it does not contain the former provision providing for payment to heirs or devisees if there is no personal representative. Now, in such a circumstance, Subsection (3) allows for payment in accordance with a court order. Section 62-6-302 is consistent with the result of *Trotter v. First Federal Sav. and Loan Ass'n*, 298 S.C. 85, 378 S.E.2d 267 (Ct. App. 1989), which recognized that a bank was authorized to make a payment from a joint account to satisfy the debt of one of the signatories, even though the other (non-consenting) signatory had contributed the funds to the account.

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 62-6-306 (discharge). Paragraph (1) applies to both a multiple-party account with right of survivorship and a multiple-party account without right of survivorship (including an account in tenancy in common form). Paragraph (2) is limited to a multiple-party account with right of survivorship; payment to the personal representative or heirs or devisees of a deceased party to an account without right of survivorship is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Section 62-6-303. A financial institution, on request, may pay sums on deposit in an account with a POD designation:

(1) to one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party;

(2) to the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties;

(3) to the personal representative of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary; or

(4) in accordance with a court order directing the payment of the sums on deposit.

REPORTER'S COMMENT

Section 62-6-303 is substantially the same as prior 62-6-110, with the addition of Subsection (4) which allows payment in accordance with a court order.

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. See Section 62-6-306 (discharge). Payment to the personal representative of a deceased beneficiary who would be entitled to payment under paragraph (2) is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Section 62-6-304. A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

REPORTER'S COMMENT

Section 62-6-304 is new and recognizes the ability to pay to an agent under an agency designation. Designation of an agent is governed by S.C. Code Section 62-6-105 and this section is in accordance with the concept of adding a non-party agent to an account, as commonly provided in account agreements. Section 62-6-304 is consistent with former S.C. Code Section 62-6-111 governing payments of a trust account to a trustee, though this section is broader in that the definition of agent under S.C. Code Section 62-2-101(2) includes any 'person authorized to make account transactions for a party.'

This section is intended to protect a financial institution that makes a payment pursuant to an account with an agency designation even though the agency may have terminated at the time of the payment due

to disability, incapacity, or death of the principal. The protection does not apply if the financial institution has received notice under Section 62-6-306 not to make payment or notice that the agency has terminated. This section applies whether or not the agency survives the party's disability or incapacity under Section 62-6-105 (designation of agent).

Section 62-6-305. If a financial institution is required or permitted to make payment pursuant to this part to a minor designated as a beneficiary, payment shall be made as ordered by the court or may be made in accordance with Section 62-5-103.

SOUTH CAROLINA COMMENTS

Section 62-6-305 is intended to avoid the need for a guardianship or other protective proceeding in situations where the Uniform Gifts to Minors Act may be used.

Section 62-6-306. (a) Payment made pursuant to this subpart in accordance with the terms of the account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(b) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from an agent under a durable power of attorney or a conservator for a party, or from the personal representative of a deceased party, or surviving spouse of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process or a court order in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(c) A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to

the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(d) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

REPORTER'S COMMENT

The provision of subsection (a) protecting a financial institution for payments made after the death, disability, or incapacity of a party is a specific elaboration of the general protective provisions of this section and is drawn from Uniform Commercial Code Section 4-405.

Knowledge of disability, incapacity, or death of a party does not affect payment on request of an agent, whether or not the agent's authority survives disability or incapacity. See Section 62-6-304 (payment to designated agent). But under subsection (b), the financial institution may not make payments on request of an agent after it has received written notice not to, whether because the agency has terminated or otherwise.

Section 62-6-307. Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

REPORTER'S COMMENT

Section 62-6-307 is substantially similar to former S.C. Code §62-6-113. As with former Section 62-6-113, Section 62-6-307 allows the financial institution, as creditor of a party, to set off in its own favor an amount from a multiple party account to cover the indebtedness of that party. This Section is in addition to any other statutory, common law, or contractual remedies, liens or rights of set-off.

Article 7

South Carolina Trust Code

Part 1

General Provisions and Definitions

GENERAL COMMENT

The South Carolina version of the Uniform Trust Code is referred to as the South Carolina Trust Code or sometimes the SCTC or sometimes the Code throughout this Article. The Uniform Trust Code is sometimes referred to as the UTC. The South Carolina Probate Code, South Carolina Code Ann. Section 62-1-100 et seq., is sometimes referred to as the SCPC. The sections of the South Carolina Trust Code are codified at Title 62, Article 7 and consequently are a part of the comprehensive South Carolina Probate Code. Depending on context, general references to “Article” in the UTC Comments may correlate to “Part” in the SCTC.

As with the UTC, the SCTC is primarily a default statute. Most of the Code’s provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 62-7-105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 62-7-102), provides definitions (Section 62-7-103), and collects provisions of importance not amenable to codification elsewhere in the SCTC. Sections 62-7-106 and 62-7-107 focus on the sources of law that will govern a trust. Section 62-7-106 clarifies that despite the Code’s comprehensive scope, not all aspects of the law of trusts have been codified. The SCTC is supplemented by the common law of trusts and principles of equity. Section 62-7-107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust’s terms.

Changing a trust’s principal place of administration is sometimes desirable, particularly to lower a trust’s state income tax. Such transfers are authorized in Section 62-7-108. The trustee, following notice to the “qualified beneficiaries,” defined in Section 62-7-103(12), may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object and if the transfer is consistent with the trustee’s duty to administer the trust at a place appropriate to its purposes, its

administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Sections 62-7-104 and 62-7-109 through 62-7-111 address procedural issues. Section 62-7-104 specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 62-7-109 specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. Section 62-7-110 allows beneficiaries with remote interests to request notice of actions, such as notice of a trustee resignation, which are normally given only to the qualified beneficiaries.

Section 62-7-111 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

Section 62-7-112 provides that South Carolina's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

Section 62-7-101. This article may be cited as the South Carolina Trust Code. In this article, unless the context clearly indicates otherwise, 'Code' means the South Carolina Trust Code.

Section 62-7-102. This article applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. The term 'express trust' includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the probate court, and includes, but is not limited to, all trusts defined in Section 62-1-201(49). This article does not apply to constructive trusts, resulting trusts, conservatorships administered by conservators as defined in Section 62-1-201(6), administration of decedent's estates, all multiple party accounts referred to in Section 62-6-101 et seq., custodial arrangements, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the

primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

REPORTER'S COMMENT

This section provides a concise statement of the positive inclusion of express trusts within the scope of the SCTC.

South Carolina has another comprehensive statement of the scope of applicable South Carolina trust law, contained in the definition paragraph of the South Carolina Probate Code Section 62-1-201(49), which contains an expanded statement of the inclusion of express trusts and further contains detailed statements of the trusts and trust type arrangements that are excluded from the scope. This statement is now included in Section 62-7-102 with reference to Section 62-1-201(49). Former Section 62-7-702(1), in the South Carolina Uniform Trustee's Powers Act, which was repealed by the SCTC, also contained a comprehensive statement of applicable South Carolina trust law.

Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 62-7-401 and 62-7-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts Sections 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 2, 5-16C (1959).

The SCTC is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of

personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding.

Section 62-7-103. In this article:

(1) 'Action,' with respect to an act of a trustee, includes a failure to act.

(2) 'Beneficiary' means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property; or

(C) In the case of a charitable trust, has the authority to enforce the terms of the Trust.

(3) 'Charitable trust' means a trust, or portion of a trust, created for a charitable purpose described in Section 62-7-405(a).

(4) 'Conservator' means a person appointed by the court to administer the estate of a protected person.

(5) 'Environmental law' means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(6) 'Guardian' means a person appointed by the court to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem or a statutory guardian.

(7) 'Interests of the beneficiaries' means the beneficial interests provided in the terms of the trust.

(8) 'Jurisdiction', with respect to a geographic area, includes a State or country.

(9) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(10) 'Power of withdrawal' means a presently exercisable general power of appointment other than a power exercisable by a trustee which is limited by an ascertainable standard, or which is exercisable by another person only upon consent of the trustee or the person holding an adverse interest.

(11) 'Property' means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(12) 'Qualified beneficiary' means a living beneficiary who, on the date the beneficiary's qualification is determined:

(A) is a distributee or permissible distributee of trust income or principal;

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date, but the termination of those interests would not cause the trust to terminate; or

(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(13) 'Revocable', as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(14) 'Settlor' means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion. Neither the possession of, nor the lapse, release, or waiver of a power of withdrawal shall cause a holder of the power to be deemed to be a settlor of the trust, and property subject to such power is not susceptible to the power holder's creditors.

(15) 'Spendthrift provision' means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

(16) 'State' means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(17) 'Terms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(18) 'Trust instrument' means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(19) 'Trustee' includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court.

(20) 'Ascertainable standard' means an ascertainable standard relating to a trustee's individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code, as amended.

(21) 'Distributee' means any person who receives property of a trust from a trustee, other than as creditor or purchaser.

(22) ‘Interested person’ or ‘interested party’ means any person or party deemed to be a necessary or proper party under Rule 19 of the South Carolina Rules of Civil Procedure.

(23) ‘Internal Revenue Code’ means the Internal Revenue Code, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor or amendment thereto.

(24) ‘Serious breach of trust’ means either: a single act that causes significant harm or involves flagrant misconduct, or a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

(25) ‘Permissible distributee’ means any person who or which on the date of qualification as a beneficiary is eligible to receive current distributions of property of a trust from a trustee, other than as a creditor or purchaser.

(26) ‘Trust investment advisor’ is a person, committee of persons, or entity who is or who are given authority by the terms of a trust instrument to direct, consent to or disapprove a trustee’s actual or proposed investment decisions.

(27) ‘Trust protector’ is a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument.

The terms and definitions contained in the South Carolina Probate Code that do not conflict with the terms defined in this section shall remain in effect for the South Carolina Trust Code.

REPORTER’S COMMENT

There are a number of definitions in Section 62-7-103 referred to throughout the South Carolina Trust Code that have no equivalent in other portions of the South Carolina Code. These include “Action,” “Charitable trust,” “Environmental law,” “Interests of the beneficiaries,” “Jurisdiction,” “Power of withdrawal,” “Qualified beneficiary,” “Revocable,” “Settlor,” “Spendthrift provision,” “Terms of a trust,” and “Trust instrument.” In the interest of uniformity, such terms are included in the South Carolina Trust Code except as noted below.

A definition of “action” (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the SCTC where reference is made to an “action” by the trustee that the term includes a failure to act.

“Beneficiary” (paragraph (2)) refers only to a beneficiary of a trust as defined in the SCTC. In addition to living and ascertained

individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 62-7-402(c), a trust is valid only if a beneficiary can be ascertained now or in the future. The term “beneficiary” includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

While the holder of a power of appointment is not necessarily considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the SCTC. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder’s creditors, the power holder’s estate, or the creditors of the power holder’s estate. *See* Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder’s will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of “beneficiary” excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

Under Section 62-7-302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power.

The definition of “beneficiary” includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 62-7-405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 62-7-110(b), charitable organizations expressly designated to receive distributions under the terms of a charitable trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under the Code.

The SCTC leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts Section 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 116-119 (1959). Except as limited by public policy, the extent of a beneficiary’s interest is determined solely by the settlor’s intent. *See* Restatement (Third) of Trusts Section 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 127-128 (1959). While most beneficial interests terminate upon a beneficiary’s death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. *See* Restatement (Third) of Trusts Section 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 140, 142 (1959).

Under the SCTC, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a “charitable trust” (paragraph (3)). The great majority of the Code’s provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 62-7-405 and 62-7-413 of the SCTC, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of equitable deviation. Although South Carolina courts have previously refused to recognize the doctrine of cy pres (*see* Section 62-7-413 comment), a charitable trust in South Carolina could be modified or terminated under the doctrine of equitable deviation. Also, Section 62-7-411 allows a noncharitable trust to, in certain instances, be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of

provisions, one applicable to the charitable interests, the other the noncharitable.

Subsection (4) reflects the definition of “conservator” contained in South Carolina Probate Code Section 62-1-201(6). See the definition of “guardian” (paragraph (6)).

To encourage trustees to accept and administer trusts containing real property, the SCTC contains several provisions designed to limit exposure to possible liability for violation of “environmental law” (paragraph (5)). Section 62-7-701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 62-7-816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 62-7-1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the SCTC, a “guardian” (paragraph (6)) makes decisions with respect to personal care; a “conservator” (paragraph (4)) manages property. The terminology used in the SCTC is that employed in Article V of the South Carolina Probate Code. Further, the South Carolina Probate Code (Section 62-1-201(18)) specifically excludes “a statutory guardian” and this modification was incorporated into the SCTC definition.

The phrase “interests of the beneficiaries” (paragraph (7)) is used with some frequency in the SCTC. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Section 62-7-108 dictates that a trustee is under a continuing duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 62-7-706(b) conditions certain of the grounds for removing a trustee on the court’s finding that removal of the trustee will best serve the interests of the beneficiaries. Section 62-7-801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 62-7-802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 62-7-808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 62-7-1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 62-7-1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

“Jurisdiction” (paragraph (8)), when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. “Jurisdiction” is used in Sections 62-7-107 and 62-7-403 to refer to the place whose law will govern the trust. The term is used in Section 62-7-108 to refer to the trust’s principal place of administration. The term is used in Section 62-7-816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of “property” (paragraph (11)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. *See* Section 62-7-401 comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the SCTC uses the concept of “qualified beneficiary” (paragraph (12)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 62-7-705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 62-7-813 to define the class to be kept informed of the trust’s administration. Section 62-7-417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 62-7-704. Prior to transferring a trust’s principal place of administration, SCTC Section 62-7-108(e) (UTC Section 108(d)) requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently receiving a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would receive distributions were the event triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a

beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Part 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

The qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 62-7-110 expands the definition of qualified beneficiaries to encompass this wider group. UTC Section 110 grants the rights of qualified beneficiaries to the attorney general of the state and charitable organizations expressly designated to receive distributions under the terms of a charitable trust; SCTC Section 62-7-110 grants the rights of qualified beneficiaries only to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. Section 62-7-110 also grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose.

The definition of "revocable" (paragraph (13)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The consequences of classifying a trust as revocable are many. The SCTC contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 62-7-505), the standard of capacity for creating a revocable trust (Section 62-7-601), the procedure for revocation (Section 62-7-602), the subjecting of the beneficiaries' rights to the settlor's control (Section 62-7-603), the period for contesting a revocable trust (Section 62-7-604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 62-7-808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 62-7-813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 62-7-1011(d)).

The definition of “settlor” (paragraph (14)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 62-7-401. Determining the identity of the “settlor” is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the “settlor” by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *See* Section 62-7-602(b).

In the case of a revocable trust employed as a will substitute, gifts to the trust’s creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of “settlor” excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child’s revocable trust would not be treated as one of the trust’s settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child’s proportionate contribution.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 62-7-505(a)(1), (3) (creditor claims against settlor of revocable trust), 62-7-602 (revocation or modification of revocable trust), and 62-7-604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 62-7-505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 62-7-411 to terminate the trust with the beneficiaries’ consent, the SCTC also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections 62-7-405(c) (standing to enforce charitable trust), 62-7-413 (South Carolina, doctrine of equitable deviation), and 62-7-706 (removal of trustee).

“Spendthrift provision” (paragraph (15)) means a term of a trust which restrains the transfer of a beneficiary’s interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary’s creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the SCTC only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 62-7-502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 62-7-411, although the Code does not presume this result.

“Terms of a trust” (paragraph (17)) is a defined term used frequently in the SCTC. While the wording of a written trust instrument is almost always the most important determinant of a trust’s terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust’s meaning. *See* Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor’s intention does not constitute evidence of a trust’s terms if it would be inadmissible in a judicial proceeding in which the trust’s terms are in question. *See* Restatement (Third) of Trusts Section 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers Sections 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, South Carolina has chosen to recognize the creation of an oral trust, Section 62-7-407. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

“Trust instrument” (paragraph (18)) is a subset of the definition of “terms of a trust” (paragraph (17)), referring to only such terms as are found in an instrument executed by the settlor. Section 62-7-403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to

Section 62-7-604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. UTC Section 813(b)(1) and SCTC Section 62-7-813(b) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 62-7-1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 62-7-1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 62-7-1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the SCTC apply to trust instruments executed before the effective date of the Code.

The definition of “trustee” (paragraph (19)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Section 62-1-201 of the South Carolina Probate Code contains the language “whether or not appointed or confirmed by court” and the South Carolina Trust Code retains that language. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the SCTC. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

Subsections (21) (defining “distributee”), (25) (defining “permissible distributee”), (26) (defining “Trust Investment Advisor”), and (27) (defining “Trust Protector”) are South Carolina additions to the UTC.

The South Carolina version of Section 62-7-103 expresses the intent that the definitions contained in the South Carolina Probate Code that are not otherwise defined within the South Carolina Trust Code and that do not conflict with the definitions contained in the South Carolina Trust Code shall continue to apply to the law governing trusts in South Carolina.

Section 62-7-104. (a) Subject to subsection (b), a person has knowledge of a fact if the person:

- (1) has actual knowledge of it;

(2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

REPORTER'S COMMENT

This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in Sections 62-7-109 (methods and waiver of notice), 62-7-305 (appointment of representative), 62-7-604(b) (limitation on contest of revocable trust), 62-7-1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and 62-7-1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. *See* Section 62-7-1005 (limitation of action against trustee following report of trustee).

This section is based on Uniform Commercial Code Section 1-202 (2000 Annual Meeting Draft).

Section 62-7-105. (a) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this article except:

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
- (4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;
- (6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602A;
- (7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under Section 62-7-1008;
- (9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;
- (10) periods of limitation for commencing a judicial proceeding;
- (11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- (12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.

REPORTER'S COMMENT

Section 62-7-105(a) begins with the premise that the provisions of the South Carolina Trust Code govern trusts when the terms of a trust do not otherwise direct. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. However, subsection (b) lists eleven

separate requirements that may not be waived and will be controlled by the terms of the SCTC irrespective of the terms of the trust.

With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust.

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 62-7-401 through 409. Subsection (b)(10) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 62-7-604 (period of limitations for contesting validity of revocable trust), and 62-7-1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust. Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful and possible to achieve. Subsection (b)(2)-(3) are echoed in Sections 62-7-404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful and possible to achieve), 62-7-801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 62-7-802(a) (trustee must administer trust solely in interests of the beneficiaries), 62-7-814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 62-7-1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries). SCTC Section 62-7-404 does not include the words "not contrary to public policy," found in UTC Section 404, recognizing that existing South Carolina law would invalidate trusts that are contrary to public policy.

The UTC provides that the terms of a trust may not deny a court authority to take such action as necessary in the interests of justice,

including requiring that a trustee furnish bond. UTC Subsections (b)(6), (13). The SCTC does not include the UTC version of subsection 105(b)(6). Section 62-7-702 of the South Carolina Trust Code provides the situations for which the trustee must provide bond.

UTC subsection (b)(14) and SCTC subsection (b)(12) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

Section 62-7-813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. UTC Subsections (b)(8) and (b)(9) specify limits on the settlor's ability to waive these information requirements. The South Carolina Trust Code does not include the UTC version of subsections 105(b)(8)-(9).

In conformity with traditional doctrine, the SCTC limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 62-7-1008. UTC Subsection (b)(10) and SCTC Subsection (b)(8) of this section provide a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, UTC subsection (b)(11) and SCTC subsection (b)(9) clarify that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Part 5.

2001 Amendment. By amendment in 2001, subsection (b)(3), (8) and (9) were revised to read as above. The language in subsection (b)(3) "that the trust have a purpose that is lawful and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 62-7-404. SCTC Section 62-7-404 does not include the words "not contrary to public policy," found in UTC Section 404, recognizing that existing South Carolina law would invalidate trusts that are contrary to public policy. As a result, SCTC subsection (b)(3) does not include the words "not contrary to public policy."

The SCTC does not include the UTC version of Subsections 105 (b)(8) - (9) thus the 2001 Amendment which applies to Subsections 105 (b)(8)-(9) is not applicable.

2010 Amendment to the SCTC. The 2010 amendment added subsection (b)(6) relating to limitations on a settlor's agent; and redesignated former subsections (b)(6) through (b)(11) as subsections (b)(7) through (b)(12), respectively.

Section 62-7-106. The common law of trusts and principles of equity supplement this article, except to the extent modified by this article or another statute of this State.

REPORTER'S COMMENT

The SCTC codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

The statutory text of the SCTC is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. See *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory Construction* Section 52.05 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a Nutshell* Section 55-4 (2d ed. 1986). See also South Carolina Probate Code Section 62-1-103.

Section 62-7-107. The meaning and effect of the terms of a trust are determined by:

- (1) the law of the jurisdiction designated in the terms of the trust; or
- (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

REPORTER'S COMMENT

This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 62-7-403.

Under prior South Carolina law, there was no statutory counterpart to this section; common law principles controlled.

Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time. See, however, *Russell v. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329 (2003), in which the South Carolina Supreme Court cited language from the *Restatement (Second) of Conflict of Laws* Sections 268-270 (1971) in adopting a rule similar to that of SCTC Section 107.

Paragraph (2) provides a rule for trusts without governing law provisions - the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. See *Restatement (Second) of Conflict of Laws* Sections 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. See *Restatement (Second) of Conflict of Laws* Section 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest

connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15.

For the authority of a settlor to designate a trust's principal place of administration, see UTC Section 108(a) or SCTC Section 62-7-108(b). Because SCTC Section 62-7-108 includes an additional paragraph not in the UTC, which is at SCTC Section 62-7-108(a), the reference to UTC Section 108(a) in the UTC Comment is appropriate for SCTC Section 62-7-108(b).

Section 62-7-108. (a) Unless otherwise designated by the terms of a trust, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is:

(1) the usual place of business of the corporate trustee if there is but one corporate cotrustee, or

(2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee, and otherwise

(3) the usual place of business or residence of any of the cotrustees as agreed upon by them.

(b) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

(c) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(d) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (c), may transfer the trust's principal place of

administration to another State or to a jurisdiction outside of the United States.

(e) Unless otherwise designated in the trust, the trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than ninety days before initiating the transfer. The notice of proposed transfer must include:

- (1) the name of the jurisdiction to which the principal place of administration is to be transferred;
- (2) the address and telephone number at the new location at which the trustee can be contacted;
- (3) an explanation of the reasons for the proposed transfer;
- (4) the date on which the proposed transfer is anticipated to occur; and
- (5) the date, not less than ninety days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(f) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 62-7-704.

REPORTER'S COMMENT

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 62-7-107 comment.

Because of the difficult and variable situations sometimes involved, the SCTC does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an

institutional trustee, the place where the trust officer responsible for supervising the account is located.

Under the SCTC, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 62-7-202), and the rules for locating venue within a particular state (Section 62-7-204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

Because SCTC Section 62-7-108 includes an additional paragraph not in the UTC, which is at SCTC Section 62-7-108(a), the references to the subsections of UTC Section 108 in the UTC Comment have been adjusted correspondingly for SCTC Section 62-7-108.

SCTC Section 62-7-108(a) incorporates the provisions of former SCPC Section 62-7-202 (which dealt with venue), except SCTC subsection 108(a) is not limited to matters of venue.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under UTC subsection (a) and SCTC subsection (b), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 62-7-107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

UTC Subsection (b) and SCTC subsection (c) provide that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. "Interests of the beneficiaries," defined in Section 62-7-103(7), means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust.

UTC Subsections (c)-(f) and SCTC subsections (d)-(g) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new

trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. *See* Section 62-7-105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 62-7-103(12) but also to those granted the rights of qualified beneficiaries under Section 62-7-110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

SCTC Section 62-7-108(e), which corresponds to UTC subsection 108(d), adds to the UTC version the introductory phrase “unless otherwise designated in the trust.”

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. UTC Subsection (f) and SCTC subsection (g) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 62-7-704. Absent an order of succession in the terms of the trust, Section 62-7-704(c) provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 62-7-704(d) the procedure for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. *See* 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 615 (4th ed. 1989).

Section 62-7-109. (a) Notice to a person under this article or the sending of a document to a person under this article must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail,

personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this article or a document otherwise required to be sent under this article need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this article or the sending of a document under this article may be waived by the person to be notified or sent the document.

(d) If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail addressed to the person being notified at the post office address given in his request for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least twenty days before the time set for the hearing; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy thereof in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.

(e) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(f) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

REPORTER'S COMMENT

Subsection (a) clarifies that notices under the SCTC may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not

reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure.

Under the SCTC, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. See Sections 62-7-411 (termination of noncharitable irrevocable trust) and 62-7-704 (appointment of successor trustee). UTC Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Part 3.

In a nonjudicial context, SCTC Section 62-7-109(b) does not require notification of a person whose identity or location is unknown or cannot be reasonably ascertainable.

To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (UTC Section 108(d) and SCTC Section 62-7-108(e)) or of a trustee's report (Section 62-7-813(e)). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 62-7-417), of a temporary assumption of duties without accepting trusteeship (Section 62-7-701(c)(1)), and of a trustee's resignation (Section 62-7-705(a)(1)).

Notices under the SCTC are nonjudicial.

Previous South Carolina law had no precise counterpart. However, the South Carolina Probate Code contains various provisions respecting notice. The general notice section, SCPC Section 62-1-401 provides that notice of a hearing or other petition shall be delivered at least twenty (20) days before the time set for the hearing by certified, registered, or ordinary first class mail, or by delivering a copy to the person being notified at least twenty (20) days before the time set for hearing. That section also provides for the service of notice of hearing by publication if the address or identity of the person cannot be ascertained with reasonable diligence. SCTC Section 62-7-109(d) differs from the UTC version and incorporates the substance of SCPC Section 62-1-401.

The SCTC adds Subsections 62-7-109(e) and (f), which are not in UTC Section 109.

Section 62-7-110. (a) Whenever notice to qualified beneficiaries of a trust is required under this article, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this article if the charitable organization, on the date the charitable organization's qualification is being determined:

(A) is a distributee or permissible distributee of trust income or principal;

(B) would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(c) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 62-7-408 or 62-7-409 has the rights of a qualified beneficiary under this article.

REPORTER'S COMMENT

Former South Carolina law had no statutory counterpart.

Under the SCTC, certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 62-7-103(12). Among these notices are notice of a transfer of the trust's principal place of administration (UTC Section 108(d) and SCTC Section 62-7-108(e)), notice of a trust division or combination (Section 62-7-417), notice of a trustee resignation (Section 62-7-705(a)(1)), and notice of a trustee's annual report (Section 62-7-813(c)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. *See, e.g.*, Section 62-7-704 (filling vacancy in trusteeship). Subsection (a) addresses only notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a

charitable trust, this includes the state's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust. Under subsection (b), charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote interests. For further discussion of the definition of "qualified beneficiary," see Section 62-7-103 comment.

Subsection (c) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 62-7-408 and 62-7-409.

Section 62-7-110 does not include a counterpart to UTC subsection 110(d), in the 2004 UTC Amendments, which gives the state Attorney General the rights of a qualified beneficiary in certain cases. See, however, SCTC Section 62-7-405, which provides certain rights and powers to the South Carolina Attorney General.

Subsection (d) does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

Section 62-7-111. (a) For purposes of this section, 'interested persons' means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to only the following trust matters:

- (1) the approval of a trustee's report or accounting;
- (2) direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power;
- (3) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (4) transfer of a trust's principal place of administration; and
- (5) liability of a trustee for an action relating to the trust.

(c) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Part 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

REPORTER'S COMMENT

While the SCTC recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 62-7-201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors; incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the SCTC more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Part 3.

The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 62-7-705 solely by giving notice to the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding

settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

Section 62-7-112. The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

REPORTER'S COMMENT

This section is patterned after Restatement (Third) of Trusts Section 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of Trusts Section 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoids illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See*

Restatement (Third) of Property: Donative Transfers Section 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to “heirs” or “issue.” Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator’s lifetime.

The most direct counterpart in the law of wills is South Carolina Probate Code Section 62-2-601 (Rules of Construction and Presumption). That section provides that the testator’s intent controls the legal effect of his dispositions, and it refers to succeeding sections, which contain some, but not all, rules of construction with respect to wills. Other will construction rules are left to the common law in South Carolina. As to construction of wills, see S. Alan Medlin, *The Law of Wills and Trusts, Volume 1, Estate Planning in South Carolina* (2002) at Section 330 et seq. South Carolina Trust Code Section 62-7-112 is in part analogous to SCPC Sections 62-1-102 and 62-1-103. SCPC Section 62-1-102, entitled “Purposes; Rule of Construction,” provides for a liberal interpretation of the SCPC in furtherance of the policies set forth in that section. SCPC Section 62-1-103 provides that the provisions of the SCPC supplement existing principles of law and equity.

Part 2

Judicial Proceedings

GENERAL COMMENT

This article addresses selected issues involving jurisdiction and venue. This article is not intended to provide comprehensive coverage of procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State’s rules of civil procedure or as provided by court rule.

Section 62-7-201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust's principal place of administration. Section 62-7-202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust.

There is significant overlap between Part 2 of the SCTC covering judicial proceedings and former Part II under Article 7 of the South Carolina Probate Code. To promote consistency and familiarity with existing South Carolina law and practice, the relevant South Carolina Probate Code language has been maintained whenever possible under this part of the South Carolina Trust Code. Additionally, several separate statutes formerly under the South Carolina Probate Code regarding court jurisdiction of trusts have been consolidated into a single section herein.

Section 62-7-201. (a) Subject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. These proceedings must be formal as defined by Section 62-1-201(17) but consent petitions are not subject to the requirements of formal proceedings. Proceedings that may be maintained pursuant to this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

(1) ascertain beneficiaries, determine a question arising in the administration or distribution of a trust including questions of construction of trust instruments, instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(2) review and settle interim or final accounts;

(3) review the propriety of employment of a person by a trustee including an attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of a person so employed, and the reasonableness of the compensation determined by the trustee for his own services. A person who has received excessive compensation from a trust may be ordered to make appropriate refunds. The provisions of this section do not apply to the extent there is a contract providing for the compensation to be paid for the trustee's services or if the trust directs otherwise; and

(4) appoint or remove a trustee.

(b) A proceeding under this section does not result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval, or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law or by the terms of the trust.

(c) The probate court has concurrent jurisdiction with the circuit courts of this State of actions and proceedings concerning the external affairs of trusts. These include, but are not limited to, the following proceedings:

- (1) determine the existence or nonexistence of trusts created other than by will;
- (2) actions by or against creditors or debtors of trusts; and
- (3) other actions and proceedings involving trustees and third parties.

(d) The probate court has concurrent jurisdiction with the circuit courts of this State over attorney's fees. Attorney's fees may be set at a fixed or hourly rate or by contingency fee.

(e) The court will not, over the objection of a party, entertain proceedings under this section involving a trust registered or having its principal place of administration in another state, unless:

- (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration; or
- (2) when the interests of justice otherwise would seriously be impaired.

The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.

REPORTER'S COMMENT

Section 62-7-201(a) grants exclusive subject matter jurisdiction to the probate court of interested parties' proceedings concerning the internal affairs of trusts. The subsection provides two illustrative and nonexclusive lists of such proceedings. The lists have this in common: all items on both lists are matters of dispute primarily between and

among the trustees and the beneficiaries of trusts, i.e., matters internal to trust administration, and are not matters immediately involving third parties, such as creditors and debtors of trusts. Compare the actions and proceedings concerning the external affairs of trusts, which are the subject matter of Section 62-7-204. See also the specific coverage of proceedings concerning a trustee's compensation, Section 62-7-205, and for this State's Uniform Declaratory Judgments Act, see Section 15-53-10 of the 1976 Code et seq., especially Section 15-53-50.

Section 62-7-201(b) makes it clear that no single proceeding in the probate court concerning the internal affairs of a trust will have the effect of subjecting the administration of the trust to later continuous supervision by the probate court.

SCTC subsections 62-7-201(a) and (b) incorporate former South Carolina Probate Code Section 62-7-201 regarding the Probate Court's exclusive jurisdiction over the internal affairs of trusts. Subsection (a)(3) has been taken from former South Carolina Probate Code Section 62-7-205. Such exclusive jurisdiction is subject to Section 62-1-302(d) of the South Carolina Probate Code regarding a party's right to remove a proceeding to the circuit court.

Subsections (c) and (d) are taken from former South Carolina Probate Code Section 62-7-204(A).

Subsection (e) is taken from former South Carolina Probate Code Section 62-7-203.

Subsection (e) refers to a trust's "principal place of administration" which is addressed under South Carolina Trust Code Section 62-7-108.

Whereas the Uniform Trust Code encourages resolution of disputes without resort to courts through options such as nonjudicial settlements authorized by Section 111, the South Carolina Trust Code limits nonjudicial settlements to specified matters set forth in Section 62-7-111, thereby generally maintaining the practice requiring court involvement for resolution of trust disputes.

Subsection (a) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* Restatement (Second) of Trusts Section 187, 259 (1959). This section does not limit the court's equity jurisdiction.

Section 62-7-202. (a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving

the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

REPORTER'S COMMENT

There was no corresponding statute under the South Carolina Probate Code prior to the enactment of the SCTC.

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. A trust's "principal place of administration" is addressed in SCTC Section 62-7-108. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code Section 7-103, upon which portions of this section are based, is instructive:

It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.

The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust.

Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 556-573 (4th ed. 1989).

Section 62-7-203. RESERVED.

Section 62-7-204. (a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the county of this State in which the trust's principal place of administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county in which any trust property is located or the county where the last trustee had its principal place of administration, and if the trust is created by will, in the county in which the decedent's estate was or is being administered.

(c) If proceedings concerning the same trust could be maintained in more than one place in South Carolina, the court in which the proceeding is first commenced has the exclusive right to proceed.

(d) If proceedings concerning the same trust are commenced in more than one court of South Carolina, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and, if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(e) If a court transfers venue of a proceeding concerning a trust to a court in another county, venue for that proceeding, and any subsequent matters concerning that proceeding, including appeals, shall be retained by the county to which the venue has been transferred.

(f) If a probate court judge is disqualified from matters concerning a trust proceeding, and venue has not been transferred to another county, a special probate court judge appointed for that proceeding has all of the powers and duties appertaining to the probate court judge of the county where the proceeding commenced, and venue for any

subsequent matters concerning that proceeding, including appeals, remains with the county where that proceeding or file commenced.

REPORTER'S COMMENT

South Carolina Trust Code subsections 62-7-204 (a) and (b) are taken from former South Carolina Probate Code Section 62-7-202 and incorporate provisions of UTC Section 204. SCTC subsections (c), (d), and (e) are taken from former South Carolina Probate Code Section 62-1-303 and do not incorporate UTC provisions. A trust's "principal place of administration" is addressed in SCTC Section 62-7-108. SCTC Section 62-7-204 differs significantly from UTC Section 204.

The 2013 amendment clarified that, when venue of a trust proceeding is transferred to another county, subsequent matters concerning that proceeding, including appeals, shall be retained by the county to which venue has been transferred. If a special probate judge is appointed because a probate judge is disqualified and recused from hearing a trust proceeding, venue remains with the county where the proceeding or file commenced, unless a probate court otherwise transfers venue.

Part 3

Representation

GENERAL COMMENT

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation.

There is significant overlap between Part 3 of the South Carolina Trust Code covering judicial proceedings and South Carolina Probate Code provisions concerning representation of others. To promote consistency and familiarity with existing South Carolina law and practice, the relevant South Carolina Probate Code language has been maintained whenever possible under this part of the South Carolina Trust Code.

Section 62-7-301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 62-7-302 through 305 cover the different types of representation. Section 62-7-302 deals with representation by the holder of a general testamentary power of appointment. Section 62-7-303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn issue. Section 62-7-304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 62-7-305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. Settlor's are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Section 62-7-301. (a) For purposes of this part, 'beneficiary representative' refers to a person who may represent and bind another person concerning the affairs of trusts.

(b) Notice to a beneficiary representative has the same effect as if notice were given directly to the represented person. Notice of a hearing on any petition in a judicial proceeding must be given pursuant to Section 62-7-109(d).

(c) The consent of a beneficiary representative is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(d) Except as otherwise provided in Sections 62-7-411 and 62-7-602, a person who under this part may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(e) In judicial proceedings, orders binding a beneficiary representative under this part bind the person(s) represented by that beneficiary representative.

REPORTER'S COMMENT

This section applies to both judicial and nonjudicial matters involving trusts. Nonjudicial matters may include, for example, the transfer of a trust's principal place of business, a proposed trust combination or division, a trustee's resignation, appointment of a successor trustee by

consent, a trustee's resignation, and the consent to, release of, or affirmance of a trustee's actions. See SCTC Section 62-7-111.

Subsection (a) defines the terms "beneficiary representative" for purposes of this part in an effort to avoid confusion between the SCTC term "representative" and the familiar term "personal representative" under the South Carolina Probate Code.

Subsection (b) of South Carolina Trust Code Section 62-7-301 confirms that notice of a hearing on a petition in a judicial proceeding must be given in the manner prescribed under SCTC Section 62-7-109(d). However, this section does not expressly address the manner of commencing a judicial proceeding.

Subsection (c) deals with the effect of a consent, whether by actual or virtual representation. Subsection (c) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 62-7-411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 62-7-704(c)(2)), and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 62-7-1009). A consent by a beneficiary representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries.

Subsection (d) addressing a person who may represent an incapacitated settlor specifically references the possibility of additional requirements imposed under Section 62-7-411 regarding modification or termination of noncharitable irrevocable trusts by consent and Section 62-7-602 addressing revocation or amendment of revocable trusts.

Subsection (e) confirms that orders in a judicial proceeding binding a beneficiary representative bind the person(s) represented by that beneficiary representative.

Section 62-7-302. To the extent there is no conflict of interest between the holder of a presently exercisable general power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. The term "presently exercisable general power of

appointment” includes a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder’s last Will and Testament, and the inclusion of a provision in the Will sufficient to exercise this power.

REPORTER’S COMMENT

This section tracks the language of current South Carolina Probate Code Section 62-1-108 which defines the term “presently exercisable general power of appointment.” This section does not extend the substitute representation under this section to limited or nongeneral powers of appointment (which are also not covered under South Carolina Probate Code Section 62-1-108).

It specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. Section 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder’s income interests to the detriment of the appointees or takers in default, whomever they may be.

Section 62-7-303. (a) To the extent there is no conflict of interest between the following beneficiary representatives and the person represented or among those being represented with respect to a particular question or dispute:

(1) a conservator may represent and bind the estate that the conservator controls to the extent of the powers and authority conferred upon conservators generally or by court order;

(2) a guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed to the extent of the powers and authority conferred upon guardians generally or by court order;

(3) an agent may represent and bind the principal to the extent the agent has authority to act with respect to the particular question or dispute;

(4) a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate with respect to questions or disputes involving the decedent's estate; and

(6) a person may represent and bind the person's minor or unborn issue if a conservator or guardian for the issue has not been appointed.

(b) The order in which the beneficiary representatives are listed above sets forth the priority each such beneficiary representative has relative to the others. In any judicial proceeding or upon petition to the court, the court for good cause may appoint a beneficiary representative having lower priority or a person having no priority.

REPORTER'S COMMENT

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives). Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

South Carolina Probate Code Section 62-1-403 is the counterpart to South Carolina Trust Code Section 62-7-303. The SCTC, however, adds representation by an agent on behalf of the principal under Subsection (a)(3).

The authority of a conservator or guardian under this section is subject to the authority conferred upon conservators and guardians generally under provisions of the South Carolina Probate Code or by court order, it not being the intent herein to enlarge a conservator's or guardian's powers otherwise.

Subsection (a)(2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. Under the South Carolina Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 62-7-103.

Subsection (a)(3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 62-7-411 and 62-7-602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise,

depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

Subsection (b) prioritizes the right to act as substitute representative where more than one such representation may apply.

Section 62-7-304. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the beneficiary representative and the person represented and provided the interest of the person represented is adequately represented by the beneficiary representative.

REPORTER'S COMMENT

This section authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. This section does not apply to the extent there is a conflict of interest between the beneficiary representative and the person represented by the beneficiary representative, consistent with current South Carolina Probate Code Section 62-1-403(2)(iii).

Typically, the interests of the beneficiary representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the beneficiary representative and person represented are identical, representation is not allowed in the event of conflict of interest. The beneficiary representative may have interests outside of the trust that

are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries.

South Carolina Probate Code Section 62-1-403(2)(iii) is the current counterpart to this Section 62-7-304. However, the South Carolina Trust Code adds an incapacitated person to the list of those who may be represented by another person under this section.

Section 62-7-305. At any point in a judicial proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

REPORTER'S COMMENT

Whereas the Uniform Trust Code encourages nonjudicial settlements and authorizes court appointment of a representative to act like a guardian ad litem but without ongoing court involvement, South Carolina expressly limits the scope of nonjudicial settlements to those matters specified in Section 62-7-111 and follows current practice for the appointment of guardians ad litem and ongoing court involvement pursuant to South Carolina Probate Code Section 62-1-403(4).

Part 4

Creation, Validity, Modification, and Termination of Trusts

Section 62-7-401. (a)(1) A trust described in Section 62-7-102 may be created by:

(i) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(ii) written declaration signed by the owner of property that the owner holds identifiable property as trustee; or

(iii) exercise of a power of appointment in favor of a trustee.

(2) To be valid, a trust of real property, created by transfer in trust or by declaration of trust, must be proved by some writing signed by the party creating the trust. A transfer in trust of personal property

does not require written evidence, but must be proven by clear and convincing evidence, pursuant to Section 62-7-407.

(b) A trust that arises by act or operation of law does not require the existence of a writing.

(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 settlor retains substantial control over the trust including, but not limited to, (i) a right of revocation, (ii) substantial beneficial interests in the trust, or (iii) the power to control investments or reinvestments. 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 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 pursuant to Article 2, Title 62 does not render that revocable inter vivos trust invalid, but 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 the trust assets are available for satisfaction of the elective share only to any remaining extent necessary pursuant to Section 62-2-207.

REPORTER'S COMMENT

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 62-7-103(11) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract

after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Unif Testamentary Additions to Trusts Act Section 1 (1991), codified at Uniform Probate Code Section 2-511 and SCPC Section 62-2-510 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).

Section 62-7-401(a) provides different methods to create a trust, creating a distinction between third-party-trusted trusts in subsection (a)(1)(i) and self-trusted trusts in subsection (a)(1)(ii). Subsection (a)(1)(i) provides that, if a third party is to serve as trustee, transfer of property to that other person, whether during life or at death, is sufficient to create a trust; no writing is required.

Subsection (a)(1)(ii) requires that, if the settlor is also to be the trustee, then some written declaration signed by the settlor is required to create the trust. Such a declaration need not be a trust agreement, but can be some written evidence signed by the settlor sufficient to establish that the settlor intended to hold the property in trust.

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 35-36 (1959).

The methods set out in Section 62-7-401 are not the exclusive methods to create a trust as recognized by Section 62-7-102. A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

Pre-SCTC South Carolina law made a distinction between trusts for personal property and trusts in land. Trusts in personal property could be proved, as well as created, by parol declarations. See *Harris v. Bratton*, 34 S.C. 259, 13 S.E. 447 (1891). On the other hand, for a trust

of any “land, tenements, or hereditaments” to be valid, former South Carolina Probate Code Section 62-7-101 mandated that the trust be proved by a writing signed by the party creating the trust. An exception to the requirement of a writing to establish a trust in land was found in former SCPC Section 62-7-103 for trusts arising by operation of law, such as resulting and constructive trusts. Because the SCTC applies only to express trusts and not to trusts implied in law (Section 62-7-102), Sections 62-7-401(a)(1)(i) and (1)(ii) codify existing law that trusts of real property must be established by a writing, transfers in trust of personal property do not have the same requirement, and trusts containing real property that arise by operation of law do not require evidence of writing to be valid.

Former SCPC Section 62-7-112 has been retained as SCTC Section 62-7-401(c). Former SCPC Section 62-7-112 was enacted after the *Siefert* decision, *Seifert v. Southern Nat'l Bank of South Carolina*, 305 S.C. 353, 409 S.E. 2d 337 (1991), to clarify that the settlor’s retention of substantial control over a trust, such as a right to revoke, does not render that trust invalid.

While a trust created by will may come into existence immediately at the testator’s death and not necessarily only upon the later transfer of title from the personal representative, Section 62-7-701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph ((a)(1)(iii))), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Section 62-7-302 (representation by holder of general testamentary power of appointment). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

Section 62-7-402. (a) A trust is created only if:

- (1) the settlor has capacity to create a trust;
- (2) the settlor indicates an intention to create the trust;
- (3) the trust has a definite beneficiary or is:
 - (A) a charitable trust;
 - (B) a trust for the care of an animal, as provided in Section 62-7-408; or
 - (C) a trust for a noncharitable purpose, as provided in Section 62-7-409;
- (4) the trustee has duties to perform; and
- (5) the same person is not the sole trustee and sole current and future beneficiary.

(b) If the trust agreement is in writing, the trust instrument may be signed by the settlor or in the settlor's name by some other person in the settlor's presence and by the settlor's direction.

(c) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(d) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(e) For purposes of Section 62-7-402(a)(5), if a person holds legal title to property in a fiduciary capacity and also has an equitable or beneficial title in the same property, either by transfer, by declaration, or by operation of law, no merger of the legal and equitable titles shall occur unless:

- (1) the fiduciary is the sole fiduciary and is also the sole current and future beneficiary; and
- (2) the legal title and the equitable title are of the same quality and duration.

If either one of these conditions is not met, no merger may occur and the fiduciary relationship does not terminate.

REPORTER'S COMMENT

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 62-7-103(17) ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 62-7-601 (capacity of settlor to create revocable trust), and see generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (c) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. See Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiaries' enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the Statute of Uses. See Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The SCTC modifies the UTC by adding the phrase "current and future" to UTC subsection (a)(5). The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests,

both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

Subsection (d) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. See Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts Section 122 (1959); Restatement (Second) of Property: Donative Transfers Section 12.1 cmt. a (1986).

No similar statutory provisions existed under South Carolina law prior to the enactment of the SCTC, except that former SCPC Section 62-7-603(A)(3) specified the requirements for merger of equitable and legal title. Former Section 62-7-603(A)(3) has been retained as subsection (e).

South Carolina case law provides that, for a trust to exist, certain elements must be present, including a declaration creating the trust, a trust res, and designated beneficiaries. See *Whetstone v. Whetstone*, 309 S.C. 227, 231-32, 420 S.E.2d 877, 879 (Ct. App. 1992). The declaration of trust has to be in writing when the trust property includes realty. See *Id.* If the declaration of trust is in writing, the SCTC allows the grantor to sign the trust agreement, but also allows, under Section 62-7-402 (b), the grantor to direct a third party to sign on the grantor's behalf and in the grantor's presence.

The Supreme Court has found that, with respect to the spousal elective share, a revocable inter vivos trust that conferred only custodial powers on the trustee, and that expressly barred the trustee from exercising any powers of sale, investment, or reinvestment during the settlor's lifetime without the settlor's consent, was illusory and invalid. See *Seifert v. Southern Nat. Bank of South Carolina*, 409 S.E.2d 337, 305 S.C. 353 (1991). Former SCPC Section 62-7-112 was subsequently enacted and is retained at SCTC Section 62-7-401(c).

Section 62-7-403. A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

REPORTER'S COMMENT

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* 600 (4th ed. 1987).

Former South Carolina Probate Code Section 62-7-106 recognized religious, educational, or charitable trusts validly created in the Settlor's state of domicile where a beneficiary or object of the trust resided or was located in South Carolina. The remainder of this SCTC section appears to have no prior South Carolina statutory equivalent.

Section 62-7-403 is comparable to South Carolina Probate Code Section 62-2-505 recognizing the validity of wills executed in compliance with the law of a variety of places where the testator had a significant contact, but expands the possible jurisdictions beyond those allowed for a valid will.

Section 62-7-403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 62-7-403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of

creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

The section does not supersede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

Section 62-7-404. A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

REPORTER'S COMMENT

For an explication of the requirement that a trust must not have a purpose that is unlawful, see Restatement (Third) of Trusts Sections 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 59-65 (1959). A trust with a purpose that is unlawful is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose, which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts Section 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 60 cmt. a (1959). The 2013 amendment included the words "not contrary to public policy" because existing common law invalidates trusts that violate public policy.

Pursuant to Section 62-7-402(a), a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 62-7-408 and 62-7-409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts Section 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose

and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious.

See Restatement (Third) of Trusts Section 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 62-7-412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts Section 28 cmt. e (Tentative Draft No. 2, approved 1999).

There was no South Carolina statutory provision that correlated with SCTC Section 62-7-404. South Carolina case law has been consistent with Section 62-7-404 in refusing to impose an express trust, resulting trust, or constructive trust on property in favor of a transferor attempting to impose a trust on property he transferred to the transferee, when the facts indicate no written agreement between them existed, the transferor had a fraudulent purpose for the transfers, and the transferee committed no fraud or deceit. See *Settlemyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514 (S.C. Ct. App. 2004); *All v. Prillaman*, 200 S.C. 279, 20 S.E.2d 741 (S.C. 1942). "The law will not permit a party to deliberately put his property out of his control for a fraudulent purpose, and then, through intervention of a court of equity, regain the same after his fraudulent purpose has been accomplished" *All v. Prillaman*, 200 S.C. 279, 308, 20 S.E.2d 741, 753, quoting *Jolly v. Graham*, 78 N.E. 919, 920 (Ill. 1906). See also *Colin McK. Grant Home V. Medlock*, 292 S.C. 466, 349 S.E.2d 655 (Ct. App. 1987), involving a charitable trust, in which the equitable doctrine of equitable deviation was used to eliminate the racial restrictions from a charitable trust's requirements. See also *Buck v. Toler*, 146 S.C. 294, 141 S.E. 1 (1928), in which a testamentary trust that violated the rule against perpetuities and that was determined to have been created by the testatrix merely to tie up the property was found to be void.

Section 62-7-405. (a) A charitable trust may be created for the relief of distress or poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental or municipal purposes, or other purposes, the achievement of which purposes is beneficial to the community.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust.

(d) Unless otherwise required by statute or by rule or regulation of the Attorney General, the trustees of charitable trusts shall not be required to file with the Attorney General any copies of trusts instruments or reports concerning the activities of charitable trusts.

(e) The Attorney General may make such rules and regulations relating to the information to be contained with the filing of a trust as may be required.

(f) All trustees of any trust governed by the laws of this State whose governing instrument does not expressly provide that this section shall not apply to such trust are required to act or to refrain from acting so as not to subject the trust to the taxes imposed by Sections 4941, 4942, 4943, 4944, or 4945 of the Internal Revenue Code, or corresponding provisions of any subsequent United States internal revenue law.

(g) Nothing contained in Sections 33-31-150 and 33-31-151 may be construed to cause a forfeiture or reversion of any of the property of a trust which is subject to such Sections, or to make the purposes of the trust impossible of accomplishment.

REPORTER'S COMMENT

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts Section 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

South Carolina Trust Code Section 62-7-405 adds "distress" to the Uniform Trust Code version, to cover disasters or sudden catastrophes in addition to "poverty." The SCTC also adds "scientific, literary and benevolent" to the UTC version. Practically, the specified charitable purposes will be identical to Internal Revenue Code Section 501 (c)(3).

Charitable trusts are subject to the restriction in Section 62-7-404 that a trust purpose must be legal. This would include trusts that

involve invidious discrimination. See Restatement (Third) of Trusts Section 28 cmt. f (Tentative Draft No. 3, approved 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts Section 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 62-7-413(a), a trust with a particular charitable purpose which is impracticable or impossible to achieve does not necessarily fail. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts Section 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts Section 397 cmt. d (1959). Pursuant to Section 62-7-110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Section 62-7-405(b) must be read in conjunction with SCTC Sections 62-7-404 and 62-7-413. SCTC Section 62-7-413 incorporates the doctrine of equitable deviation from South Carolina common law. See the South Carolina Comment to SCTC Section 62-7-413.

SCTC Section 62-7-405(c) adds "the trustee and the Attorney General" to those who may maintain a proceeding to enforce the trust under the UTC version.

Former South Carolina Probate Code Sections 62-7-501 through 62-7-507, Part 5 of Article 7 of Title 62, covered charitable trusts. These sections are revised and incorporated in SCTC Section 62-7-405.

SCPC Section 62-7-501 required individual trustees of certain charitable trusts to file a copy of the trust with the Attorney General. Section 62-7-405(d) makes this initial filing applicable to all charitable trusts, subject to certain exceptions.

SCPC Section 62-7-502 required that certain charitable trusts file annual reports with the attorney general.

SCPC Section 62-7-505 exempted many charitable trusts from the filing requirements of Part Five:

“... trusts or trustees of the following: Churches, cemeteries, orphanages operated in conjunction with churches, hospitals, colleges, or universities, or school districts, nor shall it apply to banking institutions which act as trustees under the supervision of the State Board of Financial Institutions or under the supervision of federal banking agencies.”

SCPC Sections 62-7-502 and 62-7-505 are repealed. The exemption is anachronistic. SCTC Section 62-7-405(d) requires that every charitable trust make an initial filing at inception with the Attorney General, subject to certain exceptions.

SCPC Section 62-7-504 is retained at Section 62-7-405(e), empowering the Attorney General to issue regulations to require further reporting from charitable trusts.

SCPC Section 62-7-506 incorporated the prohibited transaction provisions applicable to private foundations and charitable trusts into every trust and is retained in SCTC Section 62-7-405(f). (Existing Section 33-31-150 applies the restrictions to not-for-profit South Carolina corporations.)

SCPC Section 62-7-507 made clear that incurring an excise tax for violation of the prohibited transaction provisions will not result in trust termination, and is retained in Section 62-7-405(g).

South Carolina expressly rejects the portion of the UTC Comment which makes “public policy” or “invidious discrimination” a basis to find that a trust violates Section 62-7-404.

South Carolina common law does not allow enforcement of a trust for an unlawful purpose. South Carolina’s existing case law is sufficient to prohibit discrimination in a charitable trust.

Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trust, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).

Section 62-7-406. A trust is voidable to the extent its creation was induced by fraud, duress, or undue influence.

REPORTER'S COMMENT

This section is a specific application of Restatement (Third) of Trusts Section 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 62-7-415. See also Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

The South Carolina version of this section changes the word "void" to "voidable" to eliminate any suggestion that a trust might be void *ab initio* or that the trustee's actions might be invalid even though taken in good faith and before any determination that the trust is void.

Third parties dealing with the trustee of a voidable trust will be protected by South Carolina Trust Code Section 62-7-1012.

This section is similar to present South Carolina law regarding the validity of wills.

Section 62-7-407. Except as otherwise required by statute, a trust need not be evidenced by a trust instrument. The creation of an oral trust and its terms may be established only by clear and convincing evidence.

REPORTER'S COMMENT

While it is always advisable for a settlor to reduce a trust to writing, the SCTC follows established law in recognizing oral trusts. Such trusts are viewed with caution, however.

This section is in accordance with existing South Carolina law requiring oral trusts to be proved by clear and convincing evidence. However, South Carolina statutory law has consistently required that the declaration or creation of trusts in lands, tenements or hereditaments be manifested and proved by some writing such as a trust agreement or last will. Absent such a writing, the trust would be void, per former South Carolina Probate Code Section 62-7-101 et seq. Historically, a distinction has been made between the creation of the trust and the conveyance of real property thereto, but the writing must manifest a previous trust. This section no longer distinguishes between

trusts funded with real estate from those funded with personalty. Both must be established by clear and convincing evidence. See *Beckham v. Short*, 380 S.E. 2d 826 (S.C. 1989).

Absent some specific statutory provision, such as a Statute of Frauds provision requiring that transfers of real property be proved by writing, a trust need not be evidenced by a writing.

For the Statute of Frauds generally, see Restatement (Second) of Trusts Sections 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts Section 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts Section 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts Section 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 43-45 (1959).

South Carolina Trust Code Section 62-7-401(a)(2) requires a writing to create a declaration of trust (a self-trusted trust).

Section 62-7-408. (a) A trust may be created to provide for the care of an animal or animals alive or in gestation during the settlor's lifetime, whether or not alive at the time the trust is created. The trust terminates upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person concerned for the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

REPORTER'S COMMENT

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third)

of Trusts Section 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 62-7-409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

South Carolina Trust Code Section 62-7-408 differs in several minor ways from the uniform version. Two provisions found in the UTC Comment have been added to the body of Section 62-7-408(a): (1) that the trust can benefit animals alive during the settlor's lifetime, regardless of whether they are alive at the time the trust is created, and (2) that animals in gestation at the settlor's death can be included in the trust. Surplus language in the UTC has also been omitted from the SCTC version.

Subsection (b) addresses enforcement. SCTC Section 62-7-408(b) modifies the UTC version, attempting to clarify that a person need be concerned only for an animal's welfare to petition the court. That person does not have to have a legally cognizable interest in the animal. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person deemed to have a special interest. See Restatement (Second) of Trusts Section 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations.

Sections 62-7-408 and 62-7-409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 62-7-110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited

an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. See Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control: See Section 62-7-105(a). While a trust for an animal is usually not created until the settlor's death; subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 62-7-414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. See Section 62-7-414(c).

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

A trust created under this section would not be recognized under former South Carolina law. Thus, this section creates a new concept for South Carolina.

Section 62-7-409. Except as otherwise provided in this section or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than the period allowed under any rule against perpetuities applicable under South Carolina law, except for the care

and maintenance of a cemetery or cemetery plots, graves, mausoleums, columbaria, grave markers, or monuments.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

REPORTER'S COMMENT

South Carolina Trust Code Section 62-7-409 had no exact statutory counterpart under prior South Carolina law, although this Section continues South Carolina's allowance of trusts for the perpetual care of cemetery plots as set forth in S. C. Code Section 27-5-70.

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 62-7-408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to the maximum allowed under any applicable state rule against perpetuities.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The rule against perpetuities limitation does not apply to cemeteries, cemetery plots, grave sites, mausoleums, columbaria, grave markers, or monuments.

Perpetual care cemeteries are addressed in Title 40, Chapter 8, Sections 40-8-110 et. seq.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 62-7-404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 62 cmt. W and Section 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 124.7 (4th ed. 1987).

This section is similar to Section 62-7-408, although less detailed. Much of the Comment to Section 62-7-408 also applies to this section.

Section 62-7-410. (a) In addition to the methods of termination prescribed by Sections 62-7-411 through 62-7-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms.

(b) A proceeding to approve or disapprove a proposed modification or termination under Sections 62-7-411 through 62-7-416, or trust combination or division under Section 62-7-417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under Section 62-7-411 may be commenced by the settlor. The settlor of a charitable trust as well as the Attorney General, among others, may maintain a proceeding to modify the trust under Section 62-7-413.

REPORTER'S COMMENT

South Carolina Trust Code Section 62-7-410 provides for the modification or termination of trusts and refers to the more specific provisions of Sections 62-7-411 through 62-7-417. This SCTC Section does not adopt the provisions of Uniform Trust Code Section 62-7-410, calling for termination of the trust when "no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve." These may be grounds to terminate a trust under the SCTC, but only upon appropriate notice to interested parties and an opportunity for a hearing. A declaratory judgment may be sought to determine if the trust has terminated.

Section 62-7-411. (a) A noncharitable irrevocable trust may be modified or terminated with court approval upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservator if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as ordered by the court.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

REPORTER'S COMMENT

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor, but with court approval. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 62-7-412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 62-7-414 (termination or modification of uneconomic noncharitable trust), and 62-7-416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 62-7-602 applies. South Carolina Trust Code Section 62-7-411(a) adds the phrase "with court approval" to the first sentence of the Uniform Trust Code version and the phrase "modification or" to the second sentence of the UTC version. The SCTC omits UTC subsection 411(c), which provided that a spendthrift provision would not be presumed to constitute a material purpose of the trust. SCTC Section 62-7-411(c) substitutes the phrase "as ordered by the court" to the UTC version of subsection (d) for the phrase "as agreed by the beneficiaries."

Subsection (a) provides the requirements for termination or modification by the beneficiaries with the concurrence of the settlor. Subsection (b) provides the requirements for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust modification and termination in subsections (a)-(b) carries forward the *Clafin* rule, first stated in the famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). Subsection (c) directs how the trust property is to be distributed

following a termination under either subsection (a) or (b). Subsection (d) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 62-7-410, the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. See Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Part 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. See Section 62-7-301(c). Regarding the persons who may consent on behalf of a beneficiary, see Sections 62-7-302 through 62-7-305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. If virtual or other form of representation is unavailable, Section 62-7-305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. Compare Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 62-7-602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such

authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. See, e.g., Unif Probate Code Section 5-411(a)(4). Because the SCTC uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (see Section 62-7-103(4)), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 62-7-706 is the exclusive provision on removal of trustees. Section 62-7-706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is

available. Compare Section 62-7-706(b)(4), with Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

Subsection (c) recognizes that, once termination has been approved, how the trust property is to be distributed is solely for the court to decide.

No similar statutory provisions existed under prior South Carolina law.

Under South Carolina case law, a court has the power to alter or modify an irrevocable trust to effectuate the intent of the settlor, but it is the duty of the courts to preserve, not destroy, trusts. See *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (S.C. 1978). When a settlor sought modification of an irrevocable trust without the consent of the beneficiaries, the court would modify the trust to effectuate the settlor's intent only when some exigency or emergency made the modification indispensable to the preservation of the trust. See *Chiles*.

Under existing South Carolina case law, a spendthrift trust cannot be terminated by agreement of all beneficiaries when the purpose of the trust is to provide an income stream for life or until the trust fund was exhausted, since to do so would defeat a material purpose of the trust. See *Germann v. New York Life Insurance Co*, 286 S.C. 34, 331 S.E.2d 385(S.C..App. 1985).

Section 62-7-412. (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent

practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property as ordered by the court.

REPORTER'S COMMENT

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. South Carolina Trust Code Section 62-7-412(a) conceptually broadens the traditional authority of the court to modify trust provisions because of unanticipated circumstances, especially with respect to dispositive provisions. Subsection (a) is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune provisions to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 62-7-415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying equitable deviation to a charitable trust. See Section 62-7-413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or non-charitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 62-7-404 that a trust and its terms must be for the benefit of its

beneficiaries. See also Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. See Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See Restatement (Third) of Trusts Section 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have adopted such a measure by statute. See, e.g., Mo. Rev. Stat. Section 456.590.1.

Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.

South Carolina Trust Code Section 62-7-412(c) modifies the uniform version to provide that, upon termination, trust property is to be distributed as ordered by the court.

Section 62-7-413. (a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (3) the court may deviate from the terms of the trust to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable intent.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to modify or terminate the trust only if, when the provision takes effect:

- (1) the trust property is to revert to the settlor and the settlor is still living; or
- (2) fewer than the number of years allowed under any rule against perpetuities applicable under South Carolina law, have elapsed since the date of the trust's creation.

REPORTER'S COMMENT

This section clarifies and codifies in part existing South Carolina law that recognizes "equitable deviation," which is the power of a court in certain situations to change the provisions of a charitable trust.

South Carolina has long recognized the doctrine of equitable deviation, which permits a court of equity to deviate from the strict terms of a trust when changed conditions render the accomplishment of the charitable purpose impossible or impracticable. Subsection (a) codifies the court's inherent authority to apply equitable deviation. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities.

When the Section 62-7-413 was enacted, the words "cy pres" in the Uniform Trust Code version were deleted and replaced with language referring to equitable deviation because South Carolina courts have refused to recognize the doctrine of cy pres. See e.g., *Mars v. Gilbert*, 93 S.C. 455, 77 S.E. 131 (S.C. 1913) (expressly rejecting the doctrine of equitable cy pres. but making clear that literal compliance with the terms of a will is not always required when the conditions have changed). See also *All Saints Parish, Waccamaw, a South Carolina non-profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish*, 358 S.C. 209, 595 S.E. 2d 253 (Ct. App 2004), *rev'd on other grounds*, 385 S. C. 428, 685 S.E. 2d 163 (2009).

Although Section 62-7-413 changes the references from cy pres in the UTC version to equitable deviation terminology, Section 62-7-413 is otherwise taken verbatim from the UTC (except for a slight modification in the manner of referring to the rule against perpetuities). Consequently, the substantive provisions of UTC section 413 are exactly the same as those in Section 62-7-413.

Section 62-7-414. (a) After notice to the qualified beneficiaries, and without court approval, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property as ordered by the court or, if the court does

not specify the manner of distribution, or if no court approval is required, in a manner consistent with the purposes of the trust.

(d) This section does not apply to an easement for conservation or preservation.

REPORTER'S COMMENT

Subsection (a) assumes that a trust with a value of \$100,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. Also, in subsection (c) a phrase added to the uniform version clarifies that the court may specify how the trust assets should be distributed - e.g., in cases when the court is involved in a termination under subsection (b).

Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 62-7-105.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. *See* Section 62-7-105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than \$100,000.

When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust. Termination under this Section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 62-7-816(21) authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

If the trustee or cotrustee is a beneficiary and would receive part or all of the trust assets upon termination of a trust under subsection (a), then the trustee's power to terminate is subject to the limitations in SCTC Section 62-7-814.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation

will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes Section 1.6 (2000).

While this Section is not directed principally at honorary trusts, it may be so applied. *See* Sections 62-7-408 and 62-7-409.

Because termination of a trust under this Section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

Subsection (a) had no counterpart in prior South Carolina law, though a trust document might contain similar provisions.

Section 62-7-415. The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

REPORTER'S COMMENT

There was no comparable South Carolina statutory provision authorizing a court to reform an unambiguous trust to conform to the settlor's intent.

South Carolina Trust Code Section 62-7-415 would permit the introduction of parol evidence to show the settlor's intent and the existence of a mistake of fact or law, provided that the evidence is clear and convincing to protect against the possibility of unreliable or fraudulent evidence. This section permits consideration of evidence relevant to the settlor's intention even when contradicted by the plain meaning of the words in the instrument.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was

intended to be included, or include a term that was not intended to be excluded. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scribes' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). See also John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

The 2013 amendment better conforms the language of this section to the language of the Restatement (Third) of Property provision on which this section is based.

Section 62-7-416. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

REPORTER'S COMMENT

This section is copied from Restatement (Third) of Property: Donative Transfers Section 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 62-7-415. Reformation under Section 62-7-415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the equitable deviation doctrine for charitable trusts (see Section 62-7-413), and the deviation doctrine for unanticipated circumstances (see Section 62-7-412).

There was no South Carolina statutory provision that correlates with this Section. Former Section 62-7-211 of the South Carolina Probate Code provided for division or consolidation of trusts, provided that the consolidation or division was not inconsistent with the intent of the trustor, the action would facilitate trust administration, and the action would be in the best interests of all beneficiaries and not materially impair their interests. See South Carolina Trust Code Section 62-7-417.

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. See Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications possibly authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers Section 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

South Carolina case law indicates that the courts will not allow a beneficiary's interest to be negated if the beneficiary objects, regardless

of the tax benefit desired. See *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (S.C. 1978) (the Supreme Court reversed, with respect to the one appellant only, the lower court's extinguishment of certain noncharitable beneficiaries' interests to vest a charitable contribution deduction for federal estate tax purposes).

Section 62-7-417. After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

REPORTER'S COMMENT

This section expands former South Carolina Probate Code Section 62-7-211, which allowed the division or consolidation of trusts only with court approval when such action was not authorized by the trust instrument and is subject to contrary provision in the terms of the trust. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts Section 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 62-7-414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. See Section 62-7-805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. See Section 62-7-414.

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 62-7-410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent, or ratification of a transaction, or release of trustee from liability, see Section 62-7-1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 62-7-813, which requires that the trustee keep the qualified beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers Section 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. See, e.g., *In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct. 1990) (combination); *In re Heller Inter Vivos Trust*, 613

N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 62-7-816(22).

Section 62-7-418. (a) When any person shall be seized of any lands, tenements, rents, reversions, remainders, or other hereditaments to the use, confidence, or trust of any other person or of any body politic by reason of any bargain, sale, feoffment, covenant, contract, agreement, will, or otherwise, the person or body politic that shall have such use, confidence, or trust, in fee simple, fee tail, for term of life or for years or otherwise or any use, confidence, or trust in remainder or reversion, shall be deemed and adjudged in lawful seizing, estate and possession of and in such lands, tenements, rents, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in law of and in such like estates as they shall have in use, trust, or confidence of or in them.

(b) When several persons shall be jointly seized of any lands, tenements, rents, reversions, remainders, or other hereditaments to the use, confidence, or trust of any of them that be so jointly seized, such person or persons who shall have any such use, confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments shall have such estate, possession, and seizing of and in such lands, tenements, rents, reversions, remainders, and other hereditaments only to him or them that shall have any such use, confidence, or trust, in like nature, manner, form, condition, and course as he or they had before in the use, confidence, or trust of such lands, tenements, or hereditaments, saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than such person or persons who are seized of such lands, tenements, or hereditaments to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action as they or any of them had or might have had without this section and also saving to all and singular those persons and their heirs who are seized to any use all such former right, title, entry, interest, possession, rents, customs, services, and action as they or any of them might have had to his or their own proper use in or to any lands, tenements, rents, or hereditaments whereof they are seized to any other use, anything contained in this chapter to the contrary notwithstanding.

REPORTER'S COMMENT

There is no counterpart to this section in the Uniform Trust Code.

South Carolina Trust Code Subsections 62-7-418(a) and (b) retain and incorporate former South Carolina Probate Code Sections 62-7-107 and 62-7-108.

Part 5

Creditors' Claims; Spendthrift and Discretionary Trusts

GENERAL COMMENT

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 62-7-501 and 62-7-502 state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 62-7-503 lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 62-7-504 through 62-7-507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 62-7-504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 62-7-505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 62-7-506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 62-7-507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 62-7-105(b)(5).

This article does not supersede state exemption statutes nor any fraudulent transfer statutes, which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Section 62-7-501. (a) Except as provided in subsection (b), the court may authorize a creditor or assignee of the beneficiary to reach

the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary's interest:

(1) is protected by a spendthrift provision, or

(2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.

REPORTER'S COMMENT

Absent a valid spendthrift provision, a creditor may reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. Other creditor law of the State may limit the creditor to a specified percentage of a distribution. This section does not prescribe the procedures for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the State's law on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

A creditor typically will pursue a claim by serving an order on the trustee attaching the beneficiary's interest. Assuming that the validity of the order cannot be contested, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as discretionary distributions the trustee decides to make. The creditor may also, in theory, force a judicial sale of a beneficiary's interest.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

The case law in South Carolina was uncertain as to the effectiveness and application of the spendthrift provision but appears to indicate that a spendthrift provision operated against only income interests but not

principal interests. See S. Alan Medlin, *The Law of Wills and Trusts*, Vol. I. Estate Planning in South Carolina, Section 508.2(a), p. 5-19 (2002). Older cases seem to allow a cessor clause to prevent the voluntary or involuntary alienation of the beneficiary's interest. See S. Alan Medlin, *supra*. This Section avoids the confusion regarding the effectiveness and application of the spendthrift provision and also clarifies and broadens the laws in South Carolina so that a spendthrift provision operates as a restraint against both income and principal interests, except as otherwise provided in the following sections of the SCTC.

Section 62-7-501 provides additional protection not only for spendthrift interests, but also for interests in discretionary trusts as referred to in S. C. Code Section 62-7-504. Discretionary trusts do not have to rely on spendthrift language for a beneficiary's present or future interest in the trust to be exempt from creditor attachment.

For a definition of discretionary trust, resort should be made to the South Carolina common law. See generally *Heath v. Bishop*, 25 S. C. Eq. (4 Rich. Eq.) 446 (S.C. 1851); *Collins v. Collins*, 219 S.C. 1. 63 S.E. 2d 811 (S.C.1951); see also *Sarlin v. Sarlin*, 312 S. C. 27, 430 S. E. 2d 530 (S.C. App. 1993); *Page v. Page*, 243 S. C. 312, 133 S. E. 2d 829 (S.C. 1963).

Section 62-7-502. (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust', or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

REPORTER'S COMMENT

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This

section is similar to Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 152-153 (1959). For the definition of spendthrift provision, see Section 62-7-103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. See Restatement (Third) of Trusts Section 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts Section 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 U.S.C. Section 541(c)(2).

Subsection (b), which is derived from Texas Property Code Section 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Unif. Probate Code Section 2-801(a) and SCPC Section 62-2-801(c)(6). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts Section 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. See Restatement (Third) of Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 62-7-505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. See Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 152 cmt. i (1959).

For discussion of the treatment of spendthrift provisions in South Carolina, see Comment to SCTC Section 62-7-501.

Section 62-7-503. (a) In this section, ‘child’ includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) The exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust’s exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

REPORTER’S COMMENT

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction.

The exception in subsection (b) for judgments or orders to support a beneficiary’s child is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. South Carolina Trust Code Section 62-7-503(b), however, eliminates the exceptions contained in Uniform Trust Code Section 503 for a beneficiary’s spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance as well as a judgment creditor who has provided services for the protection of a beneficiary’s interest in a spendthrift trust. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b), unlike Section 62-7-504, does not authorize the child claimant to compel a distribution from the trust. Section 62-7-504

authorizes a child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b) refers both to “support” and “maintenance” in order to accommodate differences among the states in terminology employed. No difference in meaning between the two terms is intended.

The definition of “child” in subsection (a) accommodates the differing approaches states take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the state making the award chooses to define “child” will be recognized under this Code, whether the order sought to be enforced was entered in the same or different state.

South Carolina has eliminated the exceptions found in UTC Section 503 (b) and (c) certain judgment creditors and for a claim made by the State of South Carolina or the United States to the extent a state or federal law provides for any such claim. Thus, under the SCTC, the only exception to a spendthrift trust will be for a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance. South Carolina also adds a new subsection (c), not found in the UTC, which makes clear that the exception in subsection (b) for child support shall be unenforceable against a special or supplemental needs trusts under the circumstances described in subsection (c). Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. There is also no exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter’s Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 157-157.5 (4th ed. 1987).

Section 62-7-504. (a) In this section, ‘child’ includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Except as otherwise provided in subsection (c), a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) the court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution; provided, however, this right may not be exercised by a creditor of the beneficiary.

(e) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution from insurance proceeds payable to the trustee as beneficiary to the extent state law exempts such insurance proceeds from creditors' claims.

(f) A creditor of a beneficiary who is also a trustee or cotrustee may not reach the trustee's beneficial interest or otherwise compel a distribution if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

REPORTER'S COMMENT

South Carolina Trust Code Section 62-7-504 eliminates the exceptions allowed under Uniform Trust Code Section 504 for judgments or court orders in favor of a beneficiary's spouse or former spouse. As with SCTC Section 62-7-503, the only exception will be for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance. However, a child's claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused a discretion.

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar

to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999).

This section could have limited application. Pursuant to Section 62-7-502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 62-7-503, does this section become relevant.

For a discussion of the definition of "child" in subsection (a), see Section 62-7-503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 62-7-814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The SCTC does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

The South Carolina Trust Code adds to the UTC version the proviso at the end of subsection (d), which prevents a beneficiary's creditor from enforcing on behalf of the beneficiary the beneficiary's right, to the extent it exists, to maintain a judicial proceeding against a trustee

for an abuse of discretion or failure to comply with a standard of distribution.

South Carolina's version of subsection (e), not found in the UTC, ensures that even if there is no spendthrift provision, insurance proceeds remain exempt from creditors' claims pursuant to S. C. Code Section 38-63-40 et seq. and other relevant state laws.

Section 62-7-505. (a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, and except to the extent state or federal law exempts any property of the trust from claims, costs, expenses, or allowances, the property held in a revocable trust at the time of the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by Section 62-3-801 et seq.

(b) For purposes of this section:

(1) a beneficiary who is a trustee of a trust, but who is not the settlor of the trust, cannot be treated in the same manner as the settlor of a revocable trust if the beneficiary-trustee's power to make distributions to the beneficiary-trustee is limited by an ascertainable standard related to the beneficiary-trustee's health, education, maintenance, and support;

(2) the assets in a trust that are attributable to a contribution to an inter vivos marital deduction trust described in either Section 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of the spouse of the settlor of the inter vivos marital deduction trust are deemed to have been contributed by the settlor's spouse and not by the settlor.

REPORTER'S COMMENT

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. See Restatement (Third) of Trusts Section 25 cmt. a (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. See Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. See Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. See Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 *Real Prop. Prob. & Tr. J.* 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 *Del. J. Corp. L.* 423 (1998). The SCTC confirms this policy. Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 62-7-103(14).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, under SCTC 62-7-505(a)(3), only assets held in a revocable trust at the time of the settlor's death will be subject to

creditor's claims. Assets transferred to a revocable trust following the settlor's death will not become subject to creditor's claims as a result of the transfer. For example, life insurance proceeds and cash surrender values that would be exempt under the terms of the trust pursuant to §38-63-40 or §38-65-90 would maintain the exempt status if payable to the trust. Also, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1 -- 3.7 (1986).

Section 62-7-506. Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. For purposes of this section, a mandatory distribution is a distribution where the trustee has no discretion in determining whether the distribution shall be made or the amount or timing of such distribution.

REPORTER'S COMMENT

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. *See* Section 62-7-502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

South Carolina Trust Code Section 62-7-506 adds to the Uniform Trust Code version of Section 506 a definition of "mandatory distribution" to prevent the South Carolina section from being interpreted to require distributions from discretionary trusts as referred to in SCTC Section 62-7-504. Common examples of mandatory distributions are found in qualified terminable interest property trusts, charitable remainder trusts, and grantor retained trusts, when the trustee is required to make a distribution annually of a sum certain.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

Section 62-7-507. Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

REPORTER'S COMMENTS

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) Section 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a

bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. Section 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).

Part 6

Revocable Trusts

GENERAL COMMENT

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 62-7-601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 62-7-602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 62-7-603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 62-7-604 prescribes a statute of limitations on contest of revocable trusts.

Sections 62-7-601 and 62-7-604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* Section 62-7-105. Sections 62-7-602 and 62-7-603, by contrast, are not so limited and are fully subject to the settlor's control.

Section 62-7-601. The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

REPORTER'S COMMENT

This section is patterned after Restatement (Third) of Trusts Section 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* Section 62-7-407 and comment. *See* SCTC Section 62-7-401, which requires a writing for a self-trusteed declaration of trust.

The SCTC does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 62-7-402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

South Carolina Probate Code Section 62-2-501 provides that a person who is "of sound mind and who is not a minor as defined in Section 62-2-201(27) may make a will." Section 62-2-201(27) defines a minor as a person under eighteen excluding persons under eighteen who are married or emancipated by court decree. The test for mental

capacity is whether the person has the capability to know (1) his estate, (2) the objects of his affections, and (3) to whom he wishes to give his property. The capacity to understand as opposed to actual knowledge or understanding is sufficient. It is a lower standard than that required to sign a deed or contract. *Weeks v. Drawdy*, 329 S.C. 251, 495 S.E.2d 454 (S.C. Ct.App. 1997); *McCollum v. Banks, et al.*, 213 S.C. 476, 50 S.E.2d 199 (S.C. 1948).

A higher degree of capacity is required to execute an irrevocable trust. The settlor must have the mental capacity to understand the nature of the trust and its probable consequences. *Macauley, et al. v. Wachovia Bank, et al.*, 351 S.C. 287, 569 S.E.2d 371 (S.C. Ct.App. 2002).

There was no prior statutory counterpart to this Section.

As a practical matter, the relatively common use of pour over wills in conjunction with minimally funded revocable trusts indicates that the measure of capacity for execution of the trust is the same as that for a will. See *Bowles v. Bradley*, 219 S.C. 377, 461 S.E.2d 811 (S.C. 1995).

Section 62-7-602. (a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this article.

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) a later will or codicil that expressly refers to the trust, manifesting clear and convincing evidence of the settlor's intent; or

(B) by oral statement to the trustee if the trust was created orally; or

(C) any other written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) RESERVED

(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship and with regard to the requirements of Section 62-5-408 (3)(c).

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

REPORTER'S COMMENT

South Carolina Trust Code Section 62-7-602(a) is a departure from former South Carolina law, which presumed that a trust was irrevocable unless a power of revocation was validly reserved and that, if a particular method of revocation was specified, it must be strictly followed. Where the right to revoke was reserved and no particular mode was specified, any mode sufficiently showing an intention to revoke was effective. See *Peoples National Bank of Greenville v. Peden et al.*, 229 S.E. 2d 163 (S.C. 1956), citing to 4 *Bogert on Trusts and Trustees* Section 996 and 54 *Am. Jur. Section 77 on Trusts*. Likewise, a settlor had to expressly reserve the right to modify a trust. *First Carolinas Joint Stock Land Bank v. Deschamps, et al.*, 171 S. C. 466 172 S.E. 622 (S.C. 1934).

The South Carolina Supreme Court has noted that there are some exceptions to the general rule that a trust cannot be revoked or modified unless such a power is expressly reserved in the trust instrument, such as mistake. *Chiles v. Chiles, et al.*, 20 S. C. 379, 242 S.E. 2d 426 (S.C. 1978), citing to the Restatement 2d of Trusts Section 330(2).

Most states follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts Section 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The South Carolina Trust Code

endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts Section 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts Section 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second) of Trusts Section 331 cmt. g & h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts Section 63 cmt. k (Tentative Draft No. 3, approved 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property states, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of states, contributions of community property to trusts created in noncommunity property states does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple moves from a community to a noncommunity state. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all states, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property states in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in

community property states. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property state. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most states is based not on fractional interest but on actual dollar contribution. See, e.g., Unif. Probate Code Section 6-211. Most difficult may be determining a contribution rule for entires property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

Subsection (b)(3) requires that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts Section 63 cmt. h & i (Tentative Draft No. 3, approved 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation

when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. *See* Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, approved 2001).

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (f) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

Under subsection (c), the settlor may revoke or amend a revocable trust by substantial compliance with the method specified in the terms of the trust or by a later will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property: Will and Other

Donative Transfers Section 7.2 cmt. e (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R. 3d 487 (1972).

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 62-7-705.

As to SCTC Section 62-7-602(c), although prior South Carolina case law required strict compliance with method of revocation provided by the terms of the trust, the courts would recognize a valid revocation as long as it was clear that the settlor had exercised every right within his power to revoke the trust and if notice requirements which were strictly for the benefit of the trustee were waived by the trustee. *Peoples National Bank of Greenville v. Peden et al.*, 229 S.C. 167, 92 S.E. 2d 163 (S.C. 1956). SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was created orally.

Under prior South Carolina case law, if the power to revoke was not expressly reserved in a trust, the terms of a later will could not control the disposition of property under a previously executed trust document. *Bonney v. Granger, et al.*, 292 S.C. 308, 356 S.E. 2d 138 (S.C. Ct. App. 1987). If the right to revoke was reserved and no particular method of revocation was specified, a revocable trust could be revoked by a testamentary devise of the corpus of the trust. Whether a will impliedly revoked a revocable trust was a question of intention. *Peoples National Bank of Greenville v. Peden et al.*, 229 S.C. 167, 92

S.E. 2d 163 (S.C. 1956), citing to 54 Am Jur. Section 77. A residuary clause was insufficient to revoke or amend a trust. *First Carolinas Joint Stock Land Bank v. Deschamps, et al.*, 171 S.C. 466, 172 S.E. 622 (S.C.1934).

See SCTC Section 62-7-401, which requires a writing for the creation of self-trusteed declarations of trust.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. Prior South Carolina case law required a trustee upon termination of a trust to distribute the assets to the beneficiaries or to their nominee. *Beaty Trust Co. v. S. C. Tax Com.*, 278 S.C. 113, 292 S.E. 2d 788 (S.C. 1982). There was no prior South Carolina law that addressed the responsibility of the trustee in regard to a revocable trust.

A settlor's power to revoke is not terminated by the settlor's incapacity. The power to revoke may instead be exercised by an agent in accordance with Section 62-7-602.1.

Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the South Carolina Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 62-7-103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.

In South Carolina, the probate court, acting through a conservator, exercises control over the estate and affairs of an incapacitated person in regard to trusts. Acting through the conservator, the court may create, amend or fund, but not revoke (unless amendment could be construed so broadly as to constitute a right to revoke), a revocable trust. In exercising these powers, the court must consider the estate plan and the terms of any revocable trust of which the incapacitated person is settlor.

If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

Section 62-7-602A. (a) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect

to a revocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

- (1) revocation of the trust;
- (2) amendment of the trust;
- (3) additions to the trust;
- (4) direction to dispose of property of the trust;
- (5) creation of the trust, notwithstanding the provisions of Section 62-7-402(a)(1) and (2).

(b) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect to an irrevocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

- (1) additions to the trust;
- (2) creation of the trust, notwithstanding the provisions of Section 62-7-402(a)(1) and (2).

(c) The exercise of the powers described in subsection (a) and (b) shall not alter the amount of property beneficiaries are to receive on the settlor's death under the settlor's existing will or other estate planning documents or in the absence thereof in accordance with the law of intestate succession.

REPORTER'S COMMENT

This section replaces former SCTC Section 62-7-602(e) and expands agent powers with respect to a revocable trust.

Subsection (a) expands the powers found in the Uniform Trust Code and former Section 62-7-602(e) which authorized an agent under a power of attorney to revoke, amend, or distribute property from a revocable trust of the principal. Subsection (a) adds to these powers the authorization of an agent of the settlor to create or add to a revocable trust. Subsection (b) revises the limitations of the former Section 62-7-602(e) that prohibited an agent from deviating from the settlor's estate plan by stating that there shall be no deviation in regard to the amount of property beneficiaries are to receive from the settlor's will or in the absence thereof from the law of intestate succession.

Section 62-7-603. While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

REPORTER'S COMMENT

This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death of the settlor or

other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under Section 62-7-813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 62-7-813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will pass to the settlor's agent or conservator.

Prior South Carolina law addressed the trustee's duty of loyalty to the beneficiaries of the trust. See e.g., *Ramage v. Ramage*, 283 S.C. 239, 322 S.E. 2d 22 (S.C. Ct. App. 1984). SCTC Section 62-7-603 omits the language found in the UTC 2004 Amendments expressly providing that a trust is revocable only while the settlor has the capacity to revoke.

Section 62-7-604. (a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

- (1) one year after the settlor's death; or
- (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

- (1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within one hundred twenty days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

REPORTER'S COMMENT

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 62-7-402), that undue influence, duress, or fraud was involved in the trust's creation (*see* Section 62-7-406), or that the trust had been revoked or modified (*see* Section 62-7-602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* Section 62-7-106 (SCTC supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 62-7-602 and 62-7-602.1, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is one year from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is

lacking. The one-year period is derived from Section 62-3-108, under which the contest of an informally probate will must occur by the later of one year from death or eight months after informal probate

A trustee who wishes to shorten the contest period may do so by giving notice. Subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The 120 day period in subsection (a)(2) is subordinate to the one-year bar in subsection (a)(1). A contest is automatically barred one year after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. *See* Restatement (Second) of Trusts Section 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 120 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Part 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* Section 62-7-109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 62-7-505(a)(3) and Comment

For statutory limitations periods applicable to wills, see South Carolina Probate Code Section 62-3-108.

For statutory limitations periods applicable to claims of beneficiaries against the trustee, see SCTC Section 62-7-1005.

Section 62-7-605. A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings.

REPORTER'S COMMENT

This Section is analogous to South Code Probate Code Section 62-3-905, which is applicable to wills.

Section 62-7-606. (A) Unless the trust expressly provides otherwise, if the beneficiary under a revocable trust, who is a great-grandparent or a lineal descendant of a great-grandparent of the settlor, is dead at the time of execution of the trust, fails to survive the settlor, or is treated as if he predeceased the settlor, the issue of the deceased beneficiary who survived the settlor take in place of the deceased beneficiary and if they are all of the same degree of kinship to the beneficiary they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a beneficiary under a class gift if he had survived the settlor is treated as a beneficiary for purposes of this section whether his death occurred before or after the execution of the trust.

(B) Except as provided in subsection (A), if the disposition of any real or personal property under a revocable trust fails for any reason, this property becomes a part of the residue of the trust.

(C) Except as provided in subsection (A), if the residue under a revocable trust is distributed to two or more persons and the share of one of the residuary beneficiaries fails for any reason, his share passes to the other residuary beneficiary or to other residuary beneficiaries in proportion to their interests in the residue.

REPORTER'S COMMENT

This Section retains and incorporates former South Carolina Probate Code Section 62-7-113 (except for the deletion of the words "inter vivos" when used to describe the trust and the addition of the introductory "Unless the trust expressly provides otherwise") and is analogous to SCPC Section 62-2-603 applicable to wills.

Section 62-7-607. If after executing a revocable trust the settlor is divorced or the marriage annulled or the spouse is a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses, the divorce or annulment or order revokes any disposition or appointment of property including beneficial interests made by such trust to the spouse, any provision conferring a general or special power of appointment on the spouse, and any nomination of the spouse as trustee, unless the trust expressly provides otherwise. Property prevented from passing to a spouse because of revocation by divorce or annulment or order passes as if the spouse failed to survive the settlor, and other provisions conferring some power or office on this spouse are interpreted as if the spouse failed to survive the settlor. If these provisions for the spouse are revoked solely by this section, they are revived by the settlor's remarriage to the former spouse. For purposes of this section, divorce or annulment or order means any divorce or annulment or order which would exclude the spouse as a surviving spouse within the meaning of subsections (a) and (b) of Section 62-2-802. A decree of separate maintenance which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of marital circumstances other than as described in this section revokes a disposition to a spouse in a revocable trust.

REPORTER'S COMMENT

This Section retains and incorporates South Carolina Probate Code Section 62-7-114 (except for the deletion of the words "inter vivos" when used to describe the trust) and is consistent with SCPC Section 62-2-507.

Part 7

Office of Trustee

GENERAL COMMENT

This article contains a series of default rules dealing with the office of trustee. Sections 62-7-701 and 62-7-702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 62-7-703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 62-7-704 through 62-7-707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled,

the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 62-7-708 and 62-7-709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to order bond, all of the provisions of this article are subject to modification in the terms of the trust. *See* Section 62-7-105.

Section 62-7-701. (a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:

(1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

REPORTER'S COMMENT

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 62-7-701(a), *with* Section 62-7-602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly

exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts Section 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 102 (1959). Consistent with Section 62-7-201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the SCTC does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts Section 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 62-7-704.

A person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, but a clear and early communication is recommended. The appropriate recipient of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to communicate the rejection to the person who informed the designee of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to communicate the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee.

Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and competent, otherwise to a qualified beneficiary.

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal

environmental laws such as CERCLA, 42 U.S.C. Section 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, see Section 62-7-1010(b).

South Carolina had no prior statutory counterpart. Generally, at common law, "in an express trust, a trustee must agree to serve as trustee because of the attendant duties and potential liability." S. Alan Medlin, *The Law of Wills and Trusts*, Vol. 1, Estate Planning in South Carolina (2002) at Section 502, citing *Anderson v. Earle*, 9 S.C. 460 (S.C. 1878).

Section 62-7-702. (a) A trustee shall provide bond to secure the performance of the trustee's duties if:

- (1) the terms of the governing instrument require the trustee to provide bond;
- (2) a beneficiary requests the trustee to provide bond and the court finds the request to be reasonable; or
- (3) the court finds that it is necessary for the trustee to provide bond in order to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee, including a trustee appointed by the court, if the governing instrument directs otherwise. On petition of the trustee or other interested person, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(b) If bond is required, it shall be filed in the court in the place in which the trust has its principal place of administration in amounts and with sureties and liabilities consistent with the requirements of South Carolina Code Sections 62-3-604 relating to bonds of personal representatives.

REPORTER'S COMMENT

South Carolina Trust Code Section 62-7-702 differs significantly from the Uniform Trust Code version of Section 702. SCTC Section 62-7-702 is in accord with former South Carolina Probate Code Section 62-7-304, providing that a trustee will not normally be required to post bond.

Section 62-7-703. (a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

REPORTER'S COMMENT

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 62-7-704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 62-7-705 (notice of resignation must be given to cotrustee), 62-7-706 (lack of cooperation among cotrustees as ground for removal), 62-7-707 (obligations of resigning or removed trustee), 62-7-813 (reporting requirements upon vacancy in trusteeship), and 62-7-1013 (authority of cotrustees to authenticate documents).

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are

appointed to make certain that all family lines are represented in the trust's management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and, unless an odd number of trustees is named, deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. *See* Section 62-7-105.

Much of this section is based on comparable provisions of the Restatement of Trusts, although with extensive modifications. Reference should also be made to ERISA Section 405 (29 U.S.C. Section 1105), which in recent years has been the statutory base for the most significant case law on the powers and duties of cotrustees.

Subsection (a) is in accord with Restatement (Third) of Trusts Section 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts Section 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts Section 383 (1959). Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 62-7-704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Subsections (b) and (d) provide for the proper administration of the trust in the event a cotrustee is unavailable or temporarily incapacitated. Subsection (c) compels a cotrustee to participate in the trustee's function or delegate such a duty unless excused by "absence, illness, disqualification under the law, or other temporary incapacity." Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules.

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 62-7-807 because the two situations are different. Section 62-7-807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform.

Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 62-7-105. Subsection (e) is based on language derived from Restatement (Second) of Trusts Section 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. The safeguard for a dissenting cotrustee is sprinkled throughout subsections (f), (g) and (h). Subsection (f) provides for a limitation on liability for a non-joining co-trustee, but that limitation on liability is tempered in subsection (g) by providing that a trustee must exercise "reasonable care". Under subsection (g), a trustee may not passively dissent to an improper action by a cotrustee. Subsection (h) protects a dissenting cotrustee who joins in an action at the direction of the majority and notifies any cotrustee of his dissent. Subsection (h) does not require the dissent to be in writing. Further, under subsections (g) and (h) together, a cotrustee cannot dissent and thereafter remain passive for actions by the majority of cotrustees amounting to a "serious breach of trust." The dissenting trustee must exercise "reasonable care" to correct the conduct of the cotrustee(s). The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Section 62-7-704. (a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee rejects the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian or conservator is appointed for an individual serving as trustee.

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trustee;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trustee;

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the Attorney General concurs in the selection; or

(3) by a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust. The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614.

REPORTER'S COMMENT

This section provides a definition for a vacancy in a trusteeship and the procedure for appointment of a successor trustee if no provisions for dealing with these matters are set forth in the trust. *See also* Sections 62-7-701 (accepting or declining trusteeship), 62-7-705 (resignation), and 62-7-706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

Subsection (a) provides a list of matters causing a vacancy in trusteeship. The disqualification of a trustee referred to in subsection (a)(4) would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust's principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act.

Subsection (b) grants authority to the remaining trustee(s) for the administration of the trust following a vacancy. If a vacancy in the cotrusteeship is not filled, Section 62-7-703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts Section 34 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. a (1959).

Subsection (c) provides a procedure for filling a vacancy in trusteeship if such a vacancy is required to be filled. Vacancies in this context could arise when the sole remaining trustee no longer is available to serve or the trust requires cotrustees and only one is named in the trust. Subsection (c) provides priority of succession of trustees in a non-charitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 62-7-705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in Section 62-7-705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 62-7-706.

If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts Section 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. d (1959).

Subsection (d) provides for priority of succession in a charitable trust. These sections provide a method for the vacancy to be filled without court approval. Subsection (d) includes the language added by the 2004 Amendments to the UTC, dealing with the concurrence of the Attorney General. If the attorney general does not concur in the selection, however, or if the trust does not designate a charitable

organization to receive distributions, the vacancy may be filled only by the court.

Subsection (e) provides for a court appointed special trustee or “special fiduciary” if necessary for the “administration of the trust.” The provisions of subsection (e) are unqualified and provide “whether or not a vacancy in a trusteeship exists or is required to be filled” the court has authority to appoint such an additional trustee. Such a trustee would have the authority provided by the court in its order of appointment. If the order of appointment contains no limitations, the additional trustee would succeed to the full powers of a trustee under the trust.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 62-7-812.

Section 62-7-705. (a) A trustee may resign:

(1) upon at least 30 days notice in writing to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee’s bond for acts or omissions of the trustee is not discharged or affected by the trustee’s resignation.

REPORTER’S COMMENT

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts Section 36 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the drafting committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts Section 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or

omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. *See Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 62-7-707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (*see* Section 62-7-603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

Section 62-7-705(a)(1) adds to the Uniform Trust Code version of Section 705 the words "in writing" after "notice" for clarification, as a writing is the reasonable and customary choice for notification.

This Section incorporates some of the provisions of former South Carolina Probate Code Section 62-7-705, except that this Section introduces a thirty (30) day written notice provision for resignation. The former South Carolina statute allowed the Trustee to resign if the document so provided, all beneficiaries consented, or the court approved the resignation. Subsection (c) makes clear that a mere resignation does not terminate a trustee's liability.

Section 62-7-706. (a) For the reasons set forth in subsection (b), the settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 62-7-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

REPORTER'S COMMENT

This section sets forth the grounds for removal of a trustee.

Subsection (a), contrary to the common law, grants the settlor of The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to Section 62-7-603(a), while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control.

For clarification, Section 62-7-706(a) adds to the Uniform Trust Code version the words "for the reasons set forth in subsection (b)." The UTC Comment makes clear that a beneficiary's rights under a revocable trust are subject to those of the settlor.

Trustee removal may be regulated by the terms of the trust. *See* Section 62-7-105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* Section 62-7-103(7). Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. a (1959).

Subsection (b)(1), consistent with Restatement (Third) of Trusts Section 37 cmt. a and g (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably

informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 62-7-813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee. "Serious breach of trust" is defined in SCTC Subsection 62-7-103(24).

The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 62-7-704 appointment of a successor trustee is not required.

Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. See Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999).

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," see Section 62-7-103(7). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. See Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. See Restatement (Third) of Trusts Section 37 cmt. f (Tentative Draft No. 2,

approved 1999); Restatement (Second) of Trusts Section 107 cmt. f-g (1959). Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Subsection (b)(4) also contains a specific but more limited application of Section 62-7-411. Section 62-7-411 allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 62-7-1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to Section 62-7-1004, the court may also award attorney's fees as justice and equity may require.

Section 62-7-707. (a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

REPORTER'S COMMENT

This section addresses the continuing authority and duty of a resigning or removed trustee. This section is comparable to South Carolina Probate Code Sections 62-3-608 through 62-3-611 concerning the termination of a personal representative. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. *See* Section 62-7-813(c).

There is ample authority in the SCTC for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* Sections 62-7-704(e) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 62-7-705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 62-7-706(c) (pending decision on petition for removal, court may order appropriate relief), and 62-7-1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the SCTC does not require that the trustee's personal representative wind up the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the personal representative, conservator or guardian may submit a trustee's report on the former trustee's behalf as authorized by Section 62-7-813(c). Otherwise, the former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.

Section 62-7-708. (a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

- (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) the compensation specified by the terms of the trust would be unreasonably low or high.

REPORTER'S COMMENT

This section incorporates and clarifies the provisions of current South Carolina law for determination of trustee fees. Former South Carolina Probate Code Section 62-7-205 required the trustee to return the excess part of any fee determined to be unreasonable by the court.

Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts Section 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* Section 62-7-807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts Section 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. d (1959).

Because "trustee" as defined in Section 62-7-103(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation

in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. See Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the SCTC as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The*

Effect of the Model Rules of Professional Conduct, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts Section 38 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 62-7-111(b) (matters that may be resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 62-7-816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 62-7-813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 62-7-706.

Under Sections 62-7-925 and 62-7-926 of the South Carolina Uniform Principal and Income Act, one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

Section 62-7-709. (a) A trustee is entitled to be reimbursed out of the trust property, with interest at the legal rate as appropriate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

(c) A prospective trustee is entitled to be reimbursed from trust property for expenses reasonably incurred by the prospective trustee pursuant to Section 62-7-701(c) to protect or investigate the trust assets before deciding whether or not to accept the trusteeship.

REPORTER'S COMMENT

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 62-7-807 (delegation by trustee) and 62-7-816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts Section 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefited the trust. The purpose of this provision, which is derived from Restatement (Second) of Trusts Section 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on

appropriate grounds, may delay or even deny reimbursement for expenses which benefited the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts Section 245 cmt. g (1959).

Subsection (b) implements Section 62-7-802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries. Former South Carolina Probate Code Section 62-7-704(18) empowered the trustee “to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary”

Reimbursement under this section may include attorney’s fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney’s fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 245 (4th ed. 1988).

Part 8

Duties and Powers of Trustee

GENERAL COMMENT

This article states the fundamental duties of a trustee and lists the trustee’s powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This Part was drafted where possible to conform with the South Carolina Uniform Prudent Investor Act. The South Carolina Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and investment of trust property. The SCTC also addresses a trustee’s duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, states enacting the Uniform Trust Code were encouraged to recodify their version of the Prudent Investor Act by reenacting it as Part 9 of this Code rather than

leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, states were advised to enact the provisions of this Part and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 62-7-802 (duty of loyalty), 62-7-803 (impartiality), 62-7-805 (costs of administration), 62-7-806 (trustee's skills), and 62-7-807 (delegation). For more complete instructions on how states were advised to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9. South Carolina followed the advice of the Uniform Code drafters by including the South Carolina Prudent Investor Act as Sections 62-7-901 through 62-7-932 of the SCTC.

All of the provisions of this Part may be overridden in the terms of the trust except for certain aspects of the trustee's duty to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*see* Section 62-7-105(b)(2)-(3)).

Section 62-7-801. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article.

REPORTER'S COMMENT

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.

This section describes a trustee's broad and general duty of good faith and establishes that a nominated or proposed trustee owes no duty to the beneficiary unless and until the trusteeship is accepted. See former South Carolina Probate Code Section 62-7-301 (a trustee has a general duty to administer the trust expeditiously for the benefit of the beneficiaries) and Section 62-7-305 (a trustee is under a continuing duty to administer the trust according to the objectives of the trustor); *Sarlin v. Sarlin*, 312 S.C. 27, 430 S.E.2d 530 (S.C. Ct. App. 1993) (a trustee's discretion must be exercised in good faith, consistent with the primary purpose(s) of the trust).

There was no prior South Carolina case law regarding the principle that there is no duty owed to beneficiaries without acceptance of the trust by the proposed trustee; however, there is general common law to that effect. Restatement, Second, Trusts Section 169.

Section 62-7-802. (a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 62-7-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 62-7-1005;
- (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 62-7-1009; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse;
- (2) the trustee's descendants, siblings, parents, or their spouses;
- (3) an agent or attorney of the trustee;
- (4) a corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee's best judgment; and
- (5) a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate,

provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Part 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 62-7-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

- (1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (2) payment of reasonable compensation to the trustee;
- (3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or
- (5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

REPORTER'S COMMENT

Section 62-7-802(a) sets forth the Trustee's particular duty of loyalty owed to beneficiaries. See former South Carolina Probate Code Section 62-7-301, which states that a trustee has a general duty to administer the trust "for the benefit of the beneficiaries . . ." South Carolina case law provided similarly. See *McNeil v. Morrow*, 30 S.C. Eq. (9 Rich.Cas.) 172 (S.C. 1832); *Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388 (S.C. 1986); *Yates v. Yates*, 292 S.C. 49, 354 S.E.2d 800 (S.C. Ct. App. 1987).

Section 62-7-802(b) states the general rule governing trust property transactions affected by the trustee's conflict of interest. Such a

transaction is voidable by a beneficiary unless one of the stated exceptions is shown to apply.

Regarding the general power of a beneficiary to void a conflict of interest transaction, see former SCPC Section 62-7-706, which implied such a power. In the analogous situation of a personal representative's conflict of interest transaction, SCPC Section 62-3-713 provides that any transaction affected by "a substantial conflict of interest" is voidable unless (1) the decedent's will or contract expressly authorized the transaction, or (2) the transaction is approved by the court after notice.

In general, transactions involving trustee self dealing (selling trust property to trustee individually or buying property, as trustee, from himself individually) are voidable by beneficiaries without regard to good faith and fair consideration. See *Zimmerman v. Harmon*, 25 S.C. Eq. (4 Rich. Eq.)165 (S.C.1851) and *McCants v. Bee*, 6 S.C. Eq. (1 McCord Eq.) 383 (S.C. 18). Also, see Restatement, Second, Trusts Section 170, *comments b. and h. on subsection (1)*.

In subsection (b)(1), the first exception to the "voidable" rule provides that a beneficiary may not automatically void a conflict of interest transaction if the transaction is authorized by the terms of the trust. Former SCPC Section 62-7-706 implicitly provided for that exception. If the transaction was authorized by the trust agreement, it could be assumed that the court would approve the transaction. There is no prior South Carolina case law directly on point regarding authorization in the trust agreement for the conflict of interest transaction. However, there is general common law to that effect. The most commonly recognized exception to the duty of loyalty rule is where the settlor expressly or impliedly approved of the conflict of interest position or transaction. George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees*, Section 543 (Rev. 2d ed. 1993) (where the testator/settlor created the conflict situation when his will or trust was drawn, by naming a particular person as personal representative/trustee who, after the opening of the estate/trust, would be exposed to a conflict between personal and representational interests, there is an implied exemption from the duty of loyalty, absent fraud or bad faith on the part of the fiduciary.)

Subsection (b)(2) provides the second exception to the "voidable" rule: a beneficiary may not automatically void a conflict of interest transaction if the transaction is approved by the court. Former SCPC Section 62-7-706 provided that conflict of interest transactions could be approved by the court. Prior South Carolina case law provided similarly. *Sollee v. Croft*, 28 S.C. Eq. (7 Rich. Eq.) (S.C. 1854) (the

court may permit a conflict of interest transaction.) Also, see Restatement, Second, Trusts Section 170, *comment f. on subsection (1)*; Honeywell v. Dominick, 223 S.C. 365, 75 S.E.2d 59 (S.C. 1953) (notwithstanding the general rule prohibiting a trustee from buying trust property at his own sale, the court may approve such a transaction upon finding a justifiable exception).

Subsection (b)(3), the third exception to the “voidable” rule, provides that a beneficiary’s right to void a conflict of interest transaction is subject to the limitation periods in SCTC Section 62-7-1005. Former SCPC Section 62-7-307 provided that claims against a trustee for breach of trust could be commenced within one year after receipt of final account disclosing the matter (actual disclosure) and in no event more than three years after a beneficiary’s receipt of a final account or statement, regardless of disclosure (constructive disclosure). See *Moyer v. M.S. Bailey & Son*, 347 S.C. 353, 555 S.E.2d 406 (S.C. Ct. App. 2001) (applying the provisions of former SCPC Section 62-7-307). See also *Rembert v. Gressette*, 318 S.C. 519, 458 S.E.2d 552 (S.C. Ct. App. 1995) (beneficiaries may lose claims against trustees due to laches).

Subsection (b)(4) contains the fourth exception to the “voidable” rule, providing that the transaction is not voidable by the beneficiary if the beneficiary consents to, ratifies, or releases the trustee with regard to the transaction as set forth in SCTC Section 62-7-1009. Former SCPC Section 62-7-307 implied that beneficiaries could consent to a breach; see also SCPC Section 62-3-713, governing personal representatives, which provides that a beneficiary’s right to void a conflict transaction may be lost by consent. See *Byrd v. King*, 245 S.C. 247, 140 S.E.2d 158 (S.C. 1965), applying Restatement, Second, Trusts Section 216, holding that a beneficiary may not hold the trustee liable for breach of trust if the beneficiary consented to the trustee’s act or omission. The comments to Restatement Section 216 set forth numerous fact-sensitive applications of the rule.

Subsection (b)(5), the fifth exception to the “voidable” rule, provides that a transaction contracted for prior to the person becoming trustee or before he contemplated becoming trustee is not automatically voidable by a beneficiary. There was no prior SC statutory or case law counterpart.

Whereas Section 62-7-802(b) applies an irrebuttable presumption to void certain conflict of interest transactions, Section 62-7-802(c) applies a rebuttable presumption of voidability for transactions involving trust property entered into with persons who have close business or personal ties with the trustee. There was no prior South

Carolina statutory counterpart. See *Scottish-American Mtg. Co. v. Clowney*, 70 S.C. 229, 49 S.E. 569 (S.C. 1904) (sale of trust property by trustee to trustee's spouse is voidable at the option of the beneficiary). Restatement, Second, Trusts Section 170 provides that a transaction with the trustee's spouse can be set aside as though it was made with the trustee himself. *Id.*, *comment, e. to subsection (4)*. A transaction with a non-spouse person who "is related to the trustee" makes the transaction suspicious but not ipso facto improper. *Id.*

SCTC subsection (c)(4) substitutes certain language for that in the UTC version and adds subsection (c)(5), not found in UTC Section 802, to clarify that the "interest," either "of" or "in" the trustee, must be "substantial" in order that such "interest" "might affect the best judgment of the trustee." This is consistent with *Scott on Trusts*, Secs. 170.10 - 13 and the corresponding sections of the Restatement of Trusts.

Subsection (d) addresses transactions between the trustee and a beneficiary that do not involve trust property. Subsection (d) creates a presumption that the trustee abused the confidential relationship, thereby requiring the trustee to rebut the presumption with evidence that the transaction was fair to the beneficiary. There was no South Carolina statutory counterpart. See *Guinyard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137 (S.C. Ct. App. 1984) (transactions between a trustee and beneficiaries may be sustained where there is clear affirmative proof of fair consideration, perfect candor, and absence of advantage.) *Guinyard* involved a trust property transaction, but arguably would also apply to a non-trust property transaction between trustee and beneficiary. Restatement, Second, Trusts Section 170(2) permits transactions of the type described in subsection (d) only if the trustee satisfies the heightened standard of fairness and full disclosure.

Subsection (e) allows a beneficiary to void a transaction involving nontrust property entered into by the trustee personally if the transaction constituted an opportunity belonging to the trust. There was no South Carolina statutory or case law counterpart. See, however, Restatement, Second, Trusts Section 170, *comment k. to subsection (1)*.

Subsection (f) creates an exception to the no-further-inquiry rule for trustee investments in mutual funds, and allows trustees to take additional compensation for services provided to the investment company, subject to a duty of disclosure and subject to the duties imposed by the Prudent Investor Act. See Part 9. There was no prior South Carolina case law counterpart. Subsection (f) includes the word "otherwise" found in the 2004 Amendments to UTC Section 802.

Subsection (g) makes share voting or other exercise of entity control by a trustee a fiduciary function. Former SCPC Section 62-7-704(c)(3), (13), (14), (15), and (26) provides for trustee powers with respect to entity control. The exercise of said powers was subject to the prudent man rule and had to be exercised in the best interest of the beneficiary and consistent with the purposes of the trust. See *Weston v. Weston*, 210 S.C. 1, 41 S.E.2d 372 (S.C. 1947) (it is the duty of the trustee in voting shares of corporate stock to act in the best interests of the beneficiary).

Subsection (h) sets forth exceptions to the duty of loyalty, which apply if the transaction was fair to the beneficiary.

Subsection (h)(1) and (2) provides that a trustee is free to contract with the beneficiary about the terms of appointment and compensation. Subsection (h)(3) permits transactions involving the trust with other fiduciary estates in which the trustee is also the fiduciary or in which the beneficiary of the trust has an interest. Subsection (h)(4) permits the trustee to deposit trust assets in a financial institution operated by the trustee. Subsection (h)(5) permits the trustee to advance money for the protection of the trust. There was no prior South Carolina statute on the subject of a trustee's ability to contract with a beneficiary about terms of appointment and compensation. Former SCPC Section 62-7-205 permitted a trustee to fix his own fees (if not governed by the trust instrument) subject to the right of the beneficiary to object. Former SCPC Section 62-7-704(c)(4) permitted transactions of the type described in subsection (h)(3). Former SCPC Section 67-7-704(6) permitted transactions of the type described in subsection (h)(4). Former SCPC Section 67-7-704(c)(18) permitted transactions of the type described in subsection (h)(5). There was no South Carolina case law counterpart.

Subsection (i) confirms that the court may appoint a special fiduciary to act with respect to any transaction that might violate the duty of loyalty if entered into by the trustee. There was no South Carolina statutory or case law counterpart.

Section 62-7-803. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

REPORTER'S COMMENT

The duty of impartiality is an important aspect of the duty of loyalty. Former SCPC Section 62-7-302(F)(2), retained and incorporated in

Part 9, provided similarly. Former SCPC Sections 62-7-301 and 62-7-305 set forth the general duties of administering the trust for the benefit of the beneficiaries and according to the objectives of the settlor. In *Johnson v. Thornton*, 264 S.C. 252, 214 S.E.2d 124 (S.C. 1975), the court recognized the existence of a trustee's duty to deal impartially with two or more beneficiaries. See also Restatement, Second, Trusts Section 183.

Section 62-7-804. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

REPORTER'S COMMENT

The duty to administer a trust with prudence is a fundamental duty of the trustee. Former SCPC Section 62-7-702(2) defined a prudent man as a trustee whose exercise of judgment and care complies with the requirements of former Section 62-7-302, which is retained and incorporated in Part 9.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 62-7-1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Section 62-7-805. In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

REPORTER'S COMMENT

This section is consistent with the South Carolina Prudent Investor Act, Section 62-7-933, and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule Section 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 62-7-708 and 62-7-709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of

administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts Section 188 (1959).

Former SCPC Section 62-7-302(F)(3), retained and incorporated in Part 9, provided similarly.

Section 62-7-806. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

REPORTER'S COMMENT

This section is similar to Restatement (Second) of Trusts Section 174 (1959), and consistent with the South Carolina Prudent Investor Act, Section 62-7-933.

Former SCPC Section 62-7-302(C)(6), retained and incorporated in Part 9, provided similarly.

Section 62-7-807. (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

REPORTER'S COMMENT

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. Former SCPC Section 62-7-302(H)(1), retained and incorporated in Part 9, provided similarly. The language is derived from Section 9 of

the Uniform Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 62-7-703.

Section 62-7-808. (a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

REPORTER'S COMMENT

Subsection (a) is an application of Section 62-7-603(a), which provides that a revocable trust is subject to the settlor's exclusive control. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust.

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001).

“Advisers” have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. “Trust protector,” a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers. See SCTC Sections 62-7-818 and 62-7-819.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party’s approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party’s refusal to consent would result in a serious breach of trust. See Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder’s own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder’s conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See Section 62-7-701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. See Section 62-7-105. A settlor can provide that the trustee must

accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C. Section 675(4).

There was no prior South Carolina statutory or case law counterpart.

Section 62-7-809. A trustee shall take reasonable steps to take control of and protect the trust property.

REPORTER'S COMMENT

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 62-7-804. *See also* Sections 62-7-816(1) (power to collect trust property), 62-7-816(11) (power to insure trust property), and 62-7-816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts Section 175 cmt. a, c & d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. *See* Section 62-7-105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

There was no prior South Carolina statutory or case law counterpart.

Section 62-7-810. (a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

REPORTER'S COMMENT

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 62-7-804) and the duty to report to beneficiaries (Section 62-7-813). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second) of Trusts Sections 172, 174 (1959). This Section is related to Section 62-7-813, which requires the trustee to keep the beneficiaries reasonably informed about the administration of the trust.

Subsection (c) allows the trustee to maintain assets in nominee name rather than holding individual assets in the name of the trustee.

Subsection (d) allows a trustee to use the property of two or more trusts to make joint investments. This allows the use of common trust funds or mutual funds which can be an economical method of managing assets of the trust.

Section 62-7-811. A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

REPORTER'S COMMENT

This section does not impose any new duties upon trustees. It has been held in South Carolina that a trustee who fails to collect upon a debt owed the trust, or to make an effort to do so, is liable to the trust. *Neely v. Peoples Bank of Anderson*, 133 S.C. 43, 130 S.E. 550 (S.C. 1925). See also former SCPC Section 62-7-704(c)(19), which provided that a trustee had the power to pay or contest claims, settle claims by or against the trust, and to release claims owned by the trust, which is similar to Section 62-7-816(14).

Section 62-7-812. Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee. Upon reasonable request, a successor trustee is entitled to a statement of the accounts of the trust from a predecessor trustee. A successor trustee may accept the account rendered and shall be under no duty to examine the acts or omissions of the predecessor trustee and shall not be liable for failure to seek redress for any act or omission of the predecessor trustee. The trustee of a testamentary trust may accept the account rendered by a personal representative and shall be under no duty to examine the acts or omissions of the predecessor personal representative and shall not be liable for failure to seek redress for any act or omission of the predecessor personal representative.

REPORTER'S COMMENT

Section 62-7-812 does not adopt Uniform Trust Code Section 812. Instead, Section 62-7-812 retains and incorporates former SCPC Section 62-7-707(c). Section 62-7-703 has provisions similar to former SCPC Section 62-7-707(a), (b), and (d).

Section 62-7-813. (a) Unless the terms of a trust expressly provide otherwise, while a trust is revocable the trustee's duties under this section are owed exclusively to the settlor.

(b) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable whether by the death of the settlor or by the terms of the trust on or after the effective date of this article, shall:

(1) within ninety days after the trustee accepts a trusteeship or undertakes administration of an irrevocable trust or a revocable trust that has become irrevocable whether by the death of the settlor or by the terms of the trust, notify the qualified beneficiaries, as defined in Section 62-7-103(12), of:

(A) the existence of the trust;

(B) the identity of the settlor or settlors;

(C) the trustee's name, address and telephone number;

(D) the right to request in writing a copy of the trust instrument; and

(E) the right to request in writing a copy of any trustee's report described in (c)(1) below;

(2) throughout the administration of the trust, keep the distributees and the permissible distributees, as defined in Section 62-7-103(21) and (25), reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, provided that the attorney-client privilege between the trustee and the trustee's attorney is not violated;

(3) upon the reasonable written request of a beneficiary, other than a qualified beneficiary, unless unreasonable under the circumstances, provide to the beneficiary a copy of the trust instrument redacted to include only those provisions of the trust that are relevant to the beneficiary's interest in the trust, as the trustee determines and, unless unreasonable under the circumstances, respond to a beneficiary's written request for information related to the administration of the trust;

(4) notify the distributees and permissible distributees in advance of any change in the method or rate of the trustee's compensation; and

(5) notwithstanding any of the above, not be required to notify any beneficiary in advance of transactions relating to the trust property.

(c) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable on or after the effective date of this article, shall:

(1) have a continuing duty to:

(A) keep the distributees and permissible distributees, or other qualified beneficiaries who request information in writing, reasonably informed as to the administration of the trust; and

(B) send annually, and upon the termination of the trust, a written report of the trust property which may be in any format which provides the distributees and permissible distributees, or other qualified beneficiaries who have requested in writing, with information necessary to protect their interests. The report may include a copy of the fiduciary income tax return, or copies of bank or brokerage statements, or an informal list of assets and if feasible, the market values of those assets, the liabilities, the receipts and the disbursements, including the source and amount of the trustee's compensation;

(2) upon resignation of the trustee and unless a cotrustee remains in office, send a written report as described in (c)(1) to the distributees and permissible distributees; and in the case of the death or incapacity of a trustee, the report may be sent by the trustee's personal representative, conservator or guardian.

(d) To the extent that there is no conflict of interest, the trustee's duties to inform and report under subsections (b) and (c) are deemed satisfied if the information and report are given to the beneficiary's representative as described in Sections 62-7-302 through 62-7-305.

(e) Any distributee or permissible distributee may waive the right to a trustee's report and other information described under this section and, with respect to future reports and other information, withdraw a waiver previously given.

REPORTER'S COMMENT

The 2013 Amendments completely revise the previous version of 62-7-813 and more clearly define the duties of the trustee to inform and report as well as the classes of beneficiaries to whom initial duty to inform, qualified beneficiaries are entitled to receive information as

provided in subsection (b)(1); thereafter, only distributees and permissible distributees have the right to receive information as provided in subsections (b)(2) and (b)(4); and under (b)(3) a nonqualified beneficiary may receive only a redacted copy of a trust agreement and only upon request. In regard to the duty to report, subsection (c)(1) provides that the distributees and permissible distributees have the right to receive a report as described therein. Other qualified beneficiaries may receive the report only upon written request and nonqualified beneficiaries are not entitled to a report.

Section 62-7-814. (a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as 'absolute', 'sole', or 'uncontrolled', the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) A power whose exercise is limited or prohibited by subsection (c) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(c) Subject to subsection (d), and unless the application of this section is clearly and convincingly negated in the will, the trust document, terms of the trust, or a written instrument appointing a fiduciary, expressly indicating that a rule in this subsection does not apply, any power conferred upon the fiduciary, in his capacity as a fiduciary (and not including any power conferred upon him in his capacity as a beneficiary), which would, except for this section, constitute, in whole or in part, a general power of appointment cannot be exercised by him in favor of himself, his estate, his creditors, or the creditors of his estate.

(1) The fiduciary can, however, exercise the power in favor of someone other than himself, his estate, his creditors and the creditors of his estate.

(2) If a power comes within subsection (c) and the power is conferred upon two or more fiduciaries, it can be exercised by the fiduciary or the fiduciaries who are not disqualified from exercising the power as if they were the only fiduciary or fiduciaries.

(3) If all of the serving fiduciaries are disqualified from exercising a power, the court that would have jurisdiction to appoint a fiduciary under the instrument, if there were no fiduciary currently serving, shall exercise, or shall appoint a special fiduciary whose only

power is to exercise the power that cannot be exercised by the other fiduciaries by reason of subsection (c).

(4) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(d) Subsection (c) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code, as amended, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code as amended.

REPORTER'S COMMENT

The corresponding statute under the former South Carolina law was SCPC Section 62-7-603. The intent of both former SCPC Section 62-7-603 and current SCTC Section 62-7-814 is to avoid inadvertent income tax and estate tax consequences that might result under certain circumstances where a beneficiary is also serving as a trustee.

The introductory language to subsection (A) of former SCPC Section 62-7-603 appears to be more demonstrative than the corresponding language of Uniform Trust Code Section 814(b). Consequently, current SCTC Section 62-7-814 incorporates that introductory clause from former SCPC Section 62-7-603(A) that current SCTC Section 62-7-814 does not limit the intent and protection of former SCPC Section 62-7-603.

Former SCPC Section 62-7-603 also limited certain fiduciary powers so that the trustee was not deemed to have a general power of appointment. A corresponding clause was not expressly contained in the UTC version of Section 814. Thus, the appropriate language from former SCPC Section 62-7-603 is included at current SCTC Section 62-7-814(c).

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties,

including the obligation to exercise reasonable skill, care and caution. *See* Sections 62-7-801 (duty to administer trust) and 62-7-804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). *See also* Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. *See* Section 62-7-1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Trust Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 62-7-411 through 62-7-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that this Code addresses it. It is also a topic on which numerous states have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 62-7-416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (*see*

Comment to UTC Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

QTIP marital trusts are subject to this section. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226.

Section 62-7-815. (a) A trustee, without authorization by the court, may exercise:

- (1) powers conferred by the terms of the trust; and
- (2) except as limited by the terms of the trust:

(A) all powers over the trust property which an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) any other powers conferred by this part.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this part.

REPORTER'S COMMENT

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

Former SCPC Section 62-7-704 contained the default powers that were available to all trustees when the trust instrument did not provide specific powers. Former SCPC Section 62-7-704 granted general powers that a prudent person would perform incident to the collection, preservation, management, use and distribution of the trust estate, and it also contained various specific powers. SCTC Section 62-7-815 broadens the former SCPC list of powers that apply to all trustees by stating that a trustee has all of the powers over trust property that an individual has over his own property.

Section 62-7-816. Without limiting the authority conferred by Section 62-7-815, a trustee may:

- (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in accounts--all types including margin accounts--in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, create and/or continue a business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
 - (A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
 - (B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(D) deposit the securities with a depository or other regulated financial-service institution;

(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, including by way of example qualified conservation and façade easements, and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(16) exercise elections with respect to federal, state, and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's agent under a Power of Attorney, to the beneficiary's conservator or, if the beneficiary does not have a conservator, to the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under the Uniform Gifts or Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;

(C) if the trustee does not know of an agent under a Power of Attorney, conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;
or

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

(27) allocate items of income or expense to either trust income or principal, as permitted or provided by the trust instrument and applicable law, but this power shall not be construed as prescribing the method of accounting for principal and income;

(28) to divide any trust into separate shares or separate trusts or to create separate trusts if the trustee reasonably deems it appropriate and the division or creation is consistent with the settlor's intent and facilitates the trust's administration without defeating or impairing the interests of the beneficiaries.

REPORTER'S COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 62-7-105. The powers listed are also subsumed under the general authority granted in Section 62-7-815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 62-7-815 and powers conferred elsewhere in the Code. While the Committee drafting the Uniform Trust Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see

language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 62-7-815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the SCTC, modify a trustee duty that would otherwise apply. *See, e.g.*, Sections 62-7-802(h) (exceptions to duty of loyalty) and 62-7-810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 62-7-801. The trustee has a duty to enforce claims as provided in Section 62-7-811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 62-7-812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 62-7-816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 62-7-804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 62-7-802(h)(4). South Carolina Trust Code Section 62-7-816 subsection (4) added "in accounts" to the UTC version and expressly provides for the deposit of money in "all

types” of accounts, and specifically references the inclusion of “margin accounts.”

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Section 62-7-933. SCTC Section 62-7-816 subsection (6) added language to the UTC version which authorizes a trustee to “create” a business.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Part 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 62-7-809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the SCTC designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). *See* Sections 62-7-701(c)(2) (designated

trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 62-7-1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 62-7-811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 62-7-708. *See also* Section 62-7-709 (repayment of trustee expenditures).

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The SCTC leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 62-7-502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only

when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary. South Carolina Trust Code Section 62-7-816 subsections (21) (A) & (C) added the phrase "agent under a power of attorney" to the UTC version. It is important for the practitioner to be cautious of SCPC Section 62-5-501, which may provide for a priority payee under these subsections.

Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Part 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 62-7-709 and Comment. *See also* Section 62-7-811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

South Carolina Trust Code Section 62-7-816 added to the UTC version subsections (27) and (28) to retain and incorporate specific

powers the trustee had under former South Carolina law but which were not specifically included in the Uniform Trust Code version.

Section 62-7-816A. (a) Unless the terms of the instrument expressly provide otherwise, a trustee with the discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of a trust, the original trust, may exercise that discretion by appointing all or part of the property subject to that discretion in favor of another trust for the benefit of one or more of those beneficiaries, the second trust. This power may be exercised without the approval of a court, but court approval is necessary if the terms of the original trust expressly prohibit the exercise of such power or require court approval.

(b) The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

(c) The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument, and the trustee of the second trust may be either the trustee of the original trust or another trustee.

(d) The terms of the second trust are subject to the following requirements:

(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

(2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.

(3) The terms of the second trust may not contain any provision nor reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of an original trust document if the inclusion of the provision or reduction in the original trust document would have disqualified any assets of the original trust for any federal or state income, estate, or gift tax deduction received on account of any assets of the original trust, or if the inclusion of the provision or reduction in the original trust would have reduced the amount of any federal or state income, estate, or gift tax deduction received. In addition, the terms of the second trust may not reduce any retained interest of a beneficiary of the original trust if the interest is a qualified interest under Internal Revenue Code Section 2702.

(4) If contributions to the original trust have been excluded from the gift tax by the application of Internal Revenue Code Section 2503(b) and Section 2503(c), then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

(5) If a beneficiary of the original trust has a power of withdrawal over trust property, then either:

(A) the terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or

(B) sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.

(6) If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same beneficiaries as in the original trust.

(7) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust.

(e) A trustee may not exercise the power to appoint principal or income under subsection (a) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (a) of this section.

(f) The exercise of the power to appoint principal or income under subsection (a) of this section:

(1) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate;

(2) does not result in the trustee or cotrustees of the original trust being considered the settlor of the second trust;

(3) is not prohibited by a spendthrift provision or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(g) To effect the exercise of the power to appoint principal or income under subsection (a) of this section, all of the following apply:

(1) The exercise of the power to appoint must be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument must be filed with the records of the original trust.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least ninety days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice must include a copy of the instrument described in item (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income is exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(h) The provisions of this section shall not be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, or to create an inference of impropriety made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (a) of this section. The provisions of this section shall not be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this article or under another provision of law or under common law. The terms of an original trust may modify or waive the notice requirements under subsection (g), reduce or increase restrictions on altering the interests of beneficiaries under subsection (d), and may otherwise contain provisions that are inconsistent with the requirements of this section.

(i) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to another trust pursuant to subsection (a) of this section.

(j) The provisions of Section 62-7-109 regarding notices and the sending of documents to persons under this article apply for the purposes of notices and the sending of documents under this section.

REPORTER'S COMMENT

Providing decanting authority to a trustee, authority to appoint the property of an original trust to a second trust, provides a nonjudicial method for modifying an irrevocable trust when doing so would be in

the best interests of the beneficiaries or in furtherance of the purposes of the trust. Some examples of how decanting authority might be used by a trustee include: modifying the administrative or substantive provisions of a trust to account for a change in law, combining trusts to reduce administrative costs, limiting the authority of interested trustees, correcting scrivener's errors, and conforming the distribution provisions of a trust to the requirements of a special needs trust.

Subsection (a) authorizes a trustee with discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of the original trust to exercise that discretion by appointing all or part of such property to a second trust. This authority may be exercised whether the original trust grants the trustee absolute discretion over distributions or whether the trustee's discretion is limited by an ascertainable standard.

Subsections (b) and (c) affirm the broad decanting authority intended to be afforded to trustees to eliminate the uncertainty that was faced by trustees exercising decanting authority in reliance solely on common law principles. Subsection (b) provides that the trustee may exercise the power to decant whether or not there is a current need to distribute property under any standard provided in the original trust, for example, by decanting property from an original trust that limits distributions to an ascertainable standard to a second trust to promote administration of the trust or preservation of trust property. But see subdivision (d)(6), which prevents a trustee from exercising decanting authority to eliminate an ascertainable standard limiting the trustee's discretion in the original trust document.

Subsection (d) provides certain requirements for the terms of the second trust. Subdivisions (d)(1) and (d)(2) prevent a trustee from exercising decanting authority to add beneficiaries to the second trust who were not beneficiaries of the original trust or accelerate the interest of a beneficiary with only a future interest in the original trust to a present interest under the second trust. Subdivision (d)(3) and (d)(4) restrict a trustee's ability to modify terms of an original trust or a beneficiary's fixed interest in the trust if the original trust qualified for certain tax benefits. Under subdivision (d)(5), a trustee is required to preserve a beneficiary's power of withdrawal over trust property; the trustee may do so by either maintaining sufficient trust property in the original trust to satisfy the beneficiary's power of withdrawal, or by providing the beneficiary with an identical power of withdrawal under the terms of the second trust. Subdivision (d)(6) prevents a trustee from modifying any ascertainable standard governing the trustee's power to make distributions under the terms of the original trust.

Subdivision (d)(7) provides that the terms of the second trust may grant a power of appointment to a beneficiary of the original trust exercisable in favor of persons who are not beneficiaries of the original or second trust.

The remaining provisions of the statute address procedural concerns, including notice requirements and the procedure for decanting if the trustee is a beneficiary of the original trust. Subsection (e) prevents a trustee with a beneficial interest in the original trust from exercising the authority to decant, while preserving the ability to decant in circumstances where all trustees have an interest in the trust. Subsection (f) provides that the trustee's power to decant is considered the exercise of a special power of appointment, does not result in the trustee being treated as the settlor of the second trust, and is not prohibited by a spendthrift provision or a provision prohibiting amendment or revocation of the original trust. Subsection (g) provides the procedural requirements for effecting a decanting, including the requisite notice and the beneficiaries' ability to waive the notice period. Subsection (h) affirms that the provisions of section 62-7-816A do not create an affirmative duty in the trustee to exercise the special power to appoint, limit the trustee's decanting authority derived from some other source, or nullify any decanting provisions included in an original trust that are inconsistent with the provisions of this section. Subsection (i) allows either a trustee or beneficiary to seek court approval or disapproval of a proposed exercise of the decanting power, and subsection (j) incorporates the notice provisions of SCTC section 62-7-109.

Section 62-7-817. (a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

- (1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

REPORTER'S COMMENT

SCPC Section 62-3-906(b), which provides for a proposal for distribution by a personal representative, is analogous to this SCTC Section 62-7-817(a).

This section contains several provisions governing distribution upon termination. Other provisions of the SCTC relevant to distribution upon termination include Section 62-7-816(26) (powers upon termination to windup administration and distribution), and 62-7-1005 (limitation of action against trustee).

Subsection (a) addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of Section 62-7-1009. Section 62-7-1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. *See* Restatement (Second) of Trusts Section 216 (1959).

Section 62-7-818. The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons.

These powers and discretion may include, but are not limited to, the following:

- (1) modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;
- (2) increase or decrease the interests of any beneficiaries to the trust;
- (3) modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;
- (4) remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member;
- (5) terminate the trust;
- (6) veto or direct trust distributions;
- (7) change situs or governing law of the trust, or both;
- (8) appoint a successor trust protector;
- (9) interpret terms of the trust instrument at the request of the trustee;
- (10) advise the trustee on matters concerning a beneficiary; and
- (11) amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

The powers referenced in items (5), (6) and (11) may be granted notwithstanding the provisions of Sections 62-7-410 through 62-7-412, inclusive.

REPORTER'S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section expands and defines the powers of the trust protector. See comments to SCTC Section 62-7-808 (b) - (d).

Section 62-7-819. (a) Whenever a trust instrument provides that a trustee is to follow the direction of a trust investment advisor with respect to investment decisions or distribution decisions, then, except to the extent that the trust instrument provides otherwise, the trustee has no duty to:

- (1) monitor the conduct of the trust investment advisor;
- (2) provide advice to the trust investment advisor; or
- (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have

exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

(b) Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the trust investment advisor's authority, such as confirming that the trust investment advisor's directions have been carried out and recording and reporting actions taken at the trust investment advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the governing instrument and these administrative actions are not deemed to constitute an undertaking by the trustee to monitor the trust investment advisor or otherwise participate in actions within the scope of the trust investment advisor's authority.

(c) For purposes of this section, 'investment decision' means, with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof, or rights therein.

REPORTER'S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section defines the powers of a trust investment advisor.

Part 9

South Carolina Uniform Principal and Income Act

PREFATORY NOTE

In 2001 South Carolina enacted as part of its version of the Uniform Probate Code ("the South Carolina Probate Code or SCPC") the South Carolina Uniform Principal and Income Act, Sections 62-7-401 through 62-7-432 (SCUP &IA). This is South Carolina's version of the Uniform Principal and Income Act which had been recommended in 1997 by the Uniform Law Commissioners (ULC) for enactment in all the states. ULC's 1997 Uniform Principal and Income Act revised its original 1931 Uniform Principal and Income act (the 1931 Act) and its 1962 Revised Uniform Principal and Income Act (the 1962 Act). Likewise, 2001 SCUP&IA revised South Carolina's 1963 "Revised Uniform Principal and Income Act", Sections 62-7-401 through 62-7-421 (the 1963 SC Act). South Carolina did not enact ULC's 1931 Act. When in 2005 South Carolina enacted its version of ULC's recommended 2000 Uniform Trust Code as the South Carolina Trust

Code, SC Code Title 62, Article 7 (SCTC), SCUP&IA was retained, re-numbered and incorporated at SCTC Sections 62-7-901 through 932. Any reference elsewhere in the South Carolina Code to former SCPC Sections 62-7-401 through 432 should now refer to SCTC Sections 62-7-901 through 932.

The 1997 revision by ULC of its original 1931 Uniform Principal and Income Act (the 1931 Act) and its 1962 Revised Uniform Principal and Income Act (the 1962 Act) and the subsequent 2001 revision by South Carolina of its 1963 Revised Uniform Principal and Income Act (1963 SC Act) had two purposes:

(1) One purpose was to revise the 1931 and 1962 Acts and the 1963 SC Act, respectively. Revision was needed to support the now widespread use of the revocable living trust as a will substitute by the 1990s, to change the rules in those Acts that experience had shown needed to be changed, and to establish new rules to cover situations not provided for in the old Acts, including rules that apply to financial instruments invented since 1962.

(2) The other purpose was to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the principle of investing for total return rather than a certain level of "income" as traditionally perceived in terms of interest, dividends, and rents.

Revision of the 1931 and 1962 Acts and the corresponding 1963 SC Act.

The prior Acts and revision of those Acts dealt with four questions affecting the rights of beneficiaries:

(1) How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?

(2) When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?

(3) When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?

(4) After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?

Changes in the traditional sections are of three types: new rules that deal with situations not covered by the prior Acts, clarification of provisions in the 1962 Act, and changes to rules in the prior Acts.

New rules. Issues addressed by some of the more significant new rules include:

(1) The application of the probate administration rules to revocable living trusts after the settlor's death and to other terminating trusts. Sections 62-7-905 through 909.

(2) The payment of interest or some other amount on the delayed payment of an outright pecuniary gift that is made pursuant to a trust agreement instead of a will when the agreement does not provide for such a payment. Section 62-7-905(3).

(3) The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the old Acts deal only with partnership interests acquired from a decedent). Section 62-7-910.

(4) An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives. Section 62-7-912.

(5) The allocation of receipts from discount obligations such as zero-coupon bonds. Section 62-7-915(B).

(6) The allocation of net income from harvesting and selling timber between principal and income. Section 62-7-921.

(7) The allocation between principal and income of receipts from derivatives, options, and asset-backed securities. Sections 62-7-923 and 924.

(8) Disbursements made because of environmental laws. Section 62-7-926(A)(7).

(9) Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships. Section 62-7-929.

(10) The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. Section 62-7-930.

Clarifications and changes in existing rules. A number of matters provided for in the prior Acts have been changed or clarified in this revision, including the following:

(1) An income beneficiary's estate will be entitled to receive only net income actually received by a trust before the beneficiary's death and not items of accrued income. Section 62-7-909.

(2) Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions. Section 62-7-910.

(3) Distributions from corporations and partnerships that exceed 20% of the entity's gross assets will be principal whether or not intended by the entity to be a partial liquidation. Section 62-7-910 (D)(2).

(4) Deferred compensation is dealt with in greater detail in a separate section. Section 62-7-918.

(5) The 1962 Act rule for "property subject to depletion," (patents, copyrights, royalties, and the like), which provides that a trustee may allocate up to 5% of the asset's inventory value to income and the balance to principal, has been replaced by a rule that allocates 90% of the amounts received to principal and the balance to income. Section 62-7-919.

(6) The percentage used to allocate amounts received from oil and gas has been changed - 90% of those receipts are allocated to principal and the balance to income. Section 62-7-920.

(7) The unproductive property rule has been eliminated for trusts other than marital deduction trusts. Section 62-7-922.

(8) Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee. Section 62-7-927.

Coordination with the Uniform Prudent Investor Act

The law of trust investment has been modernized. See Uniform Prudent Investor Act (1994); Restatement (Third) of Trusts: Prudent Investor Rule (1992) (hereinafter Restatement of Trusts 3d: Prudent Investor Rule). Now it is time to update the principal and income allocation rules so the two bodies of doctrine can work well together. This revision deals conservatively with the tension between modern investment theory and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settlor, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio-based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee's ability to fully implement modern portfolio theory. [Since the early 1990s when this Prefatory Note and the following Comments were prepared by ULC, Restatement of Trusts 3d has progressed significantly as reported in the Forenote to Chapter 17 of what is now cited as "Restatement Third, Trusts":

The contents of this Chapter (Introduction and Sections 90-92) were approved at the American Law Institute's 1990 Annual Meeting and were originally published as Sections 227-229 of Restatement Third, Trusts (Prudent Investor Rule) in 1992 [referred to throughout this SCUP&IA Prefatory Note and the following Comments as either "Restatement of Trusts 3d; Prudent Investor Rule" or simply "1992 Restatement"]

Therefore, appropriate reference to Chapter 17 (Introduction and Sections 90-92) of Restatement Third, Trusts is suggested.]

As to modern investing see, e.g., the Preface to, terms of, and Comments to the Uniform Prudent Investor Act (1994); the discussion and reporter's note by Edward C. Halbach, Jr. in Restatement of Trusts 3d: Prudent Investor Rule; John H. Langbein, The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641 (1996); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); and Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U. L. Rev. 52 (1987). See also R.A. Brearly, An Introduction to Risk and Return from Common Stocks (2d ed. 1983); Jonathan R. Macey, An Introduction to Modern Financial Theory (2d ed. 1998). As to the need for principal and income reform see, e.g., Joel C. Dobris, Real Return, Modern Portfolio Theory and College, University and Foundation Decisions on Annual Spending From Endowments: A Visit to the World of Spending Rules, 28 Real Prop., Prob., & Tr. J. 49 (1993); Joel C. Dobris, The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?, 28 Real Prop., Prob., & Tr. J. 393 (1993); and Kenneth L. Hirsch, Inflation and the Law of Trusts, 18 Real Prop., Prob., & Tr. J. 601 (1983). See also, Jerold I. Horn, The Prudent Investor Rule B, Impact on Drafting and Administration of Trusts, 20 ACTEC Notes 26 (Summer 1994).

Section 62-7-901. This part may be cited as the South Carolina Uniform Principal and Income Act.

Section 62-7-902. As used in the South Carolina Uniform Principal and Income Act:

(1) 'Accounting period' means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(2) 'Beneficiary' includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) 'Fiduciary' means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) 'Income' means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Section 62-7-910 through Section 62-7-924.

(5) 'Income beneficiary' means a person to whom net income of a trust is or may be payable.

(6) 'Income interest' means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) 'Mandatory income interest' means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) 'Net income' means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under the South Carolina Uniform Principal and Income Act to or from income during the period.

(9) 'Person' means any individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government, governmental subdivision, agency, or instrumentality; or public corporation, or other legal or commercial entity.

(10) 'Principal' means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) 'Remainder beneficiary' means a person entitled to receive principal when an income interest ends.

(12) 'Terms of a trust' means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) 'Trustee' includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

REPORTER'S COMMENT

"Income beneficiary." The definitions of income beneficiary (Section 62-7-902(5)) and income interest (Section 62-7-902(6)) cover both mandatory and discretionary beneficiaries and interests. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the Act.

"Inventory value." There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Act and the 1963 SC Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement to income distributed from a probate estate).

"Net income." The reference to "transfers under this Act to or from income" means transfers made under Sections 62-7-904(A), 921(A), 926(B), 927(B), 904(A) and 930.

"Terms of a trust." This term was chosen in preference to "terms of the trust instrument" (the phrase used in the 1962 Act and the 1963 SC Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the (1959) and the Restatement (Second) of Trusts Sec. 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

Section 62-7-903. (A) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Sections 62-7-905 through 62-7-909, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in the South Carolina Uniform Principal and Income Act;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by the South Carolina Uniform Principal and Income Act;

(3) shall administer a trust or estate in accordance with the South Carolina Uniform Principal and Income Act if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and the South Carolina Uniform

Principal and Income Act do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(B) In exercising:

(1) the power to adjust pursuant to Section 62-7-904(A);
(2) a discretionary power in connection with the conversion or administration of a unitrust under Sections 62-7-904B through Section 62-7-904P; or

(3) a discretionary power of administration regarding a matter within the scope of the South Carolina Uniform Principal and Income Act, whether granted by the terms of a trust, a will, or the South Carolina Uniform Principal and Income Act, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with the South Carolina Uniform Principal and Income Act is presumed to be fair and reasonable to all of the beneficiaries.

REPORTER'S COMMENT

Prior Act. The rule in Section 62-7-404(1) of the 1963 SC Act is restated in Section 62-7-903(a), without changing its substance, to emphasize that this Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 62-7-404(a) of the 1963 SC Act applied only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 62-7-903(A) states that it also applies to matters within the scope of Sections 62-7-905 through 62-7-909. Section 62-7-903(A)(2) incorporates the rule in Section 62-7-404(b) of the 1963 SC Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1963 SC Act Section 62-7-404(a)(3) - "and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs" - because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual's decision-making process, it is probably the individual's decision to spend or to save, but this is not a useful guideline for trust administration. No case has been

found in which a court has relied on the “prudent man” rule of the 1963 SC Act.

Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts Sec 187. The situations in which a court will control will control the exercise of a trustee’s discretion are discussed in the comments to Sec 187. See also *id.* Sec 233 Comment p.

Questions for which there is no provision. Section 62-7-903(A)(4) allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation-indexed bonds might have fallen into this category had they been announced after the Uniform Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for the Uniform Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary’s level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 62-7-903(B) after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 62-7-904(A).

Duty of impartiality. Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule Sec 183 (1992). This rule applies whether the beneficiaries’ interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. *Id.* Sec 183, Comment *a.* “The precise meaning of the trustee’s duty of

impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time.” Id. Sec 232, Comment *c*.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 62-7-903(B) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

Section 62-7-904. (A) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the provisions in Section 62-7-903(A), that the trustee is unable to comply with Section 62-7-903(B). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Sections 62-7-904A through 62-7-904P, in which case the unitrust amount becomes the net income of the trust.

(B) In deciding whether and to what extent to exercise the power to adjust in subsection (A), a trustee shall consider all factors relevant to the trust and its beneficiaries, including, but not limited to:

- (1) the nature, purpose, and expected duration of the trust;
- (2) the intent of the settlor;
- (3) the identity and circumstances of the beneficiaries;
- (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) the assets held in the trust and the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property and the extent to

which an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount otherwise allocated to income under other sections of the South Carolina Uniform Principal and Income Act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(C) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction is allowed, in whole or in part, if the trustee did not have the power to make the adjustment, but only to the extent that making such an adjustment would cause adverse tax consequences under applicable tax laws and regulations;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside, but only to the extent that making such an adjustment would cause adverse tax consequences under applicable tax laws and regulations;

(5) if possessing or exercising the power to make an adjustment is determinative in causing an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment is determinative in causing all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would

not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust;

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly, except that a trustee may make an adjustment that also benefits a beneficiary even if the terms of the trust provide for trustee compensation as a percentage of the trust's income; or

(9) if the trust has been converted to, and is then operating as a unitrust under Sections 62-7-904B through 62-7-904P.

(D) If subsection (C)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(E) A trustee may release the entire power of adjustment in subsection (A) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power causes a result described in subsections (C)(1) through (6) or subsection (C)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not contemplated in subsection (C). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(F) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power to adjust in subsection (A).

REPORTER'S COMMENTS

Purpose and Scope of Provision. The purpose of Section 62-7-904 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 62-7-904(A) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 62-7-903(A) that he is unable to comply with Section 62-7-903(B). In

deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 62-7-904(B) but the trustee may not make an adjustment in circumstances described in Section 62-7-904(C).

Section 62-7-904 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 62-7-904(A) is the requirement in Section 62-7-903(B) that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts Sec.187 (1959). See also *id.* Sections 183, 232, 233, Comment *p* (1959).

Section 62-7-904 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 62-7-904 will be an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust - that the trustee invest and manage trust assets as a prudent investor - is expressed in this Act by language derived from the Uniform Prudent Investor Act (UPIA), but the condition will be met whether the prudent investor rule applies because the UPIA or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State's legislature or courts have not formally adopted the prudent investor rule, the Restatement establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior

Restatements.” Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory “legal list.”

The second condition will be met when the terms of the trust require all of the “income” to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust’s income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 62-7-903(A), i.e., he must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that he is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that he is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion - that he is unable to administer the trust impartially or that he is unable to achieve the degree of partiality required or permitted - he may exercise the power to adjust under Section 62-7-904(A).

Impartiality and productivity of income. The duty of impartiality between income and remainder beneficiaries is linked to the trustee’s duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust’s “income.” The 1962 Act and the 1963 SC Act imply that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive “delayed income”

from the sale proceeds of underproductive property under Section 62-7-415 of that Act arises if “any part of principal ... has not produced an average net income of a least one percent per year of its inventory value for more than a year” Under the prudent investor rule, “[t]o whatever extent a requirement of income productivity exists, ... the requirement applies not investment by investment but to the portfolio as a whole.” Restatement of Trusts 3d: Prudent Investor Rule Sec 227, Comment *i*, at 34. The power to adjust under Section 62-7-904(A) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 62-7-922(B) of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust’s assets “consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets ...” - in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 62-7-904(A) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio’s total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio’s liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule Sec 227, Comments *k-p*.

Factors to consider in exercising the power to adjust. Section 62-7-904(B) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 62-7-933(C)(3) of the South Carolina Uniform Prudent Investor Act (SCUPIA) sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 62-7-933(C)(3) of the SCUPIA are the source of the factors in paragraphs (3) through (6) and (8) of Section 62-7-904(B) (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the

same time the extent to which an adjustment from principal to income may be necessary under Section 62-7-904. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from the settlor. Section 62-7-933(D) of SCUPIA provides that “[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 62-7-904(B)(5); Uniform Prudent Investor Act Sec 3, Comment, 7B U.L.A. 18, at 25-26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule Sec 229 and Comments *a-e*.

Limitations on Section 62-7-904 power to adjust. The purpose of subsections (C)(1) through (4) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (C)(5), (6), and (8) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (C)(7) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (C)(1), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (C)(1) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property

(QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction. Subsection (C)(1) does not apply to a so-called "estate" trust. This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually. Reg. Sec 20.2056(c)-2(b)(1)(iii).

Subsection (C)(3) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 62-7-904(A). Subsection (C)(3) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater, subsection (C)(3) does not prevent a trustee from making an adjustment under Section 62-7-904(A) in determining the amount of the trust's income.

If subsection (C)(5), (6), (7), or (8), prevents a trustee from exercising the power to adjust, subsection (D) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

Release of the power to adjust. Section 62-7-904(E) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary's estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under subsection to release (E) to release just the power to adjust from income to principal.

Trust terms that limit a power to adjust. Section 62-7-904(F) applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be

construed as forbidding the use of the power to adjust under Section 62-7-904(A) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Examples. The following examples illustrate the application of Section 62-7-904:

Example (1) T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 62-7-904(B) T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

Example (2) T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 62-7-915 of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

Example (3) T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income

beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

Example (4) T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 62-7-904(A) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Example (5) T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of \$600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of \$900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 62-7-918(C) of this Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 62-7-903(B) include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be

subject to income tax on the amount that T distributes to the income beneficiary.

Example (6) T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 62-7-925(3). After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 62-7-904(B), T may exercise the power to adjust under Section 62-7-904(A) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 62-7-903(B).

Example (7) T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by \$2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 62-7-925(1) and the other one-half would have been paid from principal under Section 62-7-926(A)(1). After considering the total return from the portfolio as a whole and other relevant factors described in Section 62-7-904(B), T may exercise its power to adjust under Section 62-7-904(A) by transferring \$1,000, or half of the trust's proportionate share of the fee, from principal to income.

Section 62-7-904A. (A) A court may not change a fiduciary's decision, or order a fiduciary to change its decision, to exercise or not to exercise a discretionary power conferred by the South Carolina Uniform Principal and Income Act unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(B) The decisions subject to subsection (A) include, but are not limited to, a determination:

(1) pursuant to Section 62-7-904(A) of whether and to what extent an amount should be transferred from principal to income or from income to principal; and

(2) of the factors that are relevant to the trust and its beneficiaries, the extent to which they are relevant, and the weight, if any, to be given to the relevant factors, in deciding whether and to what extent to exercise the power in Section 62-7-904(A).

(C) If a court determines that a fiduciary has abused its discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) to the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court must order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position;

(2) to the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court must place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust;

(3) to the extent that the court is unable, after applying items (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the fiduciary had not abused its discretion, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust, or both.

(D) Upon a petition by the fiduciary, the court having jurisdiction over the trust or estate must determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power in the South Carolina Uniform Principal and Income Act would result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries would be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

REPORTER'S COMMENTS

General. All of the discretionary powers in this 1997 Act are subject to the normal rules that govern a fiduciary's exercise of discretion. Section 62-7-904A codifies those rules for purposes of the Act so that they will be readily apparent and accessible to fiduciaries, beneficiaries, their counsel and the courts if and when questions concerning such powers arise.

Section 62-7-904A also makes clear that the normal rules governing the exercise of a fiduciary's powers apply to the discretionary power to adjust conferred upon a trustee by Section 62-7-904(A). Discretionary provisions authorizing trustees to determine what is income and what is principal have been used in governing instruments for years; Section 2 of the 1931 Uniform Principal and Income Act recognized that practice by providing that "the person establishing the principal may himself direct the manner of ascertainment of income and principal...or grant discretion to the trustee or other person to do so..." Section 62-7-903(A)(2) also recognizes the power of a settlor to grant such discretion to the trustee. Section 62-7-904A applies to a discretionary power granted by the terms of a trust or a will as well as the power to adjust in Section 62-7-904A.

Power to Adjust. The exercise of the power to adjust is governed by a trustee's duty of impartiality, which requires the trustee to strike an appropriate balance between the interests of the income and remainder beneficiaries. Section 62-7-903(B) expresses this duty by requiring the trustee to "administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." Because this involves the exercise of judgment in circumstances rarely capable of perfect resolution, trustees are not expected to achieve perfection; they are, however, required to make conscious decisions in good faith and with proper motives.

In seeking the proper balance between the interests of the beneficiaries in matters involving principal and income, a trustee's traditional approach has been to determine the settlor's objectives from the terms of the trust, gather the information needed to ascertain the financial circumstances of the beneficiaries, determine the extent to which the settlor's objectives can be achieved with the resources available in the trust, and then allocate the trust's assets between stocks and fixed-income securities in a way that will produce a particular level or range of income for the income beneficiary. The key element in this process has been to determine the appropriate level or range of income for the income beneficiary, and that will continue to be the key element in deciding whether and to what extent to exercise the discretionary power conferred by Section 62-7-904(A). If it becomes necessary for a court to determine whether an abuse of the discretionary power to adjust between principal and income has occurred, the criteria should be the same as those that courts have used in the past to determine

whether a trustee has abused its discretion in allocating the trust's assets between stocks and fixed-income securities.

A fiduciary has broad latitude in choosing the methods and criteria to use in deciding whether and to what extent to exercise the power to adjust in order to achieve impartiality between income beneficiaries and remainder beneficiaries or the degree of partiality for one or the other that is provided for by the terms of the trust or the will. For example, in deciding what the appropriate level or range of income should be for the income beneficiary and whether to exercise the power, a trustee may use the methods employed prior to the enactment of SCUP&IA in 2001 in deciding how to allocate trust assets between stocks and fixed-income securities; or may consider the amount that would be distributed each year based on a percentage of the portfolio's value at the beginning or end of an accounting period, or the average portfolio value for several accounting periods, in a manner similar to a unitrust, and may select a percentage that the trustee believes is appropriate for this purpose and use the same percentage or different percentages in subsequent years. The trustee may also use hypothetical portfolios of marketable securities to determine an appropriate level or range of income within which a distribution might fall.

An adjustment may be made prospectively at the beginning of an accounting period, based on a projected return or range of returns for a trust's portfolio, or retrospectively after the fiduciary knows the total realized or unrealized return for the period; and instead of an annual adjustment, the trustee may distribute a fixed dollar amount for several years, in a manner similar to an annuity, and may change the fixed dollar amount periodically. No inference of abuse is to be drawn if a fiduciary uses different methods or criteria for the same trust from time to time, or uses different methods or criteria for different trusts for the same accounting period.

While a trustee must consider the portfolio as a whole in deciding whether and to what extent to exercise the power to adjust, a trustee may apply different criteria in considering the portion of the portfolio that is composed of marketable securities and the portion whose market value cannot be determined readily, and may take into account a beneficiary's use or possession of a trust asset.

Under the prudent investor rule, a trustee is to incur costs that are appropriate and reasonable in relation to the assets and the purposes of the trust, and the same consideration applies in determining whether and to what extent to exercise the power to adjust. In making investment decisions under the prudent investor rule, the trustee will have considered the purposes, terms, distribution requirements, and

other circumstances of the trust for the purpose of adopting an overall investment strategy having risk and return objectives reasonably suited to the trust. A trustee is not required to duplicate that work for principal and income purposes, and in many cases the decision about whether and to what extent to exercise the power to adjust may be made at the same time as the investment decisions. To help achieve the objective of reasonable investment costs, a trustee may also adopt policies that apply to all trusts or to individual trusts or classes of trusts, based on their size or other criteria, stating whether and under what circumstances the power to adjust will be exercised and the method of making adjustments; no inference of abuse is to be drawn if a trustee adopts such policies.

General rule. The first sentence of Section 62-7-904A(A) is from Restatement (Second) of Trusts Section 187 and Restatement (Third) of Trusts (Tentative Draft No. 2, 1999) Sec 50(1). The second sentence of Section 62-7-904A(A) derives from Comment e to Sec 187 of the Second Restatement and Comment b to Sec 50 of the Third Restatement.

The reference in Section 62-7-904A(A) to a fiduciary's decision to exercise or not to exercise a discretionary power underscores a fundamental precept, which is that a fiduciary has a duty to make a conscious decision about exercising or not exercising a discretionary power. Comment b to Section 50 of the Third Restatement states:

A court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

Section 62-7-904A(B) makes clear that the rule of subsection (B) applies not only to the power conferred by Section 62-7-904A but also to the evaluation process required by Section 62-7-904A(B) in deciding whether and to what extent to exercise the power to adjust. Under Section 62-7-904A(B) a trustee is to consider all of the factors that are relevant to the trust and its beneficiaries, including, to the extent the trustee determines they are relevant, the nine factors enumerated in Section 62-7-904A(B). Section 62-7-904A(B) derives from Section 62-7-933(C)(3) of SCUPIA which lists eight circumstances that a trustee shall consider, to the extent they are relevant, in investing and managing assets. The trustee's decisions about what factors are relevant for purposes of Section 62-7-904A(B) and the weight to be accorded each of the relevant factors are part of the discretionary

decision-making process. As such, these decisions are not subject to change for the purpose of changing the trustee's ultimate decision unless the court determines that there has been an abuse of discretion in determining the relevancy and weight of these factors.

Remedy. The exercise or nonexercise of a discretionary power under the act normally affects the amount or timing of a distribution to the income or remainder beneficiaries. The primary remedy under Section 62-7-904A(C) for abuse of discretion is the restoration of the beneficiaries and the trust to the positions they would have occupied if the abuse had not occurred. It draws on a basic principle of restitution that if a person pays money to someone who is not intended to receive it (and in a case to which this act applies, not intended by the settlor to receive it in the absence of an abuse of discretion by the trustee), that person is entitled to restitution on the ground that the payee would be unjustly enriched if he were permitted to retain the payment. See Restatement of Restitution Section 22 (1937). The objective is to accomplish the restoration initially by making adjustments between the beneficiaries and the trust to the extent possible; to the extent that restoration is not possible by such adjustments, a court may order the trustee to pay an amount to one or more of the beneficiaries, the trust, or both the beneficiaries and the trust. If the court determines that it is not possible in the circumstances to restore them to their appropriate positions, the court may provide other remedies appropriate to the circumstances. The approach of Section 105(c) is supported by Comment b to Section 50 of the Third Restatement of Trusts:

When judicial intervention is required, a court may direct the trustee to make or refrain from making certain payments; issue instructions to clarify the standards or guidelines applicable to the exercise of the power; or rescind the trustee's payment decisions, usually directing the trustee to recover amounts improperly distributed and holding the trustee liable for failure or inability to do so.

Advance determinations. Section 62-7-904A(D) employs the familiar remedy of the trustee's petition to the court for instructions. It requires the court to determine, upon a petition by the fiduciary, whether a proposed exercise or nonexercise of a discretionary power by the fiduciary of a power conferred by the Act would be an abuse of discretion under the general rule of Section 62-7-904A. If the petition contains the information prescribed in the second sentence of subsection (D) the proposed action or inaction is presumed not to result in an abuse, and a beneficiary who challenges the proposal must establish that it will.

Subsection (D) is intended to provide a fiduciary the opportunity to obtain an assurance of finality in a judicial proceeding before proceeding with a proposed exercise or nonexercise of a discretionary power. Its purpose is not, however, to have the court instruct the fiduciary how to exercise the discretion.

A fiduciary may also obtain the consent of the beneficiaries to a proposed act or an omission to act, and a beneficiary cannot hold the fiduciary liable for that act or omission unless:

(a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or

(b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the consent of the beneficiary was induced by improper conduct of the trustee.

Restatement (Second) of Trusts Sec 216.

If there are many beneficiaries, including some who are incapacitated or unascertained, the fiduciary may prefer the greater assurance of finality provided by a judicial proceeding that will bind all persons who have an interest in the trust.

Section 62-7-904B. The definitions in this section apply to Sections 62-7-904C through 62-7-904P.

(1) 'Code' means the Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor to the Code; reference to a specific section of the code in Sections 62-7-904B through 62-7-904P are considered a reference also to any successor provision dealing with the subject matter of that section of the Code.

(2) 'Disinterested person' means a person who is not a related or subordinate party with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.

(3) 'Express total return unitrust' means a trust created by the terms of a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent a year of the net fair market value of the amounts of the trust, valued at least annually.

(4) 'Income trust' means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the

trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons.

(5) 'Interested distributee' means a living beneficiary who is a distributee or permissible distributee of trust income or principal who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party with respect to that distributee.

(6) 'Interested trustee' means any of the following:

(a) an individual trustee who is a qualified beneficiary;

(b) a trustee who may be removed and replaced by an interested distributee;

(c) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(7) 'Legal disability' means a person under a legal disability who is a minor, an incompetent or incapacitated person, or an unborn individual, or whose identity or location is unknown.

(8) 'Qualified beneficiary' means a qualified beneficiary as defined in Section 62-7-103(12).

(9) 'Related or subordinate party' means a related or subordinate party as defined in Section 672(c) of the Code.

(10) 'Representative' means a person who may represent and bind another as provided in Part 3 of this article, the provisions of which apply for purposes of this section and Sections 62-7-904C through 62-7-904P.

(11) 'Settlor' means an individual, including a testator, who creates a trust.

(12) 'Total return unitrust' means an income trust that has been converted under and meets the provisions of this section and Section 62-7-904C through 62-7-904P.

(13) 'Treasury regulations' means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time.

(14) 'Trustee' means a person acting as trustee of the trust, except as otherwise expressly provided in this section and Sections 62-7-904C through 62-7-904P whether acting in that person's discretion or on the direction of one or more persons acting in a fiduciary capacity.

(15) 'Unitrust amount' means an amount computed as a percentage of the fair market value of the assets of the trust.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904C. (A) A trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter 'trustee') in the trustee's sole discretion and without court approval, may:

- (1) convert an income trust to a total return unitrust;
- (2) reconvert a total return unitrust to an income trust; or
- (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

- (a) The trustee adopts a written policy for the trust providing:

- (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined pursuant to the South Carolina Uniform Principal and Income Act;

- (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or

- (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

- (b) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62-7-904B through 62-7-904P, to:

- (i) the settlor of the trust, if living; and

- (ii) all persons who are the qualified beneficiaries of the trust at the time the notice is given. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.

- (c) There is at least:

- (i) one qualified beneficiary described in Section 62-7-103(12)(A) or (B) who is not under a legal disability or a representative of a qualified beneficiary so described; or

- (ii) one qualified beneficiary described in Section 62-7-103(12)(C) who is not under a legal disability or a representative of a qualified beneficiary so described.

- (d) No person receiving notice of the trustee's intention to take the proposed action objects to the action within ninety days after notice has been given. The objection must be by written notice to the trustee.

(B) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as

trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval:

- (1) convert an income trust to a total return unitrust;
- (2) reconvert a total return unitrust to an income trust; or
- (3) change the percentage used to calculate the unitrust amount

or the method used to determine the fair market value of the trust if all of the following apply:

(a) The trustee adopts a written policy for the trust providing:

(i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined pursuant to the South Carolina Uniform Principal and Income Act;

(ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined pursuant to the South Carolina Uniform Principal and Income Act rather than unitrust amounts, or

(iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(b) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee:

(i) the percentage to be used to calculate the unitrust amount;

(ii) the method to be used in determining the fair market value of the trust; and

(iii) which assets, if any, are to be excluded in determining the unitrust amount.

(c) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62-7-904B through 62-7-904P and the determinations of the disinterested person to:

(i) the settlor of the trust, if living; and

(ii) all persons who are the qualified beneficiaries of the trust at the time of the giving of the notice. If a qualified beneficiary is under a legal disability, notice must be given to the representative of the qualified beneficiary if a representative is available without court order.

(d) There is at least:

(i) one qualified beneficiary described in Section 62-7-103(12)(A) or (B) or a representative of a beneficiary so described; or

(ii) one qualified beneficiary described in Section 62-7-103(12)(C) or a representative of a qualified beneficiary so described.

(e) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within ninety days after notice has been given. The objection must be by written instrument delivered to the trustee.

(C) A trustee may act under subsection (A) or (B) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, if all of the following apply:

(1) Instead of sending written notice to the persons described in subsection (A)(3)(b) or subsection (B)(3)(b), as the case may be, the trustee shall send written notice to each charitable organization expressly designated to receive the income of the trust under the governing instrument and, if no charitable organization is expressly designated to receive all of the income of the trust under the governing instrument, to the Attorney General of this State.

(2) Subsection (A)(3)(d) or subsection (B)(3)(d) of this subsection, as the case may be, does not apply to this action.

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by Section 4942 of the Code.

(D) The provisions of Section 62-7-109 regarding notices and the sending of documents to persons under this article shall apply for purposes of notices and the sending of documents under this section.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904D. (A) If a trustee desires to:

- (1) convert an income trust to a total return unitrust;
- (2) reconvert a total return unitrust to an income trust; or
- (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets but does not have the ability to or elects not to do it under Section 62-7-904C, the trustee may petition the court for an order as the trustee considers appropriate. If there is only one trustee of the trust and the trustee is an interested trustee or if there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own

discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as necessary to enable the court to make its determinations under Sections 62-7-904B through 62-7-904P.

(B) A qualified beneficiary or a representative of a qualified beneficiary may request the trustee to:

- (1) convert an income trust to a total return unitrust;
- (2) reconvert a total return unitrust to an income trust; or
- (3) change the percentage used to calculate the unitrust amount

or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the qualified beneficiary or a representative of the qualified beneficiary may petition the court to order the trustee to take the action.

(C) All proceedings under this section must be conducted as provided in Part 2 of this article.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904E. (A) The fair market value of the trust assets must be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to the trustee to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained must be valued using valuation methods as are considered reasonable and appropriate by the trustee. Assets, such as a residence or tangible personal property, used by the trust beneficiary may be excluded by the trustee from the fair market value for computing the unitrust amount.

(B) The percentage to be used by the trustee in determining the unitrust amount must be a reasonable current return from the trust, but not less than three percent nor more than five percent, taking into account the intentions of the settlor of the trust as expressed in the terms of the trust, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust assets, and projected inflation and its impact on the trust.

(C) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) may, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in Section 1222(5) of the Code and then from net long-term capital gain described in Section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in Section 643(a) of the Code without regard to Section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and

(4) shall then consider the unitrust amount as coming from the principal of the trust.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904F. In administering a total return unitrust, the trustee may, in its sole discretion but subject to the terms of the trust, determine:

(1) the effective date of the conversion;

(2) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) if the trust is reconverted to an income trust, the effective date of the reconversion; and

(5) any other administrative issues as may be necessary or appropriate to carry out the purposes of Sections 62-7-904B through 62-7-904P.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904G. Conversion to a total return unitrust under Sections 62-7-904B through 62-7-904P does not affect any other provision of the terms of the trust, if any, regarding distributions of principal. For purposes of Sections 62-7-904B through 62-7-904P, the

distribution of a unitrust amount is considered a distribution of income and not of principal.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904H. No trustee or disinterested person who in good faith takes or fails to take any action under Sections 62-7-904B through 62-7-904P is liable to any person affected by the action or inaction, regardless of whether the person received written notice as provided in Sections 62-7-904B through 62-7-904P and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by such action or inaction is to obtain an order of the court directing the trustee to:

- (1) convert an income trust to a total return unitrust;
- (2) reconvert from a total return unitrust to an income trust; or
- (3) change the percentage used to calculate the unitrust amount.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904I. Sections 62-7-904B through 62-7-904P apply to all trusts in existence on, or created after the effective date of Sections 62-7-904A through 62-7-904P unless:

- (1) the governing instrument contains a provision clearly expressing the settlor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;
- (2) the trust is a trust described in Section 170(f)(2)(B), Section 664(d), Section 2702(a)(3), or Section 2702(b) of the Code;
- (3) the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes; or
- (4) the governing instrument expressly prohibits use of Sections 62-7-904B through 62-7-904P by specific reference to Sections 62-7-904B through 62-7-904P or expressly states the settlor's intent that net income not be calculated as a unitrust amount.

A provision in the terms of the trust that 'the provisions of Sections 62-7-904B through 62-7-904P of this part or any corresponding provision of future law, must not be used in the administration of this trust,' or 'the trustee shall not determine the distributions to the income beneficiary as a unitrust amount,' or similar words reflecting that intent

is sufficient to preclude the use of Sections 62-7-904B through 62-7-904P.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904J. RESERVED

Section 62-7-904K. RESERVED

Section 62-7-904L. RESERVED

Section 62-7-904M. (A) The unitrust amount to be distributed by the express total return unitrust may be determined by the terms of the unitrust governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple-year basis.

(B) The terms of an express total return unitrust governing instrument may provide that:

(1) any assets of such a unitrust for which a fair market value cannot be readily ascertained must be valued using valuation methods that the trustee considers reasonable and appropriate;

(2) any assets of such a unitrust, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded by the trustee from the net fair market value for computing the unitrust amount.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904N. The distribution from an express total return unitrust of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent reasonably apports between the income beneficiaries and the remainder of the total return of an express total return unitrust.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904O. (A) The terms of an express total return unitrust governing instrument may provide the method similar to the method provided under Section 62-7-904C for changing the unitrust

percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(B) If the terms of an express total return unitrust governing instrument do not specifically or by reference to Section 62-7-904C grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power.

REPORTER'S COMMENTS

See comments after Section 62-7-904P.

Section 62-7-904P. Unless the terms of the express total return unitrust governing instrument specifically provide otherwise, the trustee:

(A) shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(B) shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(C) may, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in Section 1222(5) of the Code and then from net long-term capital gain described in Section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in Section 643(a) of the Code without regard to Section 1.643(a)-3(b) of the Treasury Regulations; and

(D) shall then consider the unitrust amount as coming from the principal of the trust.

REPORTER'S COMMENTS

Background. The Uniform Prudent Investor Act (UPIA), enacted in 1994 by the Uniform Law Commission (ULC), embodies basic principles for an investment regime, "especially the principle of investing for total return rather than a certain level of 'income' as traditionally perceived in terms of interest, dividends, and rents," based on categories of receipts. Total return investing is established by the ULC as the investment regime of a "prudent investor", and UPIA provides that trustees "shall invest and manage trust assets as a prudent investor would" in default of contrary provisions in the terms of the trust. There is a fundamental distinction, however, between needs of trust income beneficiaries and those of trust principal or remainder beneficiaries, which affects the duty of trustees to administer trusts

“impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or will clearly manifest an intention that the fiduciary [trustee] shall or may favor one or more of the beneficiaries.” These inherent conflicts could in any given situation make it problematic for the trustee to comply with the duty of impartiality. For example, in a low interest/low dividend environment, a prudent investor investing for total return would normally invest less for interest/dividend return and more for capital gains return. The result: an income beneficiary receives, for example, only a one percent return for the year while the remainder beneficiary reaps the rewards of the capital gains. Of course, the opposite would be true in a double-digit high interest/high dividend environment. In neither case would the trustee’s conduct comply with its duty of impartiality, nor would the results be fair and reasonable for the respective beneficiaries affected. Realizing this dilemma for trustees, the ULC addressed this issue in its work on amending its 1962 Revised Uniform Principal and Income Act. This work produced ULC’s 1997 Uniform Principal and Income Act (UP&IA) which includes ULC’s approach to providing assistance to trustees: the power to adjust. South Carolina enacted versions of both UPIA (as SCUPIA) and UP&IA (as SCUP&IA), effective on the same date, July 18, 2001.

Alternate Approach. The power to adjust was not the only approach considered to provide assistance to trustees. During the late 1990s and early 2000s, some states began working independently of the ULC on various versions of unitrust powers for trustees. In the early 2000s, some states enacted unitrust versions with no power to adjust or other ULC provisions. Other states enacted versions of the UP&IA incorporating their respective unitrust versions, thereby having both the power to adjust and their respective unitrust powers as options. No unitrust approach has ever been included in the UP&IA. South Carolina did not include any such unitrust option in 2001 when it enacted SCUP&IA. In the years since 2001, however, the unitrust approach has become increasingly recognized among the states as an established alternative to the power to adjust. The 2013 South Carolina amendments adopted a unitrust option, in subsections 904A through 904P.

Purpose and Scope of Unitrust Option. The purpose of Sections 62-7-904B through 62-7-904P is similar to that of Section 62-7-904 (power to adjust): to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio’s total return in the form of traditional trust accounting income categories such as interest, dividends, and rents.

Section 62-7-904C(A) authorizes a trustee who meets the qualifications set forth in this section to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply: (a) The trustee adopts a written policy for the trust that contains the three provisions that follow numbered (i), (ii), and (iii); (b) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62-7-904B through 62-7-904P, to those persons described in the two provisions that follow numbered (i) and (ii); (c) There is at least one qualified beneficiary or a representative described in the two provisions that follow numbered (i) and (ii); (d) No person receiving notice of the trustee's intention to take the proposed action objects to the proposed action within ninety days after notice has been given. An objection must be by written notice to the trustee. Section 62-7-904C(B) authorizes an interested trustee or a majority of interested trustees (if there is no trustee of the trust other than an interested trustee) in its or their sole discretion and without court approval to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply: (a) The trustee adopts a written policy for the trust that contains the three provisions that follow numbered (i), (ii), and (iii); (b) The trustee appoints a disinterested person who, in its sole discretion but acting in its fiduciary capacity, determines for the trustee the three items that follow numbered (i), (ii), and (iii); (c) The trustee gives written notice of its intention to take the action, include copies of the written policy and Sections 62-7-904B through 62-7-904P and the determinations of the disinterested person to those persons described in the two provisions that follow numbered (i) and (ii); (d) There is at least one qualified beneficiary or a representative described in the two provisions that follow numbered (i) and (ii); (e) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determinations of the disinterested person within ninety days after notice has been given. The objection must be by written instrument delivered to the trustee. Section 62-7-904C(C) authorizes a trustee to act under subsection (A) or (B) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, if all of the

provisions in the three subsections that follow numbered (1), (2), and (3) apply. Section 62-7-904C(D) provides that the provisions of Section 62-7-109 regarding notices and the sending of documents to persons under this article shall apply for purposes of notices and the sending of documents under this section.

Section 62-7-904D(A) provides that if a trustee desires to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets, but does not have the ability to or elects not to do it under Section 62-7-904C, the trustee may petition the court for an order as the trustee considers appropriate. If there is only one trustee of the trust and the trustee is an interested trustee or if there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as necessary to enable the court to make its determinations under Sections 62-7-904B through 62-7-904P. Section 62-7-904D(B) authorizes a qualified beneficiary or a representative of a qualified beneficiary to request the trustee to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets. If the trustee does not take the action requested, the qualified beneficiary or a representative of a qualified beneficiary may petition the court to order the trustee to take the action. Section 62-7-904D(C) provides that all proceedings under this section must be conducted as provided in Part 2 of this article.

Section 62-7-904E(A) requires that the fair market value of the trust assets be determined at least annually, using a valuation date selected by the trustee in its discretion, and that assets for which a fair market value cannot be readily ascertained be valued using valuation methods considered reasonable and appropriate by the trustee. This section authorizes the trustee, in its discretion, to use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to the trustee to reduce the impact of fluctuations in market value on the unitrust amount and to exclude from the fair market value for computing the unitrust amount assets such as a residence or tangible personal property used by the trust beneficiary. Section 62-7-904E(B) requires that the percentage used in determining

the unitrust amount be a reasonable current return from the trust, in any event not less than three percent nor more than five percent, taking into account the intentions of the settlor of the trust as expressed in the terms of the trust, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust assets, and projected inflation and its impact on the trust. Section 62-7-904E(C) provides that, following the conversion of an income trust to a total return unitrust, the trustee: (1) must consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust; (2) must then consider the unitrust amount as paid from ordinary income not allocable to net accounting income; (3) may, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and (4) must then consider the unitrust amount as coming from the principal of the trust.

Section 62-7-904F authorizes the trustee, in administering a total return unitrust, to determine in its sole discretion but subject to the provisions of the terms of the trust: (1) the effective date of the conversion; (2) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases; (3) whether distributions are to be made in cash or in kind or partly in cash and partly in kind; (4) if the trust is reconverted to an income trust, the effective date of the reconversion; and (5) any other administrative issues as may be necessary or appropriate to carry out the purposes of Sections 62-7-904B through 62-7-904P.

Section 62-7-904G clearly establishes that conversion to a total return unitrust under Sections 62-7-904B through 62-7-904P shall not affect any other provision of the terms of the trust, if any, regarding distributions of principal. For purposes of Sections 62-7-904B through 62-7-904P, the distribution of a unitrust amount is considered a distribution of income and not of principal.

Section 62-7-904H purports to establish evidence of good faith by the trustee or any disinterested person who takes or fails to take any action under Sections 62-7-904B through 62-7-904P as a complete defense against liability to any person affected by such action or

inaction, regardless of whether the person received written notice as provided in Sections 62-7-904B through 62-7-904P and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by an action or inaction shall be to obtain an order of the court directing the trustee (1) to convert an income trust to a total return unitrust, (2) to reconvert from a total return unitrust to an income trust, or (3) to change the percentage used to calculate the unitrust amount.

Section 62-7-904I addresses certain types of trusts and trust provisions or other default circumstances which cause Sections 62-7-904B through 62-7-904P not to apply to such trusts.

Section 62-7-904M(A) is the first of the four final sections that address the express total return unitrust as distinguished from the total return unitrust and the income trust. Each of these trusts is included in the definitions section, 62-7-904B where subsection (3) provides: 'Express total return unitrust' means a trust created by the terms of a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent a year of the net fair market value of the assets of the trust, valued at least annually. Note that this Section 62-7-904M(A) provides in addition to "annually": "or averaged on a multiple year basis." Section 62-7-904M(B) authorizes the terms of such governing instrument to provide that: (1) any assets of such a unitrust for which a fair market value cannot be readily ascertained must be valued using valuation methods that the trustee considers reasonable and appropriate; and (2) any assets of such a unitrust, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount.

Section 62-7-904N establishes South Carolina's critically important position on the effect of the distribution of such a unitrust amount: "The distribution from an express total return unitrust of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent reasonably apportions between the income beneficiaries and the remaindermen the total return of an express total return unitrust" (emphasis added).

Section 62-7-904O(A) authorizes the terms of an express total return unitrust governing instrument to provide the method similar to the method provided under Section 62-7-904C for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions. Section 62-7-904O(B) denies a trustee the power to change the unitrust

percentage or change to an income trust if the terms of an express total return unitrust governing instrument do not specifically or by reference to Section 62-7-904C grant such power to that trustee.

Section 62-7-904P provides that, unless the terms of the express total return unitrust governing instrument specifically provide otherwise, the trustee: (A) must consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust; (B) must then consider the unitrust amount as paid from ordinary income not allocable to net accounting income; (C) may, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and (D) must then consider the unitrust amount as coming from the principal of the trust.

Treasury Department and Internal Revenue Service (Treasury and Service). The promulgation by the ULC of its 1994 UPIA and 1997 UP&IA and the developing interest of the states in these two uniform laws, the 1997 UP&IA's power to adjust, and the alternative unitrust approach garnered Treasury and Internal Revenue Service interest in the late 1990s. During that period, there was a recognition that "state statutes are in the process of changing traditional concepts of income and principal in response to investment strategies that seek total positive return on trust assets". Considerable time and resources were devoted to addressing the various tax issues raised which culminated in the Treasury and the Service adopting 15 Treasury Regulations amendments. The effect of these amendments was to conform the regulations to the changes referred to above. These amendments were issued as final regulations generally effective January 2, 2004, and were published in 69 Federal Register No. 1, January 2, 2004, pp. 13-22, 26 CFR Parts 1, 20, 25, and 26 [TD 9102] RIN 1545-AX96.

The prefatory Summary, Background, and Explanation materials published with the final regulations referred to above are instructive, particularly the Service responses to many of the comments on the original proposed regulations that were published on February 15, 2001. Of the many Treasury and Service positions expressed in these materials on various issues that arose during this process, one of the

more instructive of these appears on page 16 under the heading "Trusts Qualifying for Gift and Estate Tax Marital Deductions":

The proposed regulations provide that a spouse will be treated as entitled to receive all net income from a trust, as required for the trust to qualify for the gift and estate tax marital deductions under Sec. 20.2056(b)-5(a)(1) of the Estate Tax Regulations Sec. 25.2523(e)-1(f)(1) of the Gift Tax Regulations, if the trust is administered under applicable state law that provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust and that meets the requirements of Sec. 1.643(b)-1. Thus, a spouse who, as the income beneficiary, is entitled in accordance with the state statute and the governing instrument to a unitrust amount of no less than 3% and no more than 5% would be entitled to all the income from the trust for purposes of qualifying the trust for the marital deduction.

Several commentators suggested that a trust that provides for a unitrust payment to the spouse should satisfy the income standard even in states that have not enacted legislation defining income as a unitrust amount or providing that a right to income may be satisfied by such a payment. The income distribution requirement that must be satisfied for a trust to qualify for the gift and estate tax marital deductions ensures that the spouse receives what is traditionally considered to be income from the assets held in trust. As previously discussed, the IRS and the Treasury Department believe that only if applicable state law has authorized a departure from traditional concepts of income and principal should such a departure be respected for Federal tax purposes. A state statute specifically authorizing certain unitrust amounts in satisfaction of an income interest or certain powers to adjust in conformance with the provisions of Sec.1.643(b)-1 would meet this standard. However, in the absence of a state statute, or, for example, a decision of the highest court of the state applicable to all trusts administered under that state's law, the applicable state law requirement will not be satisfied.

Section 62-7-905. After a decedent dies, in the case of an estate, or after an income interest in a trust ends, a fiduciary:

(1) of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary pursuant to Sections 62-7-907 through 62-7-930 which apply to trustees and the provisions of item (5). The fiduciary shall distribute the net income and net

principal receipts to the beneficiary who is to receive the specific property;

(2) shall determine the remaining net income of a decedent's estate or a terminating income interest pursuant to Sections 62-7-907 through 62-7-930 which apply to trustees and by:

(a) including in net income all income from property used to discharge liabilities;

(b) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on death taxes; except that the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income does not cause the reduction or loss of the deduction; and

(c) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law;

(3) shall distribute to a beneficiary who receives a pecuniary amount outright the rate of interest or other amount provided by the will or the terms of the trust. If the will or the terms of the trust provide no interest amount, the beneficiary of a pecuniary amount outright shall receive no interest or other income on the bequest for one year after the first appointment of a personal representative. Beginning one year after the first appointment of a personal representative, and notwithstanding any other provision of law to the contrary, the beneficiary of a pecuniary amount outright must be treated as any other beneficiary under item (4). If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust, the fiduciary shall treat the pecuniary amount as if it were required to be paid under a will and as if the payment were being made beginning one year after the first appointment of a personal representative;

(4) shall distribute the net income remaining after distributions required by item (3) in the manner pursuant to Section 62-7-906 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust; and

(5) may not reduce principal or income receipts from property described in item (1) because of a payment pursuant to Sections 62-7-924 and 62-7-925 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

REPORTER'S COMMENT

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power

of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sec 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

Gift of a pecuniary amount. Section 62-7-905(3) and (4) provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 62-7-408(b)(2) of the 1963 SC Act.

Interest on pecuniary amounts. Section 62-7-905(3) provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions*, App. B (4th ed. 1997).

Administration expenses and interest on death taxes. Under Section 62-7-905(2)(b) a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

Interest on Estate Taxes. Under the 1963 Act, Section 62-7-418(5) charges interest on estate and inheritance taxes to principal. The 1931 Act has no provision. Section 62-7-925(3) of this Act provides that, except to the extent provided in Section 62-7-905(2)(b) or (c), all interest must be paid from income.

Section 62-7-906.(A) Each beneficiary described in Section 62-7-905(4) is entitled to receive a portion of the net income equal to his fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(B) In determining a beneficiary's share of net income, the:

(1) beneficiary is entitled to receive a portion of the net income equal to his fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) fractional interest of the beneficiary in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) fractional interest of the beneficiary in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(4) distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(C) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(D) A trustee may apply the provisions of this section, to the extent that the trustee considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

REPORTER'S COMMENT

Relationship to Prior Acts. Section 62-7-906 retains the concept in Section 62-7-408(2) of the 1963 SC Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis

for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Act that has been noted by several commentators. See, e.g., Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions* 91 (4th ed. 1998); Thomas H. Cantrill, *Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation*, 10 *Prob. Notes* 322, 327 (1985).

Section 62-7-907. (A) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(B) An asset becomes subject to a trust on the date:

(1) it is transferred to the trust, in the case of an asset that is transferred to a trust during the transferor's life;

(2) the testator dies, in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the estate; or

(3) the individual dies, in the case of an asset that is transferred to a fiduciary by a third party because of the death of the individual.

(C) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined pursuant to subsection (D), even if there is an intervening period of administration to wind up the preceding income interest.

(D) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

REPORTER'S COMMENT

Period during which there is no beneficiary. The purpose of the second part of subsection (D) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period

preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 62-7-908 and 909 apply accordingly if the terms of the trust do not contain different provisions.

Section 62-7-908. (A) A trustee shall allocate an income receipt or disbursement, other than one subject to Section 62-7-905(1), to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(B) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(C) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this part. Distributions to shareholders or other owners from an entity subject to Section 62-7-910 are considered due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

REPORTER'S COMMENT

Prior Acts. Professor Bogert stated that "Section 4 of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends." George G. Bogert, *The Revised Uniform Principal and Income Act*, 38 *Notre Dame Law. 50, 52* (1962). The 1962 Act also provided that an asset passing to an inter vivos trust by a bequest in the settlor's will is governed by the rule that applies to a testamentary trust, so that

different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor's life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to simplify administration, Section 62-7-908 of this Act applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

Periodic payments. Under Section 62-7-908 a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., *The American Law Relating to Income and Principal* 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent's securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor's death. Under the 1962 Act, the pre-death portion of the first periodic payment due after death was apportioned to principal in the case of a testamentary trust or securities bequeathed by will to an inter vivos trust.

Nonperiodic payments. Under the second sentence of Section 62-7-908(B) interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under Section 62-7-905(1) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 62-7-915.

Section 62-7-909. (A) In this section, 'undistributed income' means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or must be added to principal under the terms of the trust.

(B) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust, unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In that case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(C) When the obligation of a trustee to pay a fixed annuity or a fixed fraction of the value of the trust assets ends, the trustee shall prorate the final payment if, and to the extent, required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

REPORTER'S COMMENT

Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) provided that a deceased income beneficiary's estate is entitled to the undistributed income. The ULC Drafting Committee for the 1997 Act concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary's heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (A) changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

Example - Accrued periodic payments. The rules in Sections 62-7-908 and 909 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 62-7-908(A), the July 20 payment is added to the principal of the successive income interest when received.

Under Section 62-7-909(B), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section 62-7-909, neither the income beneficiary of the terminated income interest nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Beneficiary with an unqualified power to revoke. The requirement in subsection (B) to pay undistributed income to a mandatory income beneficiary or his estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. Without this exception, subsection (B) would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that he is permitted to withdraw, a trustee is not required to pay him or his estate the undistributed income attributable to the portion of the principal that he left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that he has been given or has not withdrawn the assets because he is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to him or his estate the undistributed income from the 75% that he cannot withdraw.

Section 62-7-910. (A) In this section, 'entity' means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or other organization in which a trustee has an interest other than a trust or estate subject to Section 62-7-911, a business or activity to which Section 62-7-912 applies, or an asset-backed security to which Section 62-7-924 applies.

(B) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(C) A trustee shall allocate the following receipts from an entity to principal:

- (1) property other than money;

(2) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) money received in total or partial liquidation of the entity;
and

(4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(D) Money is received in partial liquidation:

(1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) if the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity's gross assets of the entity, as shown by the year-end financial statements immediately preceding the initial receipt.

(E) Money is not received in partial liquidation, nor may it be taken into account pursuant to subsection (D)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(F) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

REPORTER'S COMMENT

Entities to which Section 62-7-910 applies. The reference to partnerships in Section 62-7-910(A) is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.

Capital gain dividends. If a capital gain dividend does not include any net short-term capital gain, cash received by a trust because of a net short-term capital gain is income under this Act.

Reinvested dividends. If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would

be principal. Making or continuing such an election would be equivalent to deciding under Section 62-7-904 to transfer income to principal in order to comply with Section 62-7-903(B). However, if the trustee makes or continues the election for a reason other than to comply with Section 62-7-903(B), e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

Distribution of property. The 1963 SC Act describes a number of types of property that would be principal if distributed by a corporation. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Section 62-7-910 embraces all of the items enumerated in the 1963 SC Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

Partial liquidations. Under subsection (D)(1) any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds twenty percent of the entity's gross assets, the entire distribution is a partial liquidation under subsection (D)(2) whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than twenty percent of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity's taxable income is ignored.

Other large distributions. A cash distribution may be quite large (for example, more than ten percent but not more than twenty percent of the entity's gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, ninety percent of which would have been allocated to principal if the trust had owned the assets directly. In such a case, the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 62-7-904(A) to make an adjustment between income and principal, subject to the limitations in Section 62-7-904(C).

Section 62-7-911. A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 62-7-910 or 62-7-924 applies to a receipt from the trust.

REPORTER'S COMMENT

Terms of the distributing trust or estate. Under Section 62-7-903(A) a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution - for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

Investment trusts. An investment entity to which the second sentence of this Section 62-7-911 applies includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements to which Section 62-7-924 applies. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165 (1997).

Section 62-7-912. (A) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the general accounting records of the trust, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(B) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or

activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the general accounting records of the trust to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(C) Activities for which a trustee may maintain separate accounting records include:

- (1) retail, manufacturing, service, and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) management of rental properties;
- (5) extraction of minerals and other natural resources;
- (6) timber operations; and
- (7) activities subject to Section 62-7-923.

REPORTER'S COMMENT

Purpose and scope. The provisions in Section 62-7-912 are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly-owned corporation (or, where permitted by state law, a single-member limited liability company), and to facilitate the trustee's ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 62-7-912 permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account for these activities in a "subtrust"; an individual trustee may continue to use the business and record-keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give

the trustee broad authority to select business record-keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 62-7-912 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up period, none of the proceeds would be income for purposes of Section 62-7-905.

Separate accounts. A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 62-7-912. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent's business practices, may continue the same banking arrangements that were used during the decedent's lifetime. In either case, the trustee is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

Section 62-7-913. A trustee shall allocate to principal:

(1) to the extent not allocated to income pursuant to this part, assets received from a transferor during his lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit;

(3) amounts recovered from third parties to reimburse the trust because of disbursements described in Section 62-7-926(A)(7) or for other reasons to the extent not based on the loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in Sections 62-7-917 through 62-7-924.

REPORTER'S COMMENT

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on a lease,

if that amount is not separately stated, the entire award is principal. The rule is the same in the 1931 and 1962 Acts and in the 1963 SC Act (Section 62-7-406(2)).

Section 62-7-914. To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

REPORTER'S COMMENT

Application of Section 62-7-912. This section applies to the extent that the trustee does not account separately under Section 62-7-912 for the management of rental properties owned by the trust.

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 62-7-914, a transfer from income to reimburse principal may be appropriate under Section 62-7-904 to the extent that some of the "rent" is really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 62-7-904 (B) in deciding whether and to what extent to make an adjustment between principal and income under Section 62-7-904(A) after considering the return from the portfolio as a whole.

Section 62-7-915. (A) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without provision for amortization of premium.

(B) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an

amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(C) This section does not apply to an obligation subject to Section 62-7-918, 62-7-919, 62-7-920, 62-7-921, or 62-7-924.

REPORTER'S COMMENT

Variable or floating interest rates. The reference in subsection (A) to variable or floating interest rate obligations is intended to clarify that, even though an obligation's interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 62-7-923.

Discount obligations. Subsection (B) applies to all obligations acquired at a discount, including short-term obligations such as U.S. Treasury Bills, long-term obligations such as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (B) the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to all discount obligations, this Act eliminates the provision in the 1962 Act for the payment from principal of an amount equal to the increase in the value of U.S. Series E bonds.

Subsection (B) also applies to inflation-indexed bonds - any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

Effect of Section 62-7-904. In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 62-7-904(A) a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

Section 62-7-916. (A) Except as otherwise provided in subsection (B), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if

the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(B) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Section 62-7-912, loss of profits from a business.

(C) This section does not apply to a contract subject to Section 62-7-918.

Section 62-7-917. If a trustee determines that an allocation between principal and income required by Section 62-7-918, 62-7-919, 62-7-920, 62-7-921, or 62-7-924 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances provided in Section 62-7-904(C) applies to the allocation. This power may be exercised by a cotrustee in the circumstances provided in Section 62-7-904(D) and may be released for the reasons and in the manner provided in Section 62-7-904(E). An allocation is presumed to be insubstantial if:

(1) the amount of the allocation increases or decreases net income in an accounting period, as determined before the allocation, by less than ten percent; or

(2) the value of the asset producing the receipt for which the allocation is made is less than ten percent of the total value of the assets of the trust at the beginning of the accounting period.

REPORTER'S COMMENT

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee's right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust's assets, which include a working interest in an oil well, have a value of \$1,000,000; the net income from the assets other than the working interest is \$40,000; and the net receipts from the working interest are \$400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating ten percent or \$40, to income under Section 62-7-920. If the net receipts from the working interest are \$35,000, so that the amount allocated to income under Section 62-7-920 would be \$3,500, the trustee may decide that this amount is sufficiently significant to the income beneficiary that the allocation provided for by Section 62-7-920 should be made, even though the trustee is still permitted under Section 62-7-917 to allocate all of the net receipts to principal because the \$3,500 would increase the net income of \$40,000, as

determined before making an allocation under Section 62-7-920 by less than ten percent. Section 62-7-917 will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 62-7-904(C) to eliminate claims that the power in this section has adverse tax consequences.

Section 62-7-918. (A) In this section:

(1) 'Payment' means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (D), (E), (F), and (G), the term also includes a payment from a separate fund, regardless of the reason for the payment.

(2) 'Separate fund' includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(B) To the extent that a payment is characterized as interest, a dividend, or a payment made instead of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(C) If part of a payment is not characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If a part of a payment is not required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not 'required to be made' to the extent that it is made because the trustee exercises a right of withdrawal.

(D) Except as otherwise provided in subsection (E), subsections (F) and (G) apply, and subsections (B) and (C) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) a trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

(2) a trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

(E) Subsections (D), (F), and (G) do not apply if and to the extent that the series of payments would, without the application of subsection (D), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

(F) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this act. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(G) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

(H) This section does not apply to payments subject to Section 62-7-919.

REPORTER'S COMMENT

Scope. Section 62-7-918 applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 62-7-919 i.e., "an asset whose value will diminish or terminate because the asset is expected to

produce receipts for a period of limited duration,” these payment rights are covered separately in Section 62-7-918 because of their special characteristics.

Section 62-7-918 applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and “private annuities” arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (C)).

Prior Acts. Under Section 12 of the 1962 Act and Section 62-7-414 of the 1963 SC Act, receipts from “rights to receive payments on a contract for deferred compensation” are allocated to income each year in an amount “not in excess of 5% per year” of the property’s inventory value. While “not in excess of 5%” suggests that the annual allocation may range from zero to five percent of the inventory value, in practice the rule is usually treated as prescribing a five percent allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent’s date of death. That rate may be much higher or lower than the average long-term interest rate. The amount determined under the five percent formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

Allocations Under Section 62-7-918(B). Section 62-7-918(B) applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For

example, some deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with "phantom" shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 62-7-918(B) payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 62-7-918(B) does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 62-7-918(C).

Allocations Under Section 62-7-918(C). The focus of Section 62-7-918, for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction (a situation that is provided for in Section 62-7-918(D)). An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 62-7-918(C) which

differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), ten percent of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 62-7-918 follows the rule in Section 62-7-913(2) which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 62-7-918(C) produces an allocation to income that is similar to the allocation under the 1962 Act formula and the 1963 SC Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 62-7-918 is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

Marital Deduction Requirements. When an IRA or other retirement arrangement (a “plan”) is payable to a marital deduction trust, the IRS treats the plan as a separate property interest that itself must qualify for the marital deduction. IRS Revenue Ruling 2006-26 said that, as written, the prior uniform act version of Section 62-7-918 does not cause a trust to qualify for the IRS’ safe harbors. Revenue Ruling 2006-26 was limited in scope to certain situations involving IRAs and defined contribution retirement plans. Without necessarily agreeing with the IRS’ position in that ruling, the revision to this section is designed to satisfy the IRS’ safe harbor and to address concerns that might be raised for similar assets. No IRS pronouncements have addressed the scope of Code § 2056(b)(7)(C).

Subsection (F) requires the trustee to demand certain distributions if the surviving spouse so requests. The safe harbor of Revenue Ruling 2006-26 requires that the surviving spouse be separately entitled to demand the fund’s income (without regard to the income from the trust’s other assets) and the income from the other assets (without regard to the fund’s income). In any event, the surviving spouse is not required to demand that the trustee distribute all of the fund’s income from the fund or from other trust assets. Treas. Reg. § 20.2056(b)-5(f)(8).

Subsection (F) also recognizes that the trustee might not control the payments that the trustee receives and provides a remedy to the surviving spouse if the distributions under subsection (d)(1) are insufficient.

Subsection (G) addresses situations where, due to lack of information provided by the fund's administrator, the trustee is unable to determine the fund's actual income. The bracketed language is the range approved for unitrust payments by Treas. Reg. § 1.643(b)-1. In determining the value for purposes of applying the unitrust percentage, the trustee would seek to obtain the value of the assets as of the most recent statement of value immediately preceding the beginning of the year. For example, suppose a trust's accounting period is January 1 through December 31. If a retirement plan administrator furnishes information annually each September 30 and declines to provide information as of December 31, then the trustee may rely on the September 30 value to determine the distribution for the following year. For funds whose values are not readily available, subsection (G) relies on Code Section 7520 valuation methods because many funds described in Section 62-7-918 are annuities, and one consistent set of valuation principles should apply whether or not the fund is, in fact, an annuity.

Application of Section 62-7-904. Section 62-7-904(A) of this act gives a trustee who is acting under the prudent investor rule the power to adjust from principal to income if, considering the portfolio as a whole and not just receipts from deferred compensation, the trustee determines that an adjustment is necessary. See Example (5) in the comment following Section 62-7-904.

CODE COMMISSIONER'S COMMENT

For the effective dates and applicability of this section, see Act 204 of 2012.

Section 62-7-919. (A) In this section, 'liquidating asset' means an asset whose value diminishes or terminates because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 62-7-918, resources subject to Section 62-7-920, timber subject to Section 62-7-921, an activity subject to Section 62-7-923, an asset

subject to Section 62-7-924, or any asset for which the trustee establishes a reserve for depreciation pursuant to Section 62-7-927.

(B) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

REPORTER'S COMMENT

Prior Acts. Section 11 of the 1962 Act (Section 62-7-414 of the 1963 SC Act) allocates receipts from "property subject to depletion" to income in an amount "not in excess of 5%" of the asset's inventory value. The 1931 Act has a similar five percent rule that applies when the trustee is under a duty to change the form of the investment. The five percent rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under these prior Acts the balance of each year's receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 62-7-919 abandons the annuity approach under the five percent rule.

Lottery payments. The reference in subsection (A) to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 62-7-918.

Section 62-7-920. (A) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them if:

- (1) received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income;
- (2) received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal;
- (3) an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent must be allocated to principal and the balance to income;

(4) an amount is received from a working interest or any other interest not otherwise provided for in this subsection, ninety percent of the net amount received must be allocated to principal and the balance to income.

(B) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(C) This part applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(D) If a trust owns an interest in minerals, water, or other natural resources on the effective date of this part, the trustee may allocate receipts from the interest as provided in this part or in the manner used by the trustee before the effective date of this part. If the trust acquires an interest in minerals, water, or other natural resources after the effective date of this part, the trustee shall allocate receipts from the interest as provided in this part.

REPORTER'S COMMENT

Prior Acts. The 1962 Act and the 1963 SC Act allocate to principal as a depletion allowance, twenty seven and one-half percent of the gross receipts, but not more than fifty percent of the net receipts after paying expenses. Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for the "permanent severance of natural resources from the lands" to principal.

Section 62-7-920 allocates ninety percent of the net receipts to principal and ten percent to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

Application of Sections 62-7-912 and 917. This Section 62-7-920 applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 62-7-912 or allocate all of the receipts to principal under Section 62-7-917.

Open mine doctrine. The purpose of Section 62-7-920(C) is to abolish the "open mine doctrine" as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the

production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §239.3 (4th ed. 1988), and *Nutter v. Stockton*, 626 P.2d 861 (Okla. 1981).

Effective date provision. Section 9(b) of the 1962 Act and Section 4122(b) of the SC Act provide that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate, based on the opinion in the Oklahoma case of *Franklin v. Margay Oil Corporation*, 153 P.2d 486, 501 (Okla. 1944). Section 62-7-920(D) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the property's situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust's asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 648, at 531, 533-534; Sec 657, at 600 (4th ed. 1989).

Section 62-7-921. (A) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts to:

(1) income, to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) principal, to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) or between income and principal, if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying items (1) and (2); or

(4) principal, to the extent that advance payments, bonuses, and other payments are not otherwise allocated pursuant to this subsection.

(B) In determining net receipts to be allocated pursuant to subsection (A), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(C) This part applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(D) If a trust owns an interest in timberland on the effective date of this part, the trustee may allocate net receipts from the sale of timber and related products as provided in this part or in the manner used by the trustee before the effective date of this part. If the trust acquires an interest in timberland after the effective date of this part, the trustee shall allocate net receipts from the sale of timber and related products as provided in this part.

REPORTER'S COMMENT

Scope of section. The rules in Section 62-7-921 are intended to apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (A) applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (A) the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

Application of Sections 62-7-912 and 917. This Section 62-7-921 applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 62-7-912 or allocate all of the receipts to principal under Section 62-7-917. The option to account for net receipts separately under Section 62-7-912 takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

Section 62-7-922. (A) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the surviving spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income pursuant to Section 62-7-904 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power in Section 62-7-904(A). The trustee may decide which action or combination of actions to take.

(B) If subsection (A) is inapplicable, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

REPORTER'S COMMENT

Prior Acts' Conflict with the South Carolina Uniform Prudent Investor Act. Section 62-7-933(C)(2) of SCUPIA provides that "[a] trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole" The underproductive property provisions in Section 12 of the 1962 Act, Section 62-7-415 of the 1963 SC Act, and Section 11 of the 1931 Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In each Act the provision applies on an asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 62-7-933(C)(2) of SCUPIA. Moreover, in determining the amount of delayed income, the prior Acts do not permit a trustee to take into

account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 62-7-904(B)(7) of this Act, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to exercise the power to adjust conferred by Section 62-7-904(A).

Duty to make property productive of income. In order to implement SCUPIA, this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 62-7-904 of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. Sec 1.7520-3(b)(2)(v) *Example (1)*, Sec 20.7520-3(b)(2)(v) *Examples (1) and (2)*, and Sec 25.7520-3(b)(2)(v) *Examples (1) and (2)*, which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

Marital deduction trusts. Subsection (A) draws on language in Reg. Sec 20.2056(b)-5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse's right to compel the trustee to make property productive of income. The trustee should also consider the application of Section 62-7-904 of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule Sec 240, at 186, app. Sec 240, at 252 (1992). Example (6) in the Comment to Section 62-7-904 describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 62-7-904 may apply.

Once the two conditions have occurred - insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action under this section - the trustee must act; but instead of the formulaic approach of both the 1962 and the 1963 SC Acts which is triggered only if the trustee sells the property, this Act permits the trustee to decide whether to make the property productive of income,

convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 62-7-904(A) to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 62-7-922 the power under Section 62-7-904(A) would be exercised to transfer principal to income and not to transfer income to principal.

Section 62-7-922 does not apply to a so-called "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies. Reg. Sec 20.2056(c)-2(b)(1)(iii).

Section 62-7-923. (A) In this section, 'derivative' means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(B) To the extent that a trustee does not account pursuant to Section 62-7-912 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(C) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

REPORTER'S COMMENT

Scope and application. It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees. If the

trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 62-7-910 and not Section 62-7-923. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 62-7-912; if a trustee chooses not to account under Section 62-7-912. Section 62-7-923(B) provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (C) to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

Definition of “derivative.” “Derivative” is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract-based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled “Accounting for Derivative and Similar Financial Instruments and for Hedging Activities,” which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The definition in Section 62-7-923(A) is derived in part from the FASB definition. The purpose of the definition in subsection (A) is to implement the substantive rule in subsection (B) that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 62-7-912. As a result, it is much shorter than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms. FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

The definition of *derivative financial instrument* in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that “... a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics.” However, the continued development of financial

markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The ULC, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

Marking to market. A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts.

Receipt of property other than cash. If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 62-7-913(2).

Options. Options to which subsection (C) applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (C) would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between owners of an entity.

Section 62-7-924. (A) In this section, 'asset-backed security' means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset subject to Section 62-7-909 or 62-7-918.

(B) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(C) If a trust receives one or more payments in exchange for the entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of

a series of payments that results in the liquidation of the interest of the trust in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

REPORTER'S COMMENT

Scope of section. Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an "interest only" or a "principal only" security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in either the capital appreciation of an underlying security or in the interest or dividend return from such a security, such as the "Primes" and "Scores" issued by Americus Trust. An asset-backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 62-7-911 whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of this Act would be allocated entirely to principal under the rule in Section 62-7-903(A)(4) and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 62-7-904 taking into account the return from the portfolio as whole and other relevant factors.

Section 62-7-925. A trustee shall make the following disbursements from income to the extent that they are not disbursements subject to Section 62-7-905(2)(b) or (c):

- (1) one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;
- (2) one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;
- (3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a

proceeding or other matter that concerns primarily the income interest;
and

(4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

REPORTER'S COMMENT

Trustee fees. The regular compensation of a trustee or the trustee's agent includes compensation based on a percentage of either principal or income or both.

Insurance premiums. The reference in paragraph (4) to "recurring" premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 62-7-926(A)(5).

Regularly recurring taxes. The reference to "regularly recurring taxes assessed against principal" includes all taxes regularly imposed on real property and tangible and intangible personal property.

Section 62-7-926. (A) A trustee shall make the following disbursements from principal:

(1) the remaining one-half of the disbursements provided in Section 62-7-925(1) and (2);

(2) all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) payments on the principal of a trust debt;

(4) expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) premiums paid on a policy of insurance not provided in Section 62-7-925(4) of which the trust is the owner and beneficiary;

(6) estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(B) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

REPORTER'S COMMENT

Environmental expenses. All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 62-7-928. However, the ULC Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 62-7-926(A)(7) on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 62-7-912. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts - when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 62-7-928(A) and (B)(5) a trustee who makes or expects to make a principal disbursement for an environmental expense described in Section 62-7-926(A)(7) is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 62-7-926(A)(7) is based upon the definition of an "environmental remediation trust" in Treas. Reg. Sec 301.7701-4(e)(as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the

definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust's property, referred to in Section 62-7-926(A)(4) include an "action to assure title" that is mentioned in Section 13(c)(2) of the 1962 Act and Section 62-7-418(2) of the 1963 SC Act.

Insurance premiums. Insurance premiums referred to in Section 62-7-926(A)(5) include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 or 1963 SC Act for life insurance premiums.

Taxes. Generation-skipping transfer taxes are payable from principal under Section 62-7-926(A)(6).

Section 62-7-927. (A) In this section, 'depreciation' means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(B) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent's estate; or

(3) under this section if the trustee is accounting pursuant to Section 62-7-912 for the business or activity in which the asset is used.

(C) An amount transferred to principal need not be held as a separate fund.

REPORTER'S COMMENT

Prior Acts. The 1931 Act has no provision for depreciation. Sections 13(a)(2) of the 1962 Act and 62-7-417(2) of the 1963 SC Act provide that a charge shall be made against income for "... a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles" That provision has been

resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee for the 1997 NCCUSL Act concluded that the decision to provide for depreciation should be discretionary with the trustee. The power to transfer funds from income to principal that is granted by this section is a "discretionary power of administration" referred to in Section 62-7-903(B) and in exercising the power a trustee must comply with Section 62-7-903(B).

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 62-7-928(B)(4) permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

Section 62-7-928. (A) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(B) A principal disbursement for purposes of this section includes the following, but only to the extent that the trustee has not been, and does not expect to be, reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) a disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) a periodic payment on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) a disbursement described in Section 62-7-926(A)(7).

(C) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income

interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (A).

REPORTER'S COMMENT

Prior Acts. The South Carolina sources of Section 62-7-928 are: Section 62-7-417(b) of the 1963 SC Act, which permits a trustee to "regularize distributions," if charges against income are unusually large, by using "reserves or other reasonable means" to withhold sums from income distributions; and Section 62-7-417(a)(2) of the 1963 SC Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs and capital improvements. [Note, however, that "special assessments" are not specifically mentioned in Section 62-7-417(a)(2) of the 1963 SC Act.] Section 12(3) of the 1931 Act permits the trustee to spread income expenses of unusual amount "throughout a series of years." Section 62-7-928 of this Act contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (B)(4) the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.

Section 62-7-929. (A) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(B) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(C) A tax required to be paid by a trustee on the trust's share of the taxable income of the entity must be paid:

(1) from income, to the extent that receipts from the entity are allocated to income;

(2) from principal, to the extent that receipts from the entity are allocated only to principal;

(3) proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) from principal to the extent that the tax exceeds the total receipts from the entity.

(D) After applying subsections (A) through (C), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

REPORTER'S COMMENT

Taxes on Undistributed Entity Taxable Income. When a trust owns an interest in a pass-through entity, such as a partnership or "S" corporation, it must report its share of the entity's taxable income regardless of how much the entity distributes to the trust. Whether the entity distributes more or less than the trust's tax on its share of the entity's taxable income, the trust must pay the taxes and allocate them between income and principal.

Subsection (C) requires the trust to pay the taxes on its share of an entity's taxable income from income or principal receipts to the extent that receipts from the entity are allocable to each. This assures the trust a source of cash to pay some or all of the taxes on its share of the entity's taxable income. Subsection (D) recognizes that, except in the case of an Electing Small Business Trust (ESBT), a trust normally receives a deduction for amounts distributed to a beneficiary. Accordingly, subsection (D) requires the trust to increase receipts payable to a beneficiary as determined under subsection (C) to the extent the trust's taxes are reduced by distributing those receipts to the beneficiary.

Because the trust's taxes and amounts distributed to a beneficiary are interrelated, the trust may be required to apply a formula to determine the correct amount payable to a beneficiary. This formula should take into account that each time a distribution is made to a beneficiary, the trust taxes are reduced and amounts distributable to a beneficiary are increased. The formula assures that after deducting distributions to a beneficiary, the trust has enough to satisfy its taxes on its share of the entity's taxable income as reduced by distributions to beneficiaries.

Example (1) - Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of \$1 million. Partnership P distributes \$100,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T's tax on \$1 million of taxable income is \$350,000. Under subsection (C) T's tax must be paid from income receipts because receipts from the entity are allocated only to income. Therefore, T must apply the entire \$100,000 of income receipts to pay its tax. In this case, Beneficiary B receives nothing.

Example (2) - Trust T receives a Schedule K-1 from Partnership P reflecting taxable income of \$1 million. Partnership P distributes \$500,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T's tax on \$1 million of taxable income is \$350,000. Under subsection (C), T's tax must be paid from income receipts because receipts from P are allocated only to income. Therefore, T uses \$350,000 of the \$500,000 to pay its taxes and distributes the remaining \$150,000 to B. The \$150,000 payment to B reduces T's taxes by \$52,500, which it must pay to B. But the \$52,500 further reduces T's taxes by \$18,375, which it also must pay to B. In fact, each time T makes a distribution to B, its taxes are further reduced, causing another payment to be due B.

Alternatively, T can apply the following algebraic formula to determine the amount payable to B:

$$D = (C - R * K) / (1 - R)$$

D = Distribution to income beneficiary
 C = Cash paid by the entity to the trust
 R = tax rate on income
 K = entity's K-1 taxable income

Applying the formula to Example (2) above, Trust T must pay \$230,769 to B so that after deducting the payment, T has exactly enough to pay its tax on the remaining taxable income from P.

Taxable Income per K-1	\$1,000,000
Payment to beneficiary	\$230,769 [1]
Trust Taxable Income	\$769,231
35 percent tax	\$269,231
Partnership Distribution	\$500,000
Fiduciary's Tax Liability	(\$269,231)
Payable to the Beneficiary	\$230,769

In addition, B will report \$230,769 on his or her own personal income tax return, paying taxes of \$80,769. Because Trust T withheld \$269,231 to pay its taxes and B paid \$80,769 taxes of its own, B bore the entire \$350,000 tax burden on the \$1 million of entity taxable income, including the \$500,000 that the entity retained that presumably increased the value of the trust's investment entity.

If a trustee determines that it is appropriate to do so, it should consider exercising the discretion granted in Section 62-7-930 to adjust between income and principal. Alternatively, the trustee may exercise the power to adjust under Section 62-7-904 to the extent it is available and appropriate under the circumstances, including whether a future

distribution from the entity that would be allocated to principal should be reallocated to income because the income beneficiary already bore the burden of taxes on the reinvested income. In exercising the power, the trust should consider the impact that future distributions will have on any current adjustments.

[1] $D = (C - R * K) / (1 - R) = (500,000 - 350,000) / (1 - .35) = \$230,769$. (D is the amount payable to the income beneficiary, K is the entity's K-1 taxable income, R is the trust ordinary tax rate, and C is the cash distributed by the entity)

Section 62-7-930. (A) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions, other than those provided in subsection (B), that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(B) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

REPORTER'S COMMENT

Discretionary adjustments. Section 62-7-930(A) permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Section 62-7-930(A)(3) applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

Mandatory adjustment. Section 62-7-930(B) provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York's EPTL Sec 11-1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, Section 62-7-930(B) limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the

predecessor of EPTL Sec 11-1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is \$30,000 and the estate tax benefit would have been \$20,000, principal will be reimbursed \$20,000 and the net benefit to the income beneficiaries will be \$10,000.

Irrevocable grantor trusts. Under Sections 671-679 of the Internal Revenue Code (the "grantor trust" provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the trust's income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well-known tax result, many trusts have been created to produce this result, but there also may be trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlers who intend this tax result rarely state it as an objective in the terms of the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. Where the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust's income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

Section 62-7-931. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 62-7-932. RESERVED

Part 9A

South Carolina Uniform Prudent Investor Act

GENERAL COMMENT

Effective July 18, 2001, South Carolina enacted as part of its Uniform Probate Code (SCPC) the South Carolina Uniform Prudent Investor Act (SCUPIA), Section 62-7-302. This is South Carolina's version of the Uniform Prudent Investor Act (UPIA) which was enacted and recommended in 1994 by the Uniform Law Commission (ULC) for enactment in all the states. UPIA consists of 16 separate sections, the first ten of which are each followed by a separate ULC Comment; whereas, SCUPIA is a single section (multi-subsection) consolidation of (1) UPIA's first ten sections but without any of the ULC Comments, (2) two other UPIA sections which have never had any comments (Sections 12, "Uniformity of Application and Construction" and 13, "Short Title") and (3) two new subsections which are not in UPIA and have never had any comments (SCUPIA subsections (J) and (K)). The remaining four sections of UPIA are not in SCUPIA and have never had any comments. Thus, prior to 2005 SCUPIA had no ULC Comments. When in 2005 South Carolina enacted its version of ULC's recommended 2000 Uniform Trust Code as the South Carolina Trust Code (SCTC), SC Code Title 62, Article 7, SCUPIA was retained, re-numbered and incorporated at SCTC Section 62-7-933, but still without any ULC Comments. Now, with this 2013 (or "current") amendment, the ULC Comments are consolidated into a single Comment drafted specifically for South Carolina purposes and inserted immediately following SCUPIA. Again, any reference elsewhere in the South Carolina Code to former SCPC Section 62-7-302 should now refer to SCTC Section 62-7-933.

When in 2005 SCUPIA was retained, re-numbered and incorporated at SCTC Section 62-7-933, certain subsections of SCUPIA as it had been originally enacted in 2001 (SCPC Section 62-7-302) were deleted as recommended by ULC because they were duplicative of provisions in the newly enacted SCTC: former SCPC Section 62-7-302(C)(6), (F), and (H). The correlative provisions of SCTC, which govern investment, management, and distribution of trust assets (i.e., trust administration), are broader in perspective than the deleted SCPC subsections, which governed only investment and management of trust assets. SCTC Section 62-7-933(C)(5)(c) retains and incorporates former SCPC Section 62-7-602.

Over the quarter century from the late 1960's to the early 1990s the investment practices of fiduciaries experienced significant change. ULC's Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as "modern portfolio theory."

UPIA, now enacted in South Carolina as SCUPIA at Section 62-7-933, draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992) [hereinafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement]. [Since the early 1990's when the uniform version of this Prefatory Note and the following Comments were prepared by ULC, Restatement of Trusts 3d has progressed significantly as reported in the Forenote to Chapter 17 of what is now cited as "Restatement Third, Trusts":

The contents of this Chapter (Introduction and Sections 90-92) were approved at the American Law Institute's 1990 Annual Meeting and were originally published as Sections 227-229 of Restatement Third, Trusts (Prudent Investor Rule) in 1992 [*referred to throughout this SCUPIA Prefatory Note and the following Comments as either "Restatement of Trusts 3d: Prudent Investor Rule" or simply "1992 Restatement"*]. The "prudent investor rule" is incorporated here without substantive change, with some updating of the Reporter's Notes, adaptation of cross-references to reflect the new numbering and content of other Trust Third Sections, and adaptation of some wording to reflect the passage of time and interim developments, particularly the widespread substitution of prudent-investor principles for prior law. Therefore, appropriate reference to Chapter 17 (Introduction and Sections 90-92) of Restatement Third, Trusts is suggested.]

Objectives of the Act. SCUPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term "portfolio" embraces all the trust's assets. SCUPIA Subsection (C)(2).

(2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. SCUPIA Subsection (C)(2).

(3) All categorical restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. SCUPIA Subsection (C)(5)(a).

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. SCUPIA Subsection (D).

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. SCUPIA Subsection (J).

Literature. These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter's notes by Edward C. Halbach, Jr., in *Restatement of Trusts 3d: Prudent Investor Rule* (1992); see also Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 27 *Real Property, Probate & Trust J.* 407 (1992); Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* (1986); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 *N.Y.U.L. Rev.* 52 (1987); John H. Langbein & Richard A. Posner, *The Revolution in Trust Investment Law*, 62 *A.B.A.J.* 887 (1976); Note, *The Regulation of Risky Investments*, 83 *Harvard L. Rev.* 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, *An Introduction to Modern Financial Theory* (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, *An Introduction to Risk and Return from Common Stocks* (2d ed. 1983).

Legislation. Most states have had legislation governing trust-investment law for many years. This Act promotes uniformity of state law on the basis of the new consensus reflected in the *Restatement of Trusts 3d: Prudent Investor Rule*. Some states had already acted. California, Delaware, Georgia, Minnesota, South Carolina, Tennessee, and Washington revised their prudent investor legislation to emphasize the total-portfolio standard of care in advance of the 1992 *Restatement*. These statutes are extracted and discussed in *Restatement of Trusts 3d: Prudent Investor Rule* § 227, reporter's note, at 60-66 (1992). Although South Carolina took such action in 1990 by amending SC Code Section 62-7-302, the South Carolina revision was not extracted and discussed in the 1992 *Restatement*.

Remedies. This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement]. [With the enactment of the South Carolina Trust Code in 2005, however, remedies and damages for breach of trust are addressed. SCTC Part 10.]

Implications for charitable and pension trusts. This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. *“In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust.”* Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: “ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions ‘codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.’” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (footnote omitted).

Other fiduciary relationships. The South Carolina Uniform Prudent Investor Act (SCUPIA) regulates the investment responsibilities of trustees. Other fiduciaries - such as executors, conservators, and guardians of the property - sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust-investment law to the special circumstances of the state schemes for administering decedents’ estates or conducting the affairs of protected persons. In South Carolina two other SC Code sections have been enacted for this purpose:

(1) Section 62-5-414.

In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-7-933 (SCUPIA).

(2) Section 62-3-703

(a) A personal representative is a fiduciary who ... shall observe the standards of care as described by Section 62-7-804.

(3) Both of these sections referred to Section 62-7-933 (SCUPIA) until 2010 when Section 62-3-703 was amended by replacing Section 62-7-933 with Section 62-7-804. Prudent administration -

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(4) The Comments to the SCTC point out that Section 62-7-804 is “similar to” SCUPIA and recognizes that trust “administration” includes a trustee’s “distribution to beneficiaries” *in addition to* a trustee’s investment and management of trust assets.

Although SCUPIA by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, “*the duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust.*” Restatement of Trusts 3d: Prudent Investor Rule § 379, Comment *b*, at 190 (1992). See also *id.* § 389, Comment *b*, at 190-91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

It is interesting to note that the ULC did not mention, on this investment point, in the 1994 UPIA Prefatory Note its earlier 1972 Uniform Management of Institutional Funds Act (UMIFA). This is probably explained by the following contrary view expressed in the 1972 Comment following UMIFA Section 6:

The section establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

Not until 2000 did South Carolina enact the South Carolina Uniform Management of Institutional Funds Act (SCUMIFA). Then in 2006 the ULC approved and recommended the Uniform Prudent Management of Institutional Funds Act (UPMIFA) which South Carolina enacted in 2008 as the South Carolina Uniform Prudent Management of Institutional Funds Act (SCUPMIFA), Sections 34-6-10 through 100. Many of SCUPIA's provisions are in SCUPMIFA which is described by ULC as "bringing the law governing charitable institutions in line with modern investment and expenditure practice".

Section 62-7-933. (A) This section may be cited as the South Carolina Uniform Prudent Investor Act, or this act.

(B)(1) Except as otherwise provided in item (2) of this subsection, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule in this act.

(2) The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

(C)(1) A trustee shall invest and manage trust assets as a prudent investor would by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(3) Among other circumstances provided in item (1) of this subsection which a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (a) general economic conditions;
- (b) the possible effect of inflation or deflation;
- (c) the expected tax consequences of investment decisions or strategies;
- (d) the role that each investment or course of action plays within the overall trust portfolio, including financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (e) the expected total return from income and the appreciation of capital;

(f) other resources of the beneficiaries;
(g) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(h) an asset's special relationship or special value to the purposes of the trust or to one or more of the beneficiaries.

(4) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(5)(a) A trustee may invest in any kind of property or type of investment consistent with the standards of this act.

(b) Nothing in this act prohibits affiliate investments if they otherwise comply with the standards of this act. For these purposes, 'affiliate' means an entity that owns or is owned by the trustee, in whole or in part, or is owned by the same entity that owns the trustee. Affiliate investments include:

(i) investment and reinvestment in the securities of an open-end or closed-end management investment company or of an investment trust registered under the Investment Company Act of 1940, as amended. A bank or trustee, or both of them, may invest in these securities even if the bank or trustee, or an affiliate of the bank or trustee, provides services to the investment company or investment trust such as that of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise, and receives reasonable remuneration for those services;

(ii) retention of the securities into which corporate securities owned by the trustee may be converted or which may be derived as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures, and the exercise by purchase or otherwise any rights, warrants, or conversion features attaching to the securities;

(iii) purchase or other acquisition and retention of a security underwritten by a syndicate, even if the trustee or its affiliate participates or has participated as a member of the syndicate, provided the trustee does not purchase the security from itself, its affiliate, or from another member of the underwriting syndicate, or its affiliate, pursuant to an implied or express reciprocal agreement between the trustee, or its affiliate, and the other member, or its affiliate, to purchase all or part of each other's underwriting participation commitment within the syndicate.

(c) Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, any bank, trust company, or private banker holding securities as a custodian or managing agent, and any bank, trust company, or private banker holding securities as custodian for a fiduciary, is authorized to deposit or arrange for the

deposit of such securities in a clearing corporation, as defined in Article 8 of the Uniform Commercial Code. When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank, trust company, or private banker acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Ownership of, and other interests in, such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank, trust company, or private banker so depositing securities pursuant to this section shall be subject to such regulations as in the case of state-chartered institutions, the Board of Financial Institutions, and, in the case of national banking associations, The Comptroller of the Currency may from time to time issue. A bank, trust company, or private banker acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank, trust company, or private banker in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This subsection shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank, trust company, or private banker holding securities as a custodian, managing agent, or custodian for a fiduciary, acting on April 17, 1973, or who thereafter may act regardless of the date of the agreement, instrument, or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of such clearing corporation.

(6) RESERVED

(D) A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

(E) Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make

and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust and with the requirements of this act.

(F) RESERVED

(G) Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

(H) RESERVED

(I) The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorize any investment or strategy permitted pursuant to this act: 'investments permissible by law for investment of trust funds', 'legal investments', 'authorized investments', 'using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital', 'prudent man rule', 'prudent trustee rule', 'prudent person rule', and 'prudent investor rule'.

(J)(1) Notwithstanding provisions of this act to the contrary, the duties of a trustee with respect to acquiring a contract of insurance upon the life of the trustor or upon the lives of the trustor and the trustor's spouse, children, or parents do not include a duty to:

(a) determine whether the contract is or remains a proper investment;

(b) exercise policy options available under the contract; or

(c) diversify the contract.

(2) The trustee is not liable to the beneficiaries of the contract of insurance or to another party for loss arising from this subsection.

(3) Except as specifically provided in the trust instrument, the provisions of this subsection apply to a trust established before or after the effective date of this subsection and to a life insurance policy acquired by the trustee before or after the effective date of this act.

(K) This act applies to 'charitable remainder trusts'. 'Charitable remainder trust' means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity.

(L) This act must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the States enacting it.

REPORTER'S COMMENT

Subsection 62-7-933(B):

Subsection 62-7-933(B)(1) of the South Carolina Uniform Prudent Investor Act (SCUPIA) imposes on trustees the obligation of prudence in the conduct of investment functions and identifies further subsections of SCUPIA that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should “observe how men of prudence, discretion and intelligence manage *their own affairs*, not in regard to speculation, but in regard to the permanent disposition of *their funds*, considering the probable income, as well as the probable safety of the capital to be invested.” *Id.* at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the *Amory* case. See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see *id.* at 508-09. Another prominent codification of the *Amory* standard is Uniform Probate Code § 7-302 (1969), which provides that “the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with *the property of another ...*” [Italics added.]

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that *a prudent man acting in a like capacity and familiar with such matters* would use in the *conduct of an enterprise of like character and with like aims . . .*” [Italics added.]

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the *Amory* case: “In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived” Restatement of Trusts 2d § 227 (1959).

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the “reasonable person” rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. SCUPIA subsections 62-7-933(C) through (G) identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. SCUPIA subsection 62-7-933(B)(2) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

Subsection 62-7-933(C)

SCUPIA subsection (C) is the heart of the Act. Subsections (C)(1), (2) and (3) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (C)(6) is derived from Uniform Probate Code § 7-302 (1969).

Objective Standard. SCUPIA subsection (C)(1) carries forward the relational and objective standard made familiar in the *Amory* case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of SCUPIA subsection (C)(1), by relating the trustee’s duty to “the purposes, terms, distribution requirements, and other circumstances of the trust,” should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio Standard. SCUPIA subsection (C)(2) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term “portfolio” embraces the entire trust estate.

Risk and Return. SCUPIA subsection (C)(2) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under “Literature.” Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main

purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

SCUPIA subsection (C)(2) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing “requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.”

Factors Affecting Investment. SCUPIA subsection (C)(3) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is *non-exclusive*. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, *Journal of Portfolio Management* 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee’s duty of impartiality requires attention to the competing interests of each of them.

Duty to Monitor. SCUPIA subsection (C)(1) through (4) apply both to investing and managing trust assets. “Managing” embraces monitoring, that is, the trustee’s continuing responsibility for oversight of the suitability of investments already made as well as the trustee’s decisions respecting new investments.

Duty to Investigate. SCUPIA subsection (C)(4) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment - for example, audit reports or records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land

appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating Categorical Restrictions. SCUPIA subsection (C)(5)(a) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categorical exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called “legal lists” of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility - in this case, inflation risk - that had not been anticipated. Accordingly, SCUPIA subsection (C)(5)(a) follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categorical restrictions. The Restatement says: “Specific investments or techniques are not *per se* prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust’s portfolio.” Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment f, at 24 (1992). The premise of SCUPIA subsection (C)(5)(a) is that trust beneficiaries are better protected by the Act’s emphasis on close attention to risk/return objectives as prescribed in SCUPIA subsection (C)(2) than in attempts to identify categories of investment that are *per se* prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding “speculative” or “risky” investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee’s task to invest at a risk level that is suitable to the purposes of the trust.

Professional Fiduciaries. The ULC Drafting Committee declined the suggestion that the Uniform Prudent Investor Act (UPIA) should create an exception to the prudent investor rule (or to the diversification requirement of UPIA Section 3) in the case of smaller trusts. The Committee believes that UPIA subsections 2(b) and (c) (SCUPIA subsections (C)(2) and (3) emphasize factors that are sensitive to the traits of small trusts. Furthermore, it is always open to the settlor of a trust under UPIA subsection 1 (b) (SCUPIA subsection (B)(2)) to reduce the trustee’s standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d:

Prudent Investor Rule § 227, Comments *h, m*, at 28, 51; reporter's note to Comment *g*, *id.* at 83.

Matters of Proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. See Uniform Probate Code Sec. 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

Subsection 62-7-933(D)

The language of this SCUPIA subsection derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., Duty of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in SCUPIA subsection (D) is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an under-diversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for Diversification. "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, *An Introduction to Modern Financial Theory* 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares

in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk - the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently - to include investments in different industries. This is uncompensated risk - nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, *An Introduction to Risk and Return from Common Stocks* 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments *e-h*, at 77 (1992). See also Macey, *supra*, at 23-24; Brealey, *supra*, at 111-13.

Diversifying by Pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 shares) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to

the UCTFA explains: “The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.” 7 Uniform Laws Ann. 402 (1985).

Fiduciary Investing in Mutual Funds. Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment *m*, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities “issued by an investment company registered under the Investment Company Act of 1940”

Subsection 62-7-933(E)

SCUPIA subsection (E), requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that “ordinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year.” Restatement of Trusts 2d § 230, comment *b* (1959). *The 1992 Restatement retreated from this rule of thumb, saying, “No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities.”* Restatement of Trusts 3d: Prudent Investor Rule § 229, comment *b* (1992).

The criteria and circumstances identified in SCUPIA subsection (C)(3) as bearing upon the prudence of decisions to invest and manage trust assets *also pertain to the prudence of decisions to retain or dispose of inception assets under this section.*

Subsection 62-7-933(G)

This subsection derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *b*, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the

relevant standard. In the language of law and economics, the standard is ex ante, not ex post.

Subsection 62-7-933(I):

This provision meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

Part 10

Liability of Trustees and Rights of Persons Dealing With Trustee

GENERAL COMMENT

Sections 62-7-1001 through 62-7-1009 identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 62-7-1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for breach of trust in Section 62-7-1001 are broad and flexible. Section 62-7-1002 provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 62-7-1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 62-7-1004 reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 62-7-1005 through 62-7-1009 deal with potential defenses. Section 62-7-1005 provides a statute of limitations on actions against a trustee. Section 62-7-1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 62-7-1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 62-7-1008 describes the effect and limits on the use of an exculpatory clause. Section 62-7-1009 deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 62-7-1010 through 62-7-1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 62-7-1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for

torts committed in the course of administration unless the trustee was personally at fault. Section 62-7-1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 62-7-1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 62-7-1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this Part is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 62-7-1010 through 62-7-1013, nor interfere with the court's ability to take such action to remedy a breach of trust as may be necessary in the interests of justice. *See* Section 62-7-105.

Section 62-7-1001. (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 62-7-706;
- (8) reduce or deny compensation to the trustee;
- (9) subject to Section 62-7-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

REPORTER'S COMMENT

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Part 8 in addition to those specified elsewhere in the Code.

Although subsections (b)(2) through (b)(9) list specific remedies, subsection (b)(10) provides a general statement of available remedies, which essentially confirms broad authority in the court to fashion an appropriate remedy for breach of trust.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 62-7-106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts Section 200 (1959). A person who may represent a beneficiary's interest under Part 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest. *See* Section 62-7-110 & Restatement (Second) of Trusts Section 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 62-7-110(c), 62-7-408, 62-7-409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts Section 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts Section 197 (1959).

The remedies identified in this section are derived from Restatement (Second) of Trusts Section 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, *see* Section 62-7-1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts Section 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 62-7-704(e) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts Section 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 62-7-708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts Section 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 62-7-1012. *See* Restatement (Second) of Trusts Section 284 (1959).

Section 62-7-1002. (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

REPORTER'S COMMENT

Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule Section 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred,

the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule Sections 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to Sections 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts Section 205 cmt. g (1959). For purposes of this section and Section 62-7-1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 62-7-1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts Section 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 62-7-703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts Section 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. *See* Restatement (Second) of Trusts Section 258 cmt. e (1959). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to

properly monitor the actions of the cotrustee? *See* Restatement (Second) of Trusts Section 258 cmt. d (1959).

Section 62-7-1003. (a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

REPORTER'S COMMENT

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts Section 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts Section 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

For purposes of this section and Section 62-7-1002, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 62-7-1001(b)(8).

Section 62-7-1004. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

REPORTER'S COMMENT

This section is similar to former South Carolina Probate Code Section 62-7-204 Paragraph (B) which granted to the probate court concurrent jurisdiction with the circuit courts of South Carolina over attorney's

fees. As that section states, "Attorney's fees may be set at a fixed or hourly rate or by contingency fee." SCTC Section 62-7-1004 goes further by codifying the power of the courts to award costs and expenses. This section codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 62-7-709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts Sections 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 188.4 (4th ed. 1988).

Section 62-7-1005. (a) Unless previously barred by adjudication, consent, or limitation, a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary or on behalf of a beneficiary against a trustee for breach of trust must be commenced within three years after the first to occur of:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.

REPORTER'S COMMENT

This section is similar in content to former South Carolina Probate Code Section 62-7-307. Both sections establish a statute of limitations especially applicable to trustees' liabilities to trust beneficiaries for breach of trust. SCTC Section 62-7-1005 sets the limit for commencing a proceeding against a trustee for breach of trust at one year after receiving a report from the trustee or its representative that provides sufficient information so that the beneficiary or representative should know of or be on inquiry notice about the claim. In other cases, the three-year limitation period applies.

SCTC Section 62-7-1005(a) does not adopt the Uniform Trust Code requirement that, for the one-year statute to commence, the report inform the beneficiary of the limitations period. SCTC Section 62-7-1005(c) reduces the UTC limitations period from five to three years.

The one-year and three-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 62-7-1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 62-7-106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Part 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 62-7-603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 62-7-1009. For the provisions relating to the duty to report to beneficiaries, see Section 62-7-813.

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 62-7-813(e).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the three-year limitations

period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, leaving the resolution of this question to other law of the State.

Section 62-7-1005A. (A) If a trust instrument provides that a trustee is to follow the direction of a trust protector and the trustee acts in accordance with such direction, then except in cases of wilful misconduct on the part of the trustee so directed, the trustee is not liable directly or indirectly from any such act.

(B) If a trust instrument provides that a trustee is to make decisions with the consent of a trust protector, then except in cases of wilful misconduct or gross negligence on the part of the trustee, the trustee is not liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such trust protector's failure to provide such consent after having been requested to do so by the trustee.

(C) If the trust document provides for a trust protector and the serving trust protector is unwilling or unable to serve or continue to serve and there is no provision for a successor trust protector, the then serving trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company qualified to do business in the state of the settlor's domicile at the time of the settlor's death as successor trust protector.

(D) A trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust protector. In exercising a power or refraining from exercising any power, a trust protector shall act in good faith and in accordance with the terms and purposes of the trust.

(E) A trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

Section 62-7-1005B. (A) If a trust instrument provides that a trustee is to follow the direction of a trust investment advisor, and the trustee acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the trustee so directed, the trustee is not liable directly or indirectly from any such act.

(B) If a trust instrument provides that a trustee is to make decisions with the consent of a trust investment advisor, then except in cases of wilful misconduct or gross negligence on the part of the trustee, the trustee shall not be liable directly or indirectly from any act taken or omitted as a result of such trust investment advisor's failure to provide such consent after having been requested to do so by the trustee.

(C) If a trust instrument provides for a trust investment advisor and the serving trust investment advisor is unwilling or unable to serve or continue to serve and there is no provision for a successor trust investment advisor, the then serving trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company qualified to do business in the state of the settlor's domicile at the time of the settlor's death as successor trust investment advisor.

(D) A trust investment advisor, other than a beneficiary, is a fiduciary with respect to each power granted to such trust investment advisor. In exercising any power or refraining from exercising any power, a trust investment advisor shall act in good faith and in accordance with the terms and purposes of the trust.

(E) A trust investment advisor is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

Section 62-7-1006. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

REPORTER'S COMMENT

Former South Carolina statutes and case law resembled SCTC Section 62-7-1006. Former South Carolina Probate Code Section 62-7-302(B)(2), retained and incorporated in Part 9, stated "[a] trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." That section is part of the South Carolina Uniform Prudent Investor Act, retained and incorporated in Section 62-7-933, which provides trustee guidelines for the administration of trusts, and specifically relates to the investment and management of trust assets. As a result, that section arguably

applies to only the investment and management of the trust corpus. SCTC Section 62-7-1006, however, covers a broader scope because it does not contain language limiting its application to investment and management of trust assets.

Prior South Carolina case law could be interpreted to allow trustees to rely not only on terms pertaining to investment and management of the trust, but also to other terms contained in the trust document. South Carolina courts have held “[i]n ascertaining the Settlor’s intent, [a] court must resort first to the language of the trust instrument” *Sarlin v. Sarlin*, 312 S.C. 27, 29, 430 S.E. 2d 530, 532 (S.C. Ct. App. 1993). One could infer that a trustee should follow the same canons of interpretation as applied by the courts. Additionally, former SCPC Section 62-7-704 encouraged trustees to perform without the assistance of the courts in providing that “a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purpose of the trust” This combination of case law and statutory law seems to hold (or at the very least imply) that a trustee could reasonably rely on the terms contained in the trust instrument for all types of provisions, not only those pertaining to the investment and management of trust assets. SCTC Section 62-7-1006 provides more certainty with respect to this issue.

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 62-7-103(17) (definition of “terms of a trust”). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 62-7-415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the “terms of a trust,” both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor’s intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 62-7-933(B)(2), which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee’s reliance is reasonable. For example, a trustee’s reliance on the trust instrument

would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

Section 62-7-1007. If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

REPORTER'S COMMENT

There was no prior South Carolina statute specifically addressing the issue of a trustee's duty to ascertain the happening of events affecting the administration or distribution of a trust.

Prior South Carolina case law essentially stated that a trustee could be held liable for negligently failing to investigate events affecting the status of a beneficiary's rights to distributions. See *Rogers v. Herron*, 226 S.C. 317, 85 S.E.2d 104 (S.C. 1954); see also *First Union Nat. Bank of South Carolina v. Soden*, 511 S.E.2d 372 (Ct. App.1998) (essentially applying the same standards to a remainder beneficiary for failing to disclose her father's remarriage). SCTC Section 62-7-1007 expressly provides protection from liability for trustees who do exercise reasonable care.

Section 62-7-1008. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(a) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(b) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

REPORTER'S COMMENT

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 62-7-105 and 62-7-814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike

the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

South Carolina Trust Code Section 62-7-1008 does not include Uniform Trust Code Section 1008(b) concerning exculpatory terms drafted or caused to be drafted by the trustee.

Section 62-7-1009. (a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release or ratification to be valid.

REPORTER'S COMMENT

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts Section 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts Section 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts Section 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts Sections 170(2), 216(3) & cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* Section 62-7-603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Part 3.

The South Carolina Trust Code adds Section 62-7-1009(b) not found in the Uniform Trust Code version.

Section 62-7-1010. (a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

REPORTER'S COMMENT

Section 62-7-1010(b) is substantially similar to former South Carolina Probate Code Section 62-7-306(b). Section 62-7-1010(b) could be viewed as expanding on a trustee's exemption from tort liability by its specific reference to excluding trustees from liabilities arising from violation of environmental laws. This specific exemption is not contained in former SCPC Section 62-7-306(b). It could be assumed, however, that the general exemption for liability from torts provided by former SCPC Section 62-7-306(b) would cover tort liabilities associated with environmental laws by virtue of the all encompassing general reference to the term "torts." This assumption, however, is less than certain in light of the Uniform Trust Code Comment to Section 1010, which indicates that UTC subsection 62-7-1010(b) was enacted in response to particular concerns from trustees over this type of liability. UTC Section 1010(c) essentially mirrors Section 62-7-306(c) of the South Carolina Probate Code.

SCTC Section 62-7-1010(d) retains and incorporates the provisions of former SCPC Section 62-7-306(d), not found in the UTC version of Section 62-7-1010.

Section 62-7-1011. (a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership

after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the South Carolina versions of the Uniform Partnership Act or Uniform Limited Partnership Act.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

REPORTER'S COMMENT

Section 62-7-1011 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 62-7-1011 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee's spouse or

the trustee's descendants, siblings, parents, or the spouse of any of them.

Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner.

There was no prior South Carolina statutory or case law counterpart.

Section 62-7-1012. (a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

REPORTER'S COMMENT

SCTC Section 62-7-1012 is similar to former South Carolina Probate Code Section 62-7-708. SCTC Section 62-7-1012 protects third parties who act in good faith in dealings with trustees. While good faith is not defined in the South Carolina Trust Code, definitions of good faith in the commercial context should be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions. In addition, SCTC section 62-7-1012 protects a third party who in good faith deals with a former trustee without knowledge that the trusteeship has terminated.

This section is derived from Section 7 of the Uniform Trustee Powers Act.

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good

faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of “know,” see Section 62-7-104.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 62-7-1013. Subsection (b) is intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 297 (4th ed. 1989).

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts Section 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

Section 62-7-1013. (a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee which may make a reference to the powers set forth in the South Carolina Trust Code;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and

(7) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

(j) In a transaction involving title to real property, the certificate of trust must be executed and acknowledged in a manner that permits its

recording in the Office of the Register of Deeds or Clerk of Court in the county in which the real property is located.

(k) The Certificate of Trust may be either in the form set forth below or in any other form that satisfies the above requirements.

Settlor: _____

Name of Trust: _____

Date of Trust: _____

Current Trustee(s): _____

Address of Trust: _____

The undersigned trustee(s) does hereby confirm the existence of the within described Trust and certify the following:

1. The undersigned is/are all of the currently serving trustee(s).
2. The Trust is in full force and effect and has not been revoked, terminated or otherwise amended in any manner which would cause the representations in this Certification of Trust to be incorrect.
3. The Trust is revocable/irrevocable. (If revocable, define who can revoke the document).
4. The above designated trustee(s) is/are fully empowered to act for said Trust and is/are properly exercising the trustee's authority under this Trust. No other trustee or other individual or entity is required to execute any document for the Trust.
5. The signature(s) of _____ of the trustees is/are required for any action taken on behalf of the Trust. (Define signature requirements)
6. The proper manner for taking title to Trust property is:
[Name(s) of all current trustees], Trustee
[Name of trust], dated [Date of trust]
7. To the undersigned's knowledge, there are no claims, challenges of any kind, or cause of action alleged, which contest or question the validity of the Trust or the trustee's authority to act for the Trust.
8. The trustee is authorized by the Trust Agreement to _____ . (State, synopsise, or describe relevant powers.)

IN WITNESS THEREOF: the undersigned, being all of the trustees, do hereby execute this Certificate of Trust this ____ day of _____, 20__.

Witnesses: Trustee(s):

Probate Code “is to make uniform the law among the various jurisdictions.” See SCPC Section 62-1-102(b)(5).

Section 62-7-1102. The provisions of this article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

REPORTER’S COMMENT

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The SCTC does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* Section 62-7-109(a).

Section 62-7-1103. If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

REPORTER’S COMMENT

The South Carolina Probate Code has a substantially identical provision in SCPC Section 62-1-104.

Section 62-7-1106. (a) Except as otherwise provided in this article, on the effective date of this article:

- (1) this article applies to all trusts created before, on, or after its effective date;
- (2) this article applies to all judicial proceedings concerning trusts commenced on or after its effective date;

(3) this article applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this article would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this article does not apply and the superseded law applies;

(4) subject to subsections (a)(5) and (b), any rule of construction or presumption provided in this article applies to trust instruments executed before the effective date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done and any right acquired or accrued before the effective date of the article is not affected by this article. Unless otherwise provided in this article, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the article, that statute continues to apply to the right even if it has been repealed or superseded.

REPORTER'S COMMENT

The SCTC is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The SCTC contains an additional effective date provision. Pursuant to Section 62-7-602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

The South Carolina Probate Code counterpart is SCPC Section 62-1-100, which has been subject to considerable litigation in the years after the probate code's enactment effective July 1, 1987. Importantly, the intent to safeguard preexisting rights is contained in SCTC Section 62-7-1106 as it is in SCPC Section 62-1-100. SCPC Section 62-1-100 draws a dichotomy between procedural provisions of the SCPC (as in SCPC Section 62-1-100(b)(2)) and substantive rights in the decedent's estate, which are to be unimpaired. SCPC Section 62-1-100(b)(4).

Rules of construction or presumption apply to trusts executed before the effective date unless there is a clear indication of a contrary intent in the terms of the trust. This appears similar to SCPC Section 62-1-100(b)(5). SCTC Section 62-7-1106(b), providing that any period of limitation which had commenced to run before the effective date would continue to apply, is a counterpart to SCPC Section 62-1-100(b)(4), last sentence. SCTC subsection 62-7-1106(a)(4) makes clear that the application of a presumption or rule of construction shall not disrupt accrued or acquired rights in the trust, which are determined according to the law in effect at the trust's creation."

Severability

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective and applicability

SECTION 4. (A) This act takes effect on January 1, 2014.

(B) Except as otherwise provided in this act, on the effective date of this act:

- (1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date;
- (2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date;

(3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;

(4) subject to item (5) and subsection (C) of this section, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and

(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act. Unless otherwise provided in this act, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust and a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death.

(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.

Ratified the 4th day of June, 2013.

Approved the 7th day of June, 2013.

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JAMES H. HARRISON
Code Commissioner
P. O. Box 11489
Columbia, S.C. 29211