ARTICLE 1

General Provisions, Definitions, and Probate Jurisdiction of Court

Editor’s Note

2013 Act No. 100, Section 4, provides as follows:

“SECTION 4. (A) This act [amending Articles 1, 2, 3, 4, 6, and 7] 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or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;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other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.”

CROSS REFERENCES

Transfers not testamentary, see Section 62‑6‑204.

Part 1

Short Title, Construction, General Provisions

**SECTION 62‑1‑100.** Effective date.

 (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.

HISTORY: 1986 Act No. 539, Section 5; 1987 Act No. 171, Section 78; 1990 Act No. 522, Part I, Section 1; 1997 Act No. 152, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Descent and Distribution 6.

Executors and Administrators 1.

Trusts 4.

Wills 3.

Westlaw Topic Nos. 124, 162, 390, 409.

C.J.S. Descent and Distribution Section 8.

C.J.S. Executors and Administrators Sections 2 to 3, 5.

C.J.S. Trusts Section 27.

C.J.S. Wills Sections 3, 71.

RESEARCH REFERENCES

Encyclopedias

2 Am. Jur. Proof of Facts 2d 693, Mistake in Naming or Designating Beneficiary in Will.

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Descent and Distribution Section 2, Statutory Construction.

S.C. Jur. Descent and Distribution Section 5, Contracts Concerning Succession.

S.C. Jur. Gifts Section 24, Pay on Death Accounts.

S.C. Jur. Lis Pendens Section 24, Estate Administration.

S.C. Jur. South Carolina Rules of Civil Procedure Section 75.2, Discussion.

S.C. Jur. Wills Section 9, Presumption Against Revival.

S.C. Jur. Wills Section 23, Execution.

S.C. Jur. Wills Section 148, Use of Extrinsic Evidence to Determine Intent.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 7, Development of Trust Law in England and the United States‑Court Decisions and Statutes.

Bogert ‑ the Law of Trusts and Trustees Section 47, Creation of a Trust of a Savings Account‑Joint Accounts.

Bogert ‑ the Law of Trusts and Trustees Section 973, Uniform Acts‑Beneficiaries’ Rights to Information and the Trustee’s Duty to Account.

NOTES OF DECISIONS

In general 1

Children 2

Extrinsic evidence of contrary intent 4

Multiple‑party accounts 3

Notice of appeal 5

1. In general

A will speaks at the time of testator’s death. In re Estate of Boynton (S.C.App. 2003) 355 S.C. 299, 584 S.E.2d 154. Wills 481

2. Children

Remainder devise to “child or children” of life tenant in testator’s will did not include life tenant’s child born out‑of‑wedlock; law governing testamentary dispositions at time of testator’s death embraced view that word “children” did not include children born out‑of‑wedlock, except when testator’s intent to include them was clear, both child born out‑of‑wedlock and life tenant were alive when testator executed his will, testator did not choose to designate child born out‑of‑wedlock as devisee by name or description, and instead chose to leave remainder interest to “child or children” of life tenant. In re Estate of Boynton (S.C.App. 2003) 355 S.C. 299, 584 S.E.2d 154. Wills 497(6)

Law that existed at time of testator’s death, rather than law as it existed at time of death of life tenant, applied in construing language of testator’s will, to determine whether testator’s use of words “child or children” excluded life tenant’s child born‑out‑of‑wedlock. In re Estate of Boynton (S.C.App. 2003) 355 S.C. 299, 584 S.E.2d 154. Wills 497(6)

3. Multiple‑party accounts

Will that bequeathed to testator’s wife joint bank account or joint saving account that testator and testator’s wife “have” contained latent ambiguity as to whether testator intended to leave to wife accounts in existence at time will was executed or accounts that were in existence at time of testator’s death, and thus extrinsic evidence was admissible in action that was brought by testator’s children following testator’s death to impose constructive trust against wife. Kemp v. Rawlings (S.C. 2004) 358 S.C. 28, 594 S.E.2d 845. Wills 490(3)

Will that bequeathed to testator’s wife joint bank account or joint saving account that testator and testator’s wife “have” entitled wife to funds in joint accounts that existed at testator’s death, not simply to funds in joint accounts that were in existence at time of execution of will; accounts from time of will’s execution were no longer in existence at time of testator’s death, testator was presumed to know that will speaks at death, and testator intended for his wife to be adequately provided for. Kemp v. Rawlings (S.C. 2004) 358 S.C. 28, 594 S.E.2d 845. Wills 481

4. Extrinsic evidence of contrary intent

Section 62‑1‑100(b)(5) allows a party to present extrinsic evidence to show that a testator had a clearly contrary intent that should prevent retroactive application of a presumption or rule of construction. Bowles v. Bradley (S.C. 1995) 319 S.C. 377, 461 S.E.2d 811. Wills 487(1.2)

In a proceeding to probate a will, there was no clear evidence that the decedent intended to exclude adopted children from the class gift to his “issue” where the primary extrinsic evidence presented on the issue was entirely inconclusive; thus, the Probate Code’s rules of construction mandated that adopted children be included in the decedent’s will’s class gift to “issue.” Bowles v. Bradley (S.C. 1995) 319 S.C. 377, 461 S.E.2d 811.

The presumption against the revival of a revoked will, codified at Section 62‑2‑508, was applicable where the will was executed and the testator died prior to the effective date of the new probate code. Section 62‑2‑508 involves a “presumption” and therefore Section 62‑1‑100(b)(5), which mandates that presumptions provided in the probate code apply to wills executed before the effective date unless there is a clear indication of a contrary intent, was the governing statutory provision. White v. Wilbanks (S.C. 1990) 301 S.C. 560, 393 S.E.2d 182.

5. Notice of appeal

The respondent timely filed his notice of appeal 14 days after receipt of the probate court’s order, although Section 62‑1‑100 was amended to reduce the time in which to file a notice from 15 days to 10 days while the probate court had the matter under advisement, because as amended, Section 62‑1‑100 provided that the former procedure should be made applicable in the interest of justice or because of the infeasiblity of applying the new procedure. Edens v. Edens (S.C. 1993) 312 S.C. 488, 435 S.E.2d 851, rehearing denied. Courts 202(5)

**SECTION 62‑1‑101.** Short title.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

RESEARCH REFERENCES

Forms

Am. Jur. Pl & Pr Forms Executors & Administrators Section 1 , Introductory Comments.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Probate Code patched and refurbished: Version 2013. S. Alan Medlin, 65 S.C. L. Rev. 81 (Autumn 2013).

**SECTION 62‑1‑102.** Purposes; rules of construction.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Descent and Distribution 6.

Executors and Administrators 1.

Trusts 7.

Wills 3.

Westlaw Topic Nos. 124, 162, 390, 409.

C.J.S. Descent and Distribution Section 8.

C.J.S. Executors and Administrators Sections 2 to 3, 5.

C.J.S. Trusts Section 143.

C.J.S. Wills Sections 3, 71.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 2, Statutory Construction.

S.C. Jur. Wills Section 59, Purposes; Rule of Construction.

S.C. Jur. Wills Section 119, Order Not Subject to Collateral Attack.

LAW REVIEW AND JOURNAL COMMENTARIES

Selected Substantive Provisions of the South Carolina Probate Code: a Comparison with Previous South Carolina Law. 38 S.C. L. Rev. 611.

Notes of Decisions

Admissibility of evidence 4

Ambiguity 2

Contemporaneous writings 3

Findings 5

Intent 1

1. Intent

The paramount rule of will construction is to determine and give effect to the testator’s intent. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 439

In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 439

2. Ambiguity

In a “patent ambiguity” in a will, the uncertainty is one which arises upon the words of the instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe; while in a “latent ambiguity,” the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 487(1.1)

A court may admit extrinsic evidence to determine whether a latent ambiguity exists in a will, and if the court finds a latent ambiguity, extrinsic evidence is also permitted to help the court determine the testator’s intent. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 487(1.2)

3. Contemporaneous writings

Written beneficiary designation in testatrix’s individual retirement account agreement did not satisfy the statutory contemporaneous writing requirement for property given as a satisfaction of a devise by a testatrix, where testatrix’s will did not provide for the deduction of the retirement account, state that the retirement account was to be deducted from a $100,000 devise in will, or was in satisfaction of the $100,000 devise. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 772

4. Admissibility of evidence

Testimony of a friend of testatrix that related to a statement made almost a year after she created will, that purportedly indicated she intended for a retirement account to fulfill a $100,000 bequest to university created in will, was not admissible as an exception to the hearsay rule, where the statement of was not made at the time of the making of the will to show her belief at that time. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 703

5. Findings

Special referee’s unappealed finding that testatrix’s individual retirement account passed to university as a non‑testamentary gift constituted the law of the case, and thus, in conjunction with finding that decedent devised to university an additional bequest of $100,000, was sufficient to support referee’s finding that testatrix did not intend to leave a single bequest of $100,000 to university. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 705

Special referee’s finding that testatrix did not intend to leave only a single bequest of $100,000 to university was based on the law and other facts in the case, absent a showing as how any presumed factual errors affected the referee’s decision; factual findings that decedent was not an uneducated testatrix minimally counseled in estate law was supported by the testimony of a close friend of testatrix who testified testatrix had to petition the court to have the personal representatives of her husband’s estate removed, and that she had an attorney draft her will and had two other attorneys help her remove the trustees from her husband’s trust. Estate of Gill ex rel. Grant v. Clemson University Foundation (S.C.App. 2012) 397 S.C. 419, 725 S.E.2d 516. Wills 703

**SECTION 62‑1‑103.** Supplementary general principles of law applicable.

 Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Descent and Distribution 6.

Executors and Administrators 1.

Trusts 7.

Wills 3.

Westlaw Topic Nos. 124, 162, 390, 409.

C.J.S. Descent and Distribution Section 8.

C.J.S. Executors and Administrators Sections 2 to 3, 5.

C.J.S. Trusts Section 143.

C.J.S. Wills Sections 3, 71.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 2, Statutory Construction.

S.C. Jur. Guardian and Conservator Section 1, Scope Note.

LAW REVIEW AND JOURNAL COMMENTARIES

Selected Substantive Provisions of the South Carolina Probate Code: a Comparison with Previous South Carolina Law. 38 S.C. L. Rev. 611.

**SECTION 62‑1‑104.** Severability.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Descent and Distribution 6.

Executors and Administrators 1.

Trusts 7.

Wills 3.

Westlaw Topic Nos. 124, 162, 390, 409.

C.J.S. Descent and Distribution Section 8.

C.J.S. Executors and Administrators Sections 2 to 3, 5.

C.J.S. Trusts Section 143.

C.J.S. Wills Sections 3, 71.

**SECTION 62‑1‑105.** Construction against implied repeal.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Descent and Distribution 6.

Executors and Administrators 1.

Trusts 7.

Wills 3.

Westlaw Topic Nos. 124, 162, 390, 409.

C.J.S. Descent and Distribution Section 8.

C.J.S. Executors and Administrators Sections 2 to 3, 5.

C.J.S. Trusts Section 143.

C.J.S. Wills Sections 3, 71.

**SECTION 62‑1‑106.** Effect of fraud and evasion.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Effect of finding of presumed death under Federal Missing Persons Act, see Section 19‑5‑310.

Issuance of warrants and processes by Probate Court, see Section 14‑23‑290.

Limitations period for certain actions based on fraud, see Section 15‑3‑530.

Library References

Executors and Administrators 116, 437.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 276, 747 to 768.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 71, The Four Basic Requirements.

S.C. Jur. Wills Section 56, Relief for Fraud and Evasion; Time Limits.

Notes of Decisions

Persons benefitting 1

1. Persons benefitting

Husband’s daughter did not perpetuate fraud in connection with her father’s estate or the estate of her father’s wife, for purposes of fraud action brought by successor personal representative of wife’s estate seeking to recover wife’s assets that husband transferred to himself while wife was incompetent or while he was the personal representative of wife’s estate, though daughter received a benefit from her father’s conduct in the form of a loan, as the loan would be owed to wife’s estate depending on the resolution of successor personal representative’s claims against husband’s estate. Gordon v. Busbee (S.C.App. 2012) 397 S.C. 119, 723 S.E.2d 822. Executors and Administrators 86(2); Executors and Administrators 116

Husband’s attorney, who prepared wife’s power of attorney (POA), subsequently advised husband after husband became personal representative of wife’s estate and became the personal representative of husband’s estate after husband died, did not perpetuate fraud in connection with wife’s estate or husband’s estate, for purposes of fraud action brought by successor personal representative of wife’s estate seeking to recover wife’s assets that husband transferred to himself while wife was incompetent or while he was the personal representative of wife’s estate, where attorney did not benefit from husband’s alleged fraud and did not know that any representations she made in inventory of husband’s estate were false. Gordon v. Busbee (S.C.App. 2012) 397 S.C. 119, 723 S.E.2d 822. Executors and Administrators 86(2); Executors and Administrators 116

Husband’s son did not perpetuate fraud in connection with his father’s estate or the estate of his father’s wife, for purposes of fraud action brought by successor personal representative of wife’s estate seeking to recover wife’s assets that husband transferred to himself while wife was incompetent or while he was the personal representative of wife’s estate, where husband’s son had not received any funds transferred from wife’s estate to husband’s estate, and only participation that son had in the administration of his father’s estate was an examination of the contents of father’s safety deposit box that was properly conducted. Gordon v. Busbee (S.C.App. 2012) 397 S.C. 119, 723 S.E.2d 822. Executors and Administrators 86(2); Executors and Administrators 116

**SECTION 62‑1‑107.** Evidence as to death or status.

 In proceedings under this Code the South Carolina Rules of Evidence are applicable unless specifically displaced by the Code.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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 Section 62‑1‑507 of the Uniform Simultaneous Death Act. See Sections 62‑1‑500 to 62‑1‑510 for the Uniform Simultaneous Death Act.

Effect of Amendment

The 2013 amendment rewrote the section, deleting rules relating to determination of death and status.

CROSS REFERENCES

Definition, for purposes of multiple‑party account provisions, of “proof of death”, see Section 62‑6‑101.

Library References

Death 1 to 4.

Descent and Distribution 18.

Executors and Administrators 4.

Westlaw Topic Nos. 117, 124, 162.

C.J.S. Death Sections 1, 3 to 5, 8 to 14.

C.J.S. Executors and Administrators Section 13.

**SECTION 62‑1‑108.** Acts by holder of general power.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Power of appointment under Uniform Statutory Rule Against Perpetuities, see Sections 27‑6‑10 et seq.

Library References

Powers 17.

Westlaw Topic No. 307.

C.J.S. Powers Sections 4, 14 to 18.

**SECTION 62‑1‑109.** Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

 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.

HISTORY: 1994 Act No. 449, Section 2; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

Library References

Attorney and Client 106.

Westlaw Topic No. 45.

C.J.S. Attorney and Client Sections 283, 301 to 307.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 71, The Four Basic Requirements.

S.C. Jur. Attorney and Client Section 45, Fidelity.

S.C. Jur. Children and Families Section 81, Personal Property.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 962, Duty to Furnish Information and Permit Inspection.

NOTES OF DECISIONS

In general 1

Non‑probate asset 2

1. In general

Statute stating that the creation of attorney‑client relationship between lawyer and person serving as a fiduciary did not impose any duties or obligations to other persons interested in the estate did not absolve estate’s attorney of any duty owed to testator’s surviving spouse as client before testator’s death; any duties to a former client on a related matter were separate and distinct from any duties arising representation of the estate. Spence v. Wingate (S.C.App. 2009) 385 S.C. 316, 684 S.E.2d 188, rehearing denied, certiorari granted, affirmed as modified 395 S.C. 148, 716 S.E.2d 920. Attorney And Client 106

Failure of decedent’s wife to move to alter or amend judgment in attorney’s favor in legal malpractice action failed to preserve her argument on appeal, that by virtue of attorney’s representation of wife in a prior matter, attorney representing decedent’s estate owed wife a fiduciary duty in connection with decedent’s life insurance policy, where record indicated that trial court had not considered the argument in ruling that attorney owed no fiduciary duty to wife under statute providing that a lawyer’s representation of a fiduciary in a probate matter does not, without more, impose on the lawyer responsibilities to other parties with interests in the fiduciary property. Spence v. Wingate (S.C.App. 2008) 378 S.C. 486, 663 S.E.2d 70, rehearing denied, certiorari granted, opinion reversed 381 S.C. 487, 674 S.E.2d 169, on remand 385 S.C. 316, 684 S.E.2d 188. Appeal And Error 179(1); Appeal And Error 238(4)

2. Non‑probate asset

Fiduciary duty owed from attorney to former client with respect to former client’s interest in proceeds of former client’s husband’s life insurance policy was not precluded by statute providing that attorney‑client relationship between attorney and person serving as fiduciary for estate did not impose upon lawyer duties to persons interested in estate, even though attorney represented husband’s estate and former client was a beneficiary of estate, where life insurance policy was a non‑probate asset and manner in which policy was paid was not in control of estate’s personal representative. Spence v. Wingate (S.C. 2011) 395 S.C. 148, 716 S.E.2d 920, rehearing denied. Attorney and Client 106

**SECTION 62‑1‑110.** Fiduciary‑lawyer privilege.

 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.

HISTORY: 2008 Act No. 211, Section 1, eff May 13, 2008; 2013 Act No. 100, Section 1, eff January 1, 2014.

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).

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 962, Duty to Furnish Information and Permit Inspection.

**SECTION 62‑1‑111.** Authority to award costs and expenses.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

**SECTION 62‑1‑112.** Inherent power of court.

Section effective January 1, 2019.

 The inherent power of the court to impose penalties for contempt extends to all filing requirements, proceedings, judgments, and orders of the court. The court has the power to grant a motion to proceed in forma pauperis.

HISTORY: 2017 Act No. 87 (S.415), Section 1, eff January 1, 2019.

REPORTER’S COMMENTS

This section was enacted in 2017 to clarify the probate court’s authority to impose penalties for contempt and to grant a motion for a party to proceed in forma pauperis.

Editor’s Note

2017 Act No. 87, Section 6, provides as follows:

“(A) This act takes effect on January 1, 2019.

“(B) Except as otherwise provided in this act, on the effective date of this act:

“(1) this act applies to any conservatorships, guardianships, or protective orders for minors or persons under a disability created before, on, or after its effective date;

“(2) this act applies to all judicial proceedings concerning conservatorships, guardianships, or protective orders for minors or persons under a disability commenced on or after its effective date;

“(3) this act applies to judicial proceedings concerning conservatorships, guardianships, and protective orders for minors or persons under a disability 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 that particular provision of this act does not apply and the superseded law applies;

“(4) subject to item (B)(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 this 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.

“(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statue before the effective date of the act, that statute continues to apply to the right even if it has been repealed or suspended.”

CROSS REFERENCES

Relief from filing fees, court costs and other probate costs, see Section 8‑21‑800.

Part 2

Definitions

**SECTION 62‑1‑201.** General definitions.

 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) “VA” means the United States Department of Veterans Affairs or its successor.

 (52) “Ward” is as defined in Section 62‑5‑101.

 (53) “Will” includes codicil and any testamentary instrument that merely appoints an executor or revokes or revises another will.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Sections 1, 2; 1990 Act No. 521, Sections 2‑7; 1997 Act No. 152, Section 2; 2010 Act No. 244, Section 1, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014; 2016 Act No. 278 (S.777), Section 2, eff June 9, 2016.

REPORTER’S COMMENTS

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 Sections 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).

Editor’s Note

ARTICLE 5 of Title 62 was rewritten by 2017 Act No. 87, Section 5.A, effective January 1, 2019. For Section 62‑5‑401, referenced in (9), see now, Sections 62‑5‑402 and 62‑5‑403.

Effect of Amendment

The 2010 amendment rewrote the definitions of “Application”, “Formal proceedings”, “Informal proceedings”, and “Petition”, and added “formal” preceding “proceeding” in the definition of “Testacy proceeding”.

The 2013 amendment added subsection (14), definition of “Fair market value”; rewrote subsection (18), definition of “Guardian”; rewrote subsection (32), definition of “Person”; added subsection (35), definition of “Probate estate”; added subsection (40), definition of “SCACR”; rewrote subsection (45), definition of “State”; deleted former subsection (40), definition of “Stepchild”; and renumbered the subsections accordingly.

The 2016 amendment added a definition of “VA” as (51); renumbered “Ward” as (52) and “Will” as (53); and made a nonsubstantive change.

CROSS REFERENCES

Application of definition of duly appointed personal representative, as appearing in this section, to settlement of wrongful death or survival actions, see Section 15‑51‑42.

Meaning of “child” and related terms for purposes of intestate succession, see Section 62‑2‑109.

Payment of benefits from U.S. Department of Veterans Affairs to a minor or an incapacitated person, definitions, see Section 62‑5‑431.

Provision that court, prior to issuing written statement of informal probate, must determine whether applicant is an “interested person” as defined in this section, see Section 62‑3‑303.

Requirement in informal appointment proceedings that court determine whether applicant is “interested person” as defined in this section, see Section 62‑3‑308.

Role of court in administration of trust, see Section 62‑7‑201.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 73, Rights Under the South Carolina Probate Code (SCPC).

S.C. Jur. Dead Bodies Section 10, Next of Kin.

S.C. Jur. Descent and Distribution Section 6, Who is an Heir.

S.C. Jur. Descent and Distribution Section 7, Share of the Spouse.

S.C. Jur. Descent and Distribution Section 8, Shares of Those Other Than Spouse.

S.C. Jur. Guardian and Conservator Section 2, Definitions.

S.C. Jur. Guardian and Conservator Section 6, Definitions.

S.C. Jur. Guardian and Conservator Section 17, Petition for Appointment.

S.C. Jur. Guardian and Conservator Section 34, Administrative Powers and Duties.

S.C. Jur. Wills Section 11, Who May Make a Will.

S.C. Jur. Wills Section 60, Definitions.

S.C. Jur. Wills Section 61, Subject Matter.

S.C. Jur. Wills Section 71, Required Proof and Findings.

S.C. Jur. Wills Section 81, Claims Against Decedent; Necessity of Appointment of Personal Representative.

S.C. Jur. Wills Section 86, Objection.

S.C. Jur. Wills Section 88, Nature of Proceeding, Generally.

S.C. Jur. Wills Section 170, General Definitions.

S.C. Jur. Wills Section 188, Gift to One Deceased; Anti‑Lapse Rule.

Forms

South Carolina Legal and Business Forms Section 17:1 , Formal Requirements for Wills.

South Carolina Legal and Business Forms Section 17:2 , Testamentary Dispositions.

South Carolina Legal and Business Forms Section 17:3 , Codicils, Revocation and Revival of Wills.

South Carolina Legal and Business Forms Section 17:39 , Drafting Will.

South Carolina Legal and Business Forms Section 17:42 , Drafting Codicil.

South Carolina Legal and Business Forms Section 17:252 , Changing, Adding To, and Republishing Will‑General Form.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 656, South Carolina.

Will Contests Section 12:21, Settlement Agreements.

LAW REVIEW AND JOURNAL COMMENTARIES

Selected Substantive Provisions of the South Carolina Probate Code: a Comparison with Previous South Carolina Law. 38 S.C. L. Rev. 611.

NOTES OF DECISIONS

In general 1

Property 2

1. In general

A dispute about the title to a gun was not a claim that could be presented to the probate court under Section 62‑1‑201 because the definition of “claims” in the Probate Code expressly excludes disputes regarding the title of a decedent to specific assets alleged to be included in the estate. Matter of Howard (S.C. 1993) 315 S.C. 356, 434 S.E.2d 254. Executors And Administrators 202

2. Property

Estate property did not pass to brother despite his status as a named heir in will when testator’s daughter retained authority over the estate as personal representative while the estate was still being administered; daughter’s authority superseded brother’s argument that he was acting within his authority as a cotenant when he accepted farm subsidies based on his status as a co‑heir to testator’s estate. Estate of Livingston v. Livingston (S.C.App. 2013) 404 S.C. 137, 744 S.E.2d 203, certiorari granted, certiorari dismissed as improvidently granted 412 S.C. 610, 773 S.E.2d 579. Executors and Administrators 39

Part 3

Scope, Jurisdiction, and Courts

**SECTION 62‑1‑301.** Territorial application.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Action for declaratory judgment by a person interested in the administration of an estate of an infant or a lunatic, see Section 15‑53‑50.

Constitutional provisions regarding jurisdiction in matters testamentary and of administration, see SC Const Art. V, Section 12.

Exclusiveness of probate court’s jurisdiction once acquired, see Section 14‑23‑250.

Prohibition against collateral attack on probate court’s jurisdiction, see Section 14‑23‑260.

Requirement that application for informal appointment of administrator in intestacy shall contain statement that applicant is unaware of property having situs in this State under this section, see Section 62‑3‑301.

Library References

Courts 199.

Westlaw Topic No. 106.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 34, Judicial Supervision.

LAW REVIEW AND JOURNAL COMMENTARIES

Probate Reform for South Carolina: An Introduction to the Uniform Probate Code. 29 S.C. L. Rev. 397.

**SECTION 62‑1‑302.** Subject matter jurisdiction; concurrent jurisdiction with family court.

Section effective until January 1, 2019. See, also, Section 62‑1‑302 effective January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 3; 1988 Act No. 659, Sections 2, 3; 1990 Act No. 521, Section 8; 1992 Act No. 475, Section 2; 1997 Act No. 152, Section 3; 2005 Act No. 132, Section 4; 2008 Act No. 257, Section 1, eff June 4, 2008; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑1‑302.** Subject matter jurisdiction; concurrent jurisdiction with family court.

Section effective January 1, 2019. See, also, Section 62‑1‑302 effective until January 1, 2019.

 (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:

 (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;

 (iii) matters involving the establishment, administration, or termination of a special needs trust for disabled individuals;

 (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, intellectual disability, 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.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 3; 1988 Act No. 659, Sections 2, 3; 1990 Act No. 521, Section 8; 1992 Act No. 475, Section 2; 1997 Act No. 152, Section 3; 2005 Act No. 132, Section 4; 2008 Act No. 257, Section 1, eff June 4, 2008; 2013 Act No. 100, Section 1, eff January 1, 2014; 2017 Act No. 87 (S.415), Section 3, eff January 1, 2019.

REPORTER’S COMMENTS

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 the 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.

Concurrent jurisdiction has been granted to the probate court 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, but no concurrent jurisdiction exists which allows the family court to decide issues regarding the care, custody, and control of an adult.

Section 63‑1‑40(1) of the South Carolina Children’s Code defines a “child” as a person under the age of eighteen. Section 63‑1‑40(2) of the Children’s Code defines a “Guardian” as a person who legally has the care and management of a child. Section 62‑5‑101(1) of the S.C. Probate Code defines an “adult” as an individual who has attained the age of eighteen or who, if under eighteen, is married or has been emancipated by a court of competent jurisdiction.

Therefore, the exclusive jurisdiction to appoint a guardian and/or conservator for an adult rests with the probate court, pursuant to Section 62‑1‑302(a)(2)(i). Accordingly, when a parent or other individual was granted custody of an incapacitated individual in a family court order entered during minority, the family court does not have any continuing jurisdiction to enter further orders regarding the care, custody, or control of that person beyond the age of eighteen. (The family court’s authority over the custody and care of adults is pursuant to the Omnibus Adult Protection Act, Section 43‑35‑5 et seq.) In such a situation, the parent or custodial guardian wishing to retain or gain custody of an incapacitated young adult must file a guardianship action pursuant to Section 62‑5‑303 of the South Carolina Probate Code.

However, if the family court issued an order during the minority of an adult which directs an individual to pay child support pursuant to Section 63‑3‑530(17), the family court retains exclusive jurisdiction to make decisions regarding support beyond the age of eighteen when there are physical or mental disabilities of the child, as long as those mental or physical disabilities continue. So, even if a parent or custodial guardian was granted support for an incapacitated adult during his minority, even though a guardianship action has been filed in the probate court, the parent or custodial guardian can still go before a judge of the family court to seek modification or other redress regarding the issue of child support for the incapacitated adult. Any support paid to an individual beyond the age of eighteen, as a result of a family court order entered pursuant to Section 63‑5‑503(17), is the property of the conservatorship, and it should be paid to and managed by the conservator.

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).

The 2017 amendments re‑wrote the introductory sentence of (a)(2) and removed “subject to” in order to make the language more clear. In addition, (a)(2)(iii) was added, which deals with the probate court’s exclusive jurisdiction in matters involving special needs trusts for disabled individuals.

Code Commissioner’s Note

Pursuant to 2011 Act No. 47, Section 14(B), the Code Commissioner substituted “intellectual disability” for “mentally retarded” and “person with intellectual disability” or “persons with intellectual disability” for “mentally retarded”.

Editor’s Note

2017 Act No. 87, Section 6, provides as follows:

“(A) This act takes effect on January 1, 2019.

“(B) Except as otherwise provided in this act, on the effective date of this act:

“(1) this act applies to any conservatorships, guardianships, or protective orders for minors or persons under a disability created before, on, or after its effective date;

“(2) this act applies to all judicial proceedings concerning conservatorships, guardianships, or protective orders for minors or persons under a disability commenced on or after its effective date;

“(3) this act applies to judicial proceedings concerning conservatorships, guardianships, and protective orders for minors or persons under a disability 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 that particular provision of this act does not apply and the superseded law applies;

“(4) subject to item (B)(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 this 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.

“(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 suspended.”

Effect of Amendment

The 2008 amendment, in paragraph (d)(1), added “general”.

CROSS REFERENCES

Constitutional provisions regarding jurisdiction in matters testamentary and of administration, see SC Const Art. V, Section 12.

Court’s exclusive jurisdiction of proceedings concerning internal affairs of trust, subject to the provisions of this section, see Section 62‑7‑201.

Exclusivity of jurisdiction once acquired by Probate Court, see Section 14‑23‑250.

Jurisdiction of probate judges, see Section 14‑23‑1150.

Protection of persons and their property, jurisdiction, see Section 62‑5‑201.

Library References

Courts 198, 472.4.

Westlaw Topic No. 106.

C.J.S. Courts Section 186.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 19, Qualification of Trustees.

S.C. Jur. Children and Families Section 25, Overview.

S.C. Jur. Compromise and Settlement Section 12, Death Settlements.

S.C. Jur. Divorce Section 66, Other Factors.

S.C. Jur. Equity Section 20, Specific Performance.

S.C. Jur. Guardian and Conservator Section 4, Jurisdiction of Court.

S.C. Jur. Guardian and Conservator Section 9, Jurisdiction of Court.

S.C. Jur. Jury Section 38, When Allowed.

S.C. Jur. Mental Health Section 22, Overview.

S.C. Jur. Wills Section 61, Subject Matter.

S.C. Jur. Wills Section 128, Removal from Probate Court.

S.C. Jur. Wrongful Death Section 19, Requirement of Court Approval.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 870, Jurisdiction to Enforce Trust‑Actions Available.

Bogert ‑ the Law of Trusts and Trustees Section 966, Duty to Render Formal Account in Court of Equity.

Bogert ‑ the Law of Trusts and Trustees Section 974, Statutory Regulation of Accounts.

Will Contests Section 16:5, Taking an Appeal in General.

LAW REVIEW AND JOURNAL COMMENTARIES

“Probate Court Jurisdiction Over Testamentary Trusts.” 2 SCLQ 13 (1949). Trusts. 25 S.C. L. Rev. 506.

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1. In general

Under South Carolina law, as predicted by the district court, plaintiffs are not permitted to bring a cause of action for intentional interference with inheritance where an adequate remedy exists at probate. Wellin v. Wellin, 2015, 135 F.Supp.3d 502. Torts 291

Class of “then‑living grandchildren” identified as beneficiaries in testator’s will closed upon testator’s death, rather than at time of distribution, and thus, grandchildren born after testator’s death were not included as beneficiaries under will; will specifically provided that certain assets be divided among then‑living grandchildren upon testator’s death. In re Estate of Prioleau (S.C. 2004) 361 S.C. 627, 606 S.E.2d 769. Wills 524(5)

Proper filing of petition for approval of settlement offer gives probate court subject matter jurisdiction in wrongful death claim and, absent such petition, probate court is without jurisdiction to act with regard to settlement. Ex parte McLeod (S.C.App. 1996) 323 S.C. 461, 476 S.E.2d 167. Death 34.1

Actions requesting settlement of claims owed by and to an estate must be originated in the probate court. Thus, in an action by 2 brothers against a third brother for partition by sale of real property inherited by the 3 from their mother and for the settlement of various claims against their father’s estate, the parties’ claims relating to their father’s estate were matters for the probate court and, therefore, the circuit court lacked jurisdiction over the subject matter of that portion of the action. Anderson v. Anderson (S.C. 1989) 299 S.C. 110, 382 S.E.2d 897.

This section [Code 1962 Section 19‑401] and Code 1962 Sections 15‑444 to 15‑446 give the judge of probate complete jurisdiction in all matters of administration and in the granting of letters of administration. Ex parte Blizzard (S.C. 1937) 185 S.C. 131, 193 S.E. 633.

1.5. Construction and application

Probate code provision dealing with partition of real property applied to estate representative’s action to recover farm subsidies paid by the United States Department of Agriculture (USDA) to testator’s son, rather than statutory provision that dealt with a petition for partition of real property owned by joint tenants or tenants in common, where the action originated in the probate court. Estate of Livingston v. Livingston (S.C.App. 2013) 404 S.C. 137, 744 S.E.2d 203, certiorari granted, certiorari dismissed as improvidently granted 412 S.C. 610, 773 S.E.2d 579. Executors and Administrators 86(2)

2. Probate Court jurisdiction

Probate court lacked subject matter jurisdiction over petition to physically partition farm, ownership of which passed to original owner’s heirs upon his death 89 years before the petition; probate code merely gave probate court subject matter jurisdiction over estates of decedents or partition actions prior to closing of estate, and original owner’s estate closed 64 years earlier. Byrd v. McDonald (S.C.App. 2016) 417 S.C. 474, 790 S.E.2d 200. Partition 40

A failure to comply with the nonclaim statute would not divest either the probate court or the circuit court of subject matter jurisdiction with respect to issues arising out of the probate of an estate;’ instead, noncompliance eliminates a claimant’s right of action against a decedent’s estate and, in turn, deprives the court of the power to adjudicate the claim. In re Estate of Hover (S.C. 2014) 407 S.C. 194, 754 S.E.2d 875. Executors and Administrators 224

Dispute between brother and siblings over items of personal property from the estate to which siblings may have been entitled under will was for the probate court to decide, rather than the circuit court, pursuant to statutory provision that granted exclusive jurisdiction to the probate court over all subject matter related to estates of decedents, including will contests. Brown v. Brown (S.C.App. 2013) 402 S.C. 202, 740 S.E.2d 507. Courts 472.4(6)

Probate court in which estate heir brought partition action had subject matter jurisdiction over that heir’s waste claim based on alleged destruction by coheir of man‑made pond on one of the parcels at issue; relevant statute granted probate court exclusive original jurisdiction over all subject matter related to estates of decedents, and coheir’s alleged conduct, at a time when he was no longer personal representative of estate, made him an executor de son tort under provision authorizing entry of a judgment against the executor de son tort for value of assets wasted or lost by that person’s illegal interference. Judy v. Judy (S.C. 2011) 393 S.C. 160, 712 S.E.2d 408, rehearing denied. Courts 472.4(4); Executors and Administrators 435

On its own motion, probate court properly removed petition for removal of trustee to the circuit court, so as to give circuit court subject matter jurisdiction to hear case. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Courts 487(2)

Reference in provision of probate code specifically dealing with internal affairs of trusts, to section in code granting probate court jurisdiction to determine family law issues in connection with estate and trust actions, amounted to scrivener’s error; legislature intended to reference section in code which specifically discussed divestment of probate court’s “exclusive jurisdiction,” to allow removal of internal trust matters by a party or the probate court on its own motion to the circuit court. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Courts 198

Jurisdiction over wife’s action to set aside deed executed by deceased husband did not lie solely in probate court, where action was brought against living transferee, and was not one to contest or construe a will, to determine heirs and successors, or to determine the estate of a protected person. Brown v. Butler (S.C.App. 2001) 347 S.C. 259, 554 S.E.2d 431, rehearing denied. Courts 472.4(1)

The Probate Court had jurisdiction to determine whether to allow a casino’s claim against a decedent’s estate, which was based on a $55,000 check that was returned for insufficient funds, since the Probate Court has jurisdiction over all matters related to decedents’ estates (Section 62‑1‑302). GNOC Corp. v. Estate of Rhyne (S.C. 1994) 312 S.C. 86, 439 S.E.2d 274, rehearing denied. Courts 250; Gaming And Lotteries 287

3. Family Court jurisdiction

Family court did not have jurisdiction over wife’s action to set aside allegedly fraudulent conveyance of real property by deceased husband, where the purpose of the case was not to apportion marital property. Brown v. Butler (S.C.App. 2001) 347 S.C. 259, 554 S.E.2d 431, rehearing denied. Marriage And Cohabitation 722

3.5. Master‑in‑equity

Master‑in‑equity was not precluded from determining the rightful owner of disputed 6.2‑acre lot on the basis such a decision required a determination of intestate heirs, allegedly within the exclusive jurisdiction of the probate court, where estate brought action in circuit court for the purpose of quieting and confirming title to the 6.2‑acre lot, and master was not required to make a determination of heirs to establish rightful ownership of the property. Major v. Penn Community Services, Inc. (S.C.App. 2011) 395 S.C. 175, 717 S.E.2d 70, rehearing denied. Quieting Title 28

4. Concurrent jurisdiction between probate and family courts

Although it would have been more judicially economical for petitioner to seek declaration in probate court that common law marriage existed between him and putative wife on date of her death, in action against personal representative of wife’s estate, family court did not lack subject matter jurisdiction to determine existence of marriage on date of death, even if such declaration would be subsequently used to determine petitioner’s inheritance rights. Thomas v. McGriff (S.C. 2006) 368 S.C. 485, 629 S.E.2d 359. Courts 472.4(2.1)

Jurisdiction to determine the existence of a common‑law marriage depends upon the ultimate issue before the court; if the ultimate issue is heirship, which is within the probate court’s exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a common‑law marriage, but if the existence of a common‑law marriage is itself the ultimate issue, then the family court has exclusive jurisdiction. Thomas v. McGriff (S.C. 2006) 368 S.C. 485, 629 S.E.2d 359. Courts 472.4(2.1)

5. Removal to circuit court

On its own motion, probate court properly removed petition for removal of trustee to the circuit court, so as to give circuit court subject matter jurisdiction to hear case. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Courts 487(2)

A motion to remove an action from Probate Court to Circuit Court pursuant to Section 62‑1‑302(c) was timely, even though it was made more than 10 days after the date of the movant’s answer, where an amendment to the answer was later permitted; the removal motion became timely upon the granting of the motion to amend. Hiers by Hiers v. Mullens (S.C.App. 1992) 310 S.C. 63, 425 S.E.2d 57.

The testator’s wife did not waive her right to remove a probate proceeding to Circuit Court by her participation in a Probate Court hearing at which the testimony of witnesses was taken, even though her answer was not filed and removal was not requested until after the hearing had begun, where (1) the nature of the hearing was unclear and it was not until it began that the parties and the Probate Court became aware of the issues involved, and (2) the testimony was taken to avoid having to recall the witnesses at a later hearing. Cotty v. Yartzeff (S.C. 1992) 309 S.C. 259, 422 S.E.2d 100. Estoppel 91(1)

The probate court did not lack jurisdiction over a contested claim by the testator’s son where the claim was based on his mother’s wrongful receipt of $20,000 of the estate which was due to him and, even though no motion for removal was made by either party or the probate judge, Section 62‑1‑302 provides that an action in which a party has a right to trial by jury and which involves an amount in controversy of at least $5,000 “shall” be removed to circuit court. Thomas v. Gathings (S.C.App. 1991) 304 S.C. 308, 403 S.E.2d 682.

6. Parties

Decedent’s estranged wife had sufficient interest in real property titled in decedent’s name to be protected by fraudulent‑transfers statute, where conveyance could have adversely affected wife’s claims for separate support and maintenance, alimony, or equitable division of marital property. Brown v. Butler (S.C.App. 2001) 347 S.C. 259, 554 S.E.2d 431, rehearing denied. Divorce 1071

6.5. Res judicata

Res judicata precluded estate heir from pursuing a subsequent lawsuit for waste in circuit court against coheir following heir’s action in probate court for partition of three co‑owned tracts, though heir had specifically withdrawn waste claim in partition action; probate court could have fully adjudicated waste claim, and probate court definitively resolved heir’s claims regarding the property by ruling that it would “consider all other issues regarding money owed to either party on these parcels of land to be moot.” Judy v. Judy (S.C. 2011) 393 S.C. 160, 712 S.E.2d 408, rehearing denied. Judgment 590(5); Judgment 747(2)

7. Involuntary commitment

Under Sections 20‑7‑400(A)(2) and 20‑7‑1330(c), the family court is expressly granted the authority to commit a child to the Department of Mental Health for the purposes of examination or treatment. This authority, however, may not conflict with that of the probate courts; Section 62‑1‑302(a)(6) vests the probate court with exclusive jurisdiction over the involuntary commitment of a person. Accordingly, the family court has the authority to order treatment or an evaluation for a child, but may not involuntarily commit a child for an indefinite period of time; absolutely no authorization is given for the detention of a child in the Department of Mental Health in the absence of the need for an examination or treatment. Furthermore, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed. To comply with this requirement, the reasons for committing the child must be established and set forth in the order and the confinement must cease when those reasons no longer exist. South Carolina Dept. of Mental Health v. State (S.C. 1990) 301 S.C. 75, 390 S.E.2d 185.

8. Paternity

Probate courts have subject‑matter jurisdiction to determine paternity for the purpose of determining heirs; overruling Simmons v. Bellamy, 349 S.C. 473, 562 S.E.2d 687. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Courts 200.7

Family courts do not have exclusive jurisdiction to determine paternity, given that probate courts have subject‑matter jurisdiction to decide paternity for the purpose of determining heirs. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Courts 472.4(8)

9. Timeliness of action

Ten day time period for intervening petitioner in will contest proceeding to request removal of action to Circuit Court accrued when probate court accepted without incident personal representative’s amended answer raising for the first time affirmative defenses of statute of limitations and lack of standing of intervening petitioner; Probate Code provided that intervening petitioner had ten days to request removal following date on which all responsive pleadings were filed. Truluck v. Snyder (S.C.App. 2004) 362 S.C. 108, 606 S.E.2d 792. Courts 487(3)

Actions concerning administration of trust accounts fall within Probate Code statute of limitations rather than general statute of limitations. Mayer v. M.S. Bailey & Son (S.C.App. 2001) 347 S.C. 353, 555 S.E.2d 406.

Wife’s two‑year delay in bringing suit to set aside allegedly fraudulent conveyance by deceased husband did not constitute laches, where delay was attributable to dismissal of first suit without prejudice, and lack of diligence by new attorney, and delay did not prejudice transferee. Brown v. Butler (S.C.App. 2001) 347 S.C. 259, 554 S.E.2d 431, rehearing denied. Marriage And Cohabitation 723

10. Attorney fees

Probate court did not have subject matter jurisdiction to award attorney fees earned by dismissed attorney for estate in connection with wrongful death claim absent petition to approve settlement offer; filing of petition for approval of settlement offer gives probate court subject matter jurisdiction and attorney fee arrangement may be reviewed only in connection with evaluation of proposed settlement offer. Ex parte McLeod (S.C.App. 1996) 323 S.C. 461, 476 S.E.2d 167. Death 109

11. Review and error

Since circuit court was sitting in appellate capacity when it reviewed probate court’s denial of petition to set aside will on basis of lack of testamentary capacity, statute providing for actions being heard de novo in circuit court did not apply. In re Estate of Weeks (S.C.App. 1997) 329 S.C. 251, 495 S.E.2d 454. Wills 400

Once the circuit court found, on appeal from the probate court, that the respondent’s claim against his brother’s estate was not barred by laches, it exceeded its jurisdiction by making its own finding of fact that respondent’s claim should have been allowed; the circuit court’s jurisdiction was limited to determining whether there was any evidence to support the probate court’s ruling that the action was barred by laches. Edens v. Edens (S.C. 1993) 312 S.C. 488, 435 S.E.2d 851, rehearing denied. Executors And Administrators 256(8)

**SECTION 62‑1‑303.** Venue; multiple proceedings; transfer.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Action for declaratory judgment by a person interested in the administration of an estate of an infant or a lunatic, see Section 15‑53‑50.

Appeals, see Section 62‑1‑308.

Constitutional provisions regarding jurisdiction in matters testamentary and of administration, see SC Const Art. V, Section 12.

Exclusiveness of probate court’s jurisdiction once acquired, see Section 14‑23‑250.

Prohibition against collateral attack on probate court’s jurisdiction, see Section 14‑23‑260.

Venue for first and subsequent estate proceedings, see Section 62‑3‑201.

Venue of suits against administrators, executors, and guardians, see Sections 15‑7‑40, 15‑7‑50.

Library References

Courts 200, 202(1).

Westlaw Topic No. 106.

C.J.S. Summary Proceedings Sections 7, 9.

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S.C. Jur. Wills Section 65, Transfer; Multiple Proceedings.

LAW REVIEW AND JOURNAL COMMENTARIES

Probate Reform for South Carolina: An Introduction to the Uniform Probate Code. 29 S.C. L. Rev. 397.

Attorney General’s Opinions

Person missing for 7 years presumed to be dead and administration upon his estate proper, but should he return administration void ab initio. Op. Atty Gen, Jan 11, 1963.

NOTES OF DECISIONS

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Inhabitancy 3

1. In general

Sections 62‑1‑303 and 62‑3‑201 would continue to govern the venue of a suit brought in probate court to construe a trust created by a will and transferred to the Circuit Court pursuant to Section 62‑1‑302, rather than the venue provisions of Section 15‑7‑30, where the action remained primarily one governed by the Probate Code. Waddell v. Kahdy (S.C. 1992) 309 S.C. 1, 419 S.E.2d 783, rehearing denied.

2. Under former Section 21‑15‑10

In reviewing the judgment of the probate court, the Supreme Court is governed by the principle that the factual findings of the probate judge will not be set aside on appeal unless clearly or manifestly erroneous. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527. Courts 202(5)

Where will was properly admitted to probate in county of decedent’s residence, even though the realty in question was situated in another county, purchaser of such realty was not an innocent purchaser without notice because of the failure to file the will in the county in which the realty was located; for a search of title would have placed such purchaser on notice that his grantor took through some instrument not recorded in the county, or had no title. Davis v. Sellers (S.C. 1956) 229 S.C. 81, 91 S.E.2d 885. Vendor And Purchaser 233

Where the principal administration is in one state, any letters taken in another state are ancillary. Southern Ry. Co. v. Moore (S.C. 1930) 158 S.C. 446, 155 S.E. 740, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 283 U.S. 816, 75 L.Ed. 1432. Executors And Administrators 518(1)

State of domicile and not state of death proper for administration of estate. Henson v. Wolfe (S.C. 1924) 130 S.C. 273, 125 S.E. 293.

As to freedom of probate judge’s grant of administration on nonresident from collateral attack, except for defect on record, see Dunlap v. Savings Bank of Rock Hill (S.C. 1904) 69 S.C. 270, 48 S.E. 49, 104 Am.St.Rep. 796.

3. —— Inhabitancy

A person is an “inhabitant” of a place when he has his domicile there and, in determining inhabitancy under the present statute, the principles governing domicile are applicable. Domicile is defined as the place where a person has his true, fixed and permanent home and principal establishment, to which he has whenever he is absent, an intention of returning. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

The question of inhabitancy, as that of domicile, is largely one of intent to be determined under the facts and circumstances of each case. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527. Domicile 4(2)

The importance of the factual issue of where a deceased was last an inhabitant to a determination of a controversy over a will is not conclusive, and, when considered in the light of the broad discretion granted to the circuit judge in such cases, is insufficient alone to establish an abuse of such discretion. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

Since a deceased became mentally incapacitated while in military service and remained so incapacitated until his death, the question as to his inhabitance must be determined as of the time of his entry into the navy. This is in accord with the principles that the domicile of one away in military service ordinarily remains unchanged during such absence; and an adult who becomes insane ordinarily retains the domicile he had when he became insane. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527. Domicile 4(1)

**SECTION 62‑1‑304.** South Carolina Rules of Civil Procedure govern formal proceedings.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 2, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

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 Section 62‑1‑201 and also see Sections 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).

Effect of Amendment

The 2010 amendment rewrote this section.

CROSS REFERENCES

Commencement of proceedings in court of probate, see Section 14‑23‑280.

Regulation of practice, procedure, and conduct of business in courts of probate, see Section 14‑23‑1140.

Library References

Courts 202.

Westlaw Topic No. 106.

C.J.S. Summary Proceedings Sections 7, 9.

RESEARCH REFERENCES

Treatises and Practice Aids

Will Contests Section 13:7, Applicability of Civil Discovery Rules in Formal Discovery.

NOTES OF DECISIONS

In general 1

1. In general

Issue of whether probate court erred in awarding testator’s wife elective share was waived on appeal to circuit court, where challenging beneficiary did not argue to probate court that wife’s petition for share of estate did not strictly comply with elective share statute and did not make motion to alter or amend probate court’s judgment. In re Timmerman (S.C.App. 1998) 331 S.C. 455, 502 S.E.2d 920. Wills 782(8)

Even if personal representatives were required to answer testator’s son’s complaint to set aside will that had been admitted to informal probate, under rules of civil procedure, probate court did not abuse its discretion in determining there was good cause to excuse any technical default. In re Estate of Weeks (S.C.App. 1997) 329 S.C. 251, 495 S.E.2d 454. Wills 283

**SECTION 62‑1‑305.** Records and certified copies.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Books, including index books, to be kept by probate judges, see Section 14‑23‑1130.

Duties of the clerk of the probate court, see Section 14‑23‑1100.

Library References

Courts 202(1).

Westlaw Topic No. 106.

C.J.S. Summary Proceedings Sections 7, 9.

Attorney General’s Opinions

A court could likely find that a Probate Court may maintain an electronic index book as long as the index records are properly stored electronically with the ability to print a hard paper copy at any time, with the caveat that electronic storage should have a backup copy stored with and that otherwise complies with standards of the South Carolina Department of Archives and History. S.C. Op.Atty.Gen. (Jan. 31, 2014) 2014 WL 1398582.

**SECTION 62‑1‑306.** Jury trials.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 1988 Act No. 659, Section 4; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Commencement of proceedings in probate court, see Section 14‑23‑280.

Library References

Jury 11(2).

Westlaw Topic No. 230.

C.J.S. Juries Section 22.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Jury Section 38, When Allowed.

Treatises and Practice Aids

Will Contests Section 4:9, Jury Trial Jurisdiction.

NOTES OF DECISIONS

In general 1

Waiver 2

1. In general

A will contestant was not entitled to a jury trial in an action to void a trust created by will since the construing of a will is an equitable matter. Waddell v. Kahdy (S.C. 1992) 309 S.C. 1, 419 S.E.2d 783, rehearing denied.

Where a probate matter was commenced under the former procedure but had not concluded before the effective date of the probate code, the “interest of justice” required that the former procedure allowing a jury trial de novo on appeal to the circuit court be applied, rather than the procedure set forth in Section 62‑1‑308(d) which provides that the “hearing shall be strictly on appeal and no new evidence shall be presented”; the executrix would be denied the right to have a jury trial if the provisions of the probate code were applied, because a litigant was afforded the right to a jury trial on appeal to the circuit court under the former procedure, while a litigant is granted the right to a jury trial in the probate court under the probate code. Van Sant v. Smith (S.C. 1990) 301 S.C. 556, 393 S.E.2d 174.

2. Waiver

Intervening petitioner in will contest proceeding who initially had been a defendant did not waive his right to a jury trial, though responsive pleading he filed as a defendant did not contain a jury demand; order by Probate Court dismissing intervening petitioner as a defendant and granting him leave to intervene was a dismissal without prejudice, dismissal without prejudice had the effect of nullifying his prior responsive pleading, and demand for a jury trial was contemporaneous with his petition to challenge will on grounds of undue influence and lack of testamentary capacity. Truluck v. Snyder (S.C.App. 2004) 362 S.C. 108, 606 S.E.2d 792. Jury 25(6)

The testator’s wife did not waive her right to a jury trial in a separate Circuit Court proceeding to probate her husband’s will, by her participation in a proceeding in Probate Court, since Section 62‑1‑306 provides that a party is entitled to a jury trial “unless waived as provided in the rules of civil procedure for the courts of this state,” and the wife timely made a written demand for a jury trial. Cotty v. Yartzeff (S.C. 1992) 309 S.C. 259, 422 S.E.2d 100.

**SECTION 62‑1‑307.** Probate judge; powers.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

This section provides that the acts performable by the court may be performed by the probate judge or by a person, including a clerk, appointed by the judge. This section does not conflict with Section 14‑23‑1030 (appointment of an associate judge), 14‑23‑1070 (appointment of a deputy), or 14‑23‑1090 (appointment of a clerk) of the 1976 Code, and these sections will still be applicable.

CROSS REFERENCES

Appointment of deputy by judge of probate, see Section 14‑23‑1070.

Associate judges of probate, see Section 14‑23‑1030.

Duties of clerk of probate court, see Section 14‑23‑1100.

Library References

Judges 24.

Westlaw Topic No. 227.

C.J.S. Judges Sections 78 to 80, 143 to 152.

**SECTION 62‑1‑308.** Appeals.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 9; 1997 Act No. 152, Section 4; 1999 Act No. 55, Section 56; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

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

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.

CROSS REFERENCES

Costs on appeal from probate court, see Section 15‑37‑100.

Effect on appeal of enrollment of decree by probate court, see Section 14‑23‑380.

Election and term of probate court judges, see Sections 14‑23‑30 et seq.

Jurisdiction of circuit court, see SC Const Art V, Section 11, Sections 14‑5‑310 et seq.

Jurisdiction of Supreme Court in appeals in probate matters, see Section 18‑9‑30.

Manner in which jury shall be demanded under South Carolina Rules of Civil Procedure, see Rule 39, SCRCP.

Practice of law by probate judges, see Section 14‑23‑1110.

Right to appeal the disposition of unclaimed assets, see Section 62‑3‑914.

Library References

Courts 202(5).

Westlaw Topic No. 106.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 13, Appellate Jurisdiction of Circuit Courts.

S.C. Jur. Appeal and Error Section 53, General Rule.

S.C. Jur. Appeal and Error Section 72, Exceptions to the First Requirement of Raising Issues Below.

S.C. Jur. Appeal and Error Section 76, Historical Notes: Exceptions and Additional Sustaining Grounds; in Favorem Vitae Review of Death Penalty Cases.

S.C. Jur. Constitutional Law Section 19, Structure of the Judicial System.

S.C. Jur. South Carolina Rules of Civil Procedure Section 74.2, Discussion.

S.C. Jur. Wills Section 122, Vacation of Order for Other Cause.

S.C. Jur. Wills Section 181, Disposition of Unclaimed Assets.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 968, Judicial Accountings: Other.

Will Contests Section 16:5, Taking an Appeal in General.

LAW REVIEW AND JOURNAL COMMENTARIES

The Scope of Judicial Review: A Continuing Dialogue. 31 S.C. L. Rev. 171.

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1. In general

Circuit Court may not disturb the Probate Court’s findings of fact unless a review of the record discloses there is no evidence to support them. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Courts 202(5)

For purposes of statute requiring Circuit Court to hear and determine appeal from Probate Court according to the rules of law, “according to the rules of law” means according to the rules governing appeals. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Courts 202(5)

Under the Probate Code, a circuit court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on appeal. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Courts 202(5)

Circuit court must hear and determine appeal from probate court order “according to the rules of law,” meaning according to rules governing appeals. Golini v. Bolton (S.C.App. 1997) 326 S.C. 333, 482 S.E.2d 784. Courts 202(5)

Appeals taken from the probate court are governed by the provisions of the Probate Code. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611. Courts 202(5)

The phrase “according to the rules of law” contained in Section 62‑1‑308(d) means according to the rules governing appeals. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611. Courts 202(5)

“According to the rules of law” as used in section of probate code providing that circuit court must hear and determine appeal “according to the rules of law,” means according to rules governing appeals; in absence of statute or rule of court expressly prescribing a different standard of review, circuit court must apply same standard of review that Supreme Court would apply on appeal. Matter of Howard (S.C. 1993) 315 S.C. 356, 434 S.E.2d 254. Courts 202(5)

2. Nature of action

An action to contest a will is an action at law. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 222

3. Construction with other laws

Appeals from the probate court are governed by the statute specifically pertaining to appeals from the probate court rather than the general statute governing appellate jurisdiction in law cases. Dorn v. Cohen (S.C. 2017) 2017 WL 6503853. Courts 202(5)

The enactment of Section 62‑1‑308 of the Probate Code, which generally addresses appeals from Probate Court orders, did not impliedly repeal the earlier statute (Section 44‑17‑620), which specifically addressed appeals from Probate Court commitment orders. Mims v. Alston (S.C. 1994) 312 S.C. 311, 440 S.E.2d 357, rehearing denied. Mental Health 32

4. Jury trial

Where a probate matter was commenced under the former procedure but had not concluded before the effective date of the probate code, the “interest of justice” required that the former procedure allowing a jury trial de novo on appeal to the circuit court be applied, rather than the procedure set forth in Section 62‑1‑308(d) which provides that the “hearing shall be strictly on appeal and no new evidence shall be presented”; the executrix would be denied the right to have a jury trial if the provisions of the probate code were applied, because a litigant was afforded the right to a jury trial on appeal to the circuit court under the former procedure, while a litigant is granted the right to a jury trial in the probate court under the probate code. Van Sant v. Smith (S.C. 1990) 301 S.C. 556, 393 S.E.2d 174.

5. Cessation of proceedings pending appeal

Statute providing that, upon appeal from a Probate Court ruling, proceedings are halted until judgment from appellate courts is had, applied only to require cessation of those proceedings addressed in the orders from which an appeal was taken and did not divest Probate Court of jurisdiction over its order denying attorney in fact visitation rights with trustee, where attorney in fact did not appeal from such order. Ulmer v. Ulmer (S.C. 2006) 369 S.C. 486, 632 S.E.2d 858. Courts 202(5)

6. Scope of review

Once the circuit court found, on appeal from the probate court, that the respondent’s claim against his brother’s estate was not barred by laches, it exceeded its jurisdiction by making its own finding of fact that respondent’s claim should have been allowed; the circuit court’s jurisdiction was limited to determining whether there was any evidence to support the probate court’s ruling that the action was barred by laches. Edens v. Edens (S.C. 1993) 312 S.C. 488, 435 S.E.2d 851, rehearing denied. Executors And Administrators 256(8)

When an appeal is made to the circuit court from an order of the probate court the circuit court must determine the appeal “according to the rules of law”; the term “according to the rules of law,” as used in Section 62‑1‑308(d), means according to the rules regulating appeals. In the absence of a statute prescribing a different standard of review, a circuit court in reviewing a final order of the probate court must apply the same standard of review that either the Court of Appeals or the Supreme Court would apply in the case. In an appeal from the circuit court of an equity case originating in the probate court, the Court of Appeals may make findings in accordance with its own view of the preponderance of the evidence where the probate court and the circuit court have disagreed on the material issues in the case. Eagles v. South Carolina Nat. Bank (S.C.App. 1990) 301 S.C. 402, 392 S.E.2d 187.

7. Standard of review

Standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Courts 202(5)

If there is neither a statute nor a rule of court expressly prescribing a different standard of review when reviewing decision of the Probate Court, the Circuit Court must apply the same standard that the appellate court would apply were the appeal taken directly to either the Supreme Court or Court of Appeals. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Courts 202(5)

In the absence of a statute or rule prescribing a different standard of review in the appeal of a probate matter to the Circuit Court, the Circuit Court must apply the same standard the Court of Appeals would apply on direct appeal. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611. Courts 202(5)

8. Timeliness

Appeal of probate court order was not timely filed in the circuit court by mailing notice of appeal to circuit court on day after the order; the notice had to be filed in the circuit court within ten days. In re Estate of Cretzmeyer (S.C. 2005) 365 S.C. 12, 615 S.E.2d 116. Courts 202(5)

Rule requiring service of notice of appeal within 30 days after receipt of written notice of judgment when no other time is fixed by statute did not apply to appeal from probate court order; statute required that notice of intention to appeal be filed and served within 10 days after receipt of written notice of order. Witzig v. Witzig (S.C.App. 1996) 325 S.C. 363, 479 S.E.2d 297. Courts 202(5)

Rule permitting additional five days to respond when notice or paper is served by mail did not provide additional five days to file notice of intent to appeal; rule was pleadings rule that applied only when service was effective upon mailing and deadline for filing notice of intent to appeal did not begin to run until receipt of notice of order appealed from. Witzig v. Witzig (S.C.App. 1996) 325 S.C. 363, 479 S.E.2d 297. Appeal And Error 428(2)

The respondent timely filed his notice of appeal 14 days after receipt of the probate court’s order, although Section 62‑1‑100 was amended to reduce the time in which to file a notice from 15 days to 10 days while the probate court had the matter under advisement, because as amended, Section 62‑1‑100 provided that the former procedure should be made applicable in the interest of justice or because of the infeasiblity of applying the new procedure. Edens v. Edens (S.C. 1993) 312 S.C. 488, 435 S.E.2d 851, rehearing denied. Courts 202(5)

Although Section 62‑1‑308 requires that the grounds of an appeal from probate court to the circuit court be filed in the office of the probate court within 15 days after receipt of notice of the decision appealed from, a will contestant’s actions constituted sufficient compliance with the statute where he filed his exceptions with the probate court prior to entry of the written order. Bishop v. Battle (S.C. 1988) 296 S.C. 512, 374 S.E.2d 497.

Circuit court lacked subject‑matter jurisdiction to consider appeal of probate court’s award of reimbursement for debt payment and attorney fees to wife’s estate, in action regarding elective share, where executor for husband’s estate did not timely file notice of intent to appeal and grounds for appeal. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Courts 202(5); Wills 788(3)

9. Final order

Probate court’s order adding party to action to remove co‑trustees was not a final order and was thus not immediately appealable. Dorn v. Cohen (S.C. 2017) 2017 WL 6503853. Courts 202(5)

Probate court’s order denying the motion of testator’s daughter, as defendant, to remove, to the Circuit Court, an action in which personal representative of testator’s estate and testator’s other children petitioned for formal testacy and sought to set aside, based on fraud, a codicil in favor of daughter, was not a final order, for purposes of statute allowing appeal, to Circuit Court, from final orders of the probate court. Fulmer v. Cain (S.C. 2008) 380 S.C. 466, 670 S.E.2d 652. Wills 394

Probate court’s interlocutory order denying the motion of testator’s daughter, as defendant, to remove, to the Circuit Court, an action in which personal representative of testator’s estate and testator’s other children petitioned for formal testacy and sought to set aside, based on fraud, a codicil in favor of daughter, was not appealable under the exception to general rule that only final orders are appealable, which exception is for orders that impact the mode of trial, because the exception was confined to orders which abridged a party’s constitutional right to trial by jury, and jury trials were available in probate court; abrogating Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792. Fulmer v. Cain (S.C. 2008) 380 S.C. 466, 670 S.E.2d 652. Wills 394

Probate Court’s denial, in will contest proceeding, of intervening petitioner’s motion to have the case considered by a jury in the Circuit Court constituted a final order for the purpose of filing an appeal and thus could be appealed to the Circuit Court, as it impacted the mode of trial. Truluck v. Snyder (S.C.App. 2004) 362 S.C. 108, 606 S.E.2d 792. Wills 394

10. Under former Section 18‑5‑10

A document purported to be an appeal to the circuit court from the probate court pursuant to Section 18‑5‑10, which did not identify any grounds of appeal or error on the part of the probate court, was properly dismissed by the circuit court on the ground that it did not comply with Section 18‑5‑20. The filing and service of the ground of appeal in accordance with Section 18‑5‑20 are integral parts of the right of appeal from the probate court to the circuit court. Estate of Corley (S.C.App. 1989) 299 S.C. 525, 386 S.E.2d 264.

It is the general rule that jurisdiction of the circuit court in matters coming from the probate court is strictly appellate and review is taken on the record made in the probate court. Although an appeal from a decision of the probate court on the issue of “will” or “no will” is to be handled as a trial de novo of the factual issues in the circuit court, the plaintiffs in an action arising out of a dispute over the administration of an estate were not entitled to de novo review in the circuit court, and thus the appeal was properly dismissed since no record of the probate proceedings was provided the circuit court to review. Estate of Corley (S.C.App. 1989) 299 S.C. 525, 386 S.E.2d 264.

Any dispute arising between executors relative to the management of the estate should be settled by the judge of the Probate Court in the first analysis, since such jurisdiction as the Circuit Court has in dealing with the issues involved is appellate only. Tucker v. Tucker (S.C. 1975) 264 S.C. 172, 213 S.E.2d 588. Courts 472.4(2.1)

The circuit court ought not to disturb the findings of fact by probate court unless clearly erroneous. Sartor v. Fidelity & Deposit Co. (S.C. 1931) 160 S.C. 390, 158 S.E. 819.

On appeal from the probate court on probate of a will to the circuit court the cause is to be tried anew, and must be regarded as a law case. In re Solomons’ Estate (S.C. 1906) 74 S.C. 189, 54 S.E. 207. Appeal And Error 1088

The circuit court has, under this section [Code 1962 Section 7‑201], the power to review all the findings of the probate court. Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40.

The circuit court having, under the provisions of this section [Code 1962 Section 7‑201], the power to review all the findings of the probate court can consider the evidence given in the probate court as to fitness and personal qualifications of an applicant for administrator of an estate. Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40.

An order from the circuit court sending a case back to the probate court to take testimony on a certain question, which had been omitted at the original hearing, is erroneous as being without the appellate jurisdiction of the circuit court in such cases. Ex parte White (S.C. 1890) 33 S.C. 442, 12 S.E. 5.

The theory of this section [Code 1962 Section 7‑201] is that where a case originally within the jurisdiction of the court of probate is carried by appeal to the circuit court, the last named court can exercise appellate jurisdiction only. Ex parte White (S.C. 1890) 33 S.C. 442, 12 S.E. 5.

Where a case originally within the jurisdiction of the probate court has been heard there, and carried thence by appeal to the circuit court, the hearing in the circuit court is strictly on appeal, except that where an issue of fact or of title to land is to be decided, either party may apply to the circuit court for an order that such issue may be tried by a jury. Ex parte White (S.C. 1890) 33 S.C. 442, 12 S.E. 5.

If an issue of fact is involved in the probate of a will, the cause is to be tried anew in the circuit court, as though it were an original cause in that court, and the parties are at liberty to raise new questions, never considered by the ordinary, or even made before him. Myers v. O’Hanlon (S.C. 1861).

11. Under former Section 18‑5‑20—In general

The action of a probate court, although erroneous, is valid until reversed. Anderson v. Bowers (C.A.4 (S.C.) 1948) 170 F.2d 676, rehearing denied 209 F.2d 510, certiorari denied 69 S.Ct. 1160, 337 U.S. 918, 93 L.Ed. 1727.

A document purported to be an appeal to the circuit court from the probate court pursuant to Section 18‑5‑10, which did not identify any grounds of appeal or error on the part of the probate court, was properly dismissed by the circuit court on the ground that it did not comply with Section 18‑5‑20. The filing and service of the ground of appeal in accordance with Section 18‑5‑20 are integral parts of the right of appeal from the probate court to the circuit court. Estate of Corley (S.C.App. 1989) 299 S.C. 525, 386 S.E.2d 264.

The filing and service of the grounds of appeal are integral parts of the right of appeal from probate court to circuit court and the failure to file the grounds of appeal warrants dismissal of the action in the circuit court. Montgomery v. Keziah (S.C. 1981) 277 S.C. 84, 282 S.E.2d 853.

The fifteen‑day requirement of service of grounds of appeal after notice of an order of the probate court applies only to parties to the proceedings which resulted in the order and not ex parte proceedings. Reed v. Lemacks (S.C. 1943) 204 S.C. 26, 28 S.E.2d 441. Wills 364

After parties have been brought into court and are represented by an attorney or attorneys‑at‑law, service upon such attorney or attorneys will be deemed in legal effect service upon the adverse parties. Anderson v. Anderson (S.C. 1941) 198 S.C. 412, 18 S.E.2d 9.

Code 1962 Section 19‑255 practically confers jurisdiction of the issue of “will or no will” upon the court of common pleas. The procedure for the determination of this issue contemplates a new trial and does not contain a single element of an appeal. The right of review is, however, secured by the provisions of this section [Code 1962 Section 7‑202]. Muldrow v. Jeffords (S.C. 1928) 144 S.C. 509, 142 S.E. 602.

Appellant being allowed fifteen days after notice of the probate decree to file notice of appeal, if such notice is received within less than fifteen days of an approaching session of the circuit court, by deferring the service of notice of appeal to as late a day as possible within the limits of the fifteen‑day period available, the next stated session need not be the one immediately following the fining of the probate decree. Fultz v. McKnight (S.C. 1923) 125 S.C. 115, 118 S.E. 37.

This section [Code 1962 Section 7‑202] must be construed with Code 1962 Section 7‑204. Robertson v. Curlee (S.C. 1901) 59 S.C. 454, 38 S.E. 116.

When a right of appeal is provided from an inferior court, a writ of certiorari will not be allowed also, except, possibly, in very exceptional cases. Ex parte Gregory (S.C. 1900) 58 S.C. 114, 36 S.E. 433.

A decree refusing appeal because it was not taken in time is appealable. Henderson v. Wyatt (S.C. 1877) 8 S.C. 112.

12. —— Parties to appeal, under former Section 18‑5‑20

A person not a contestant nor a party to a probate proceeding has no individual right to appeal. Asbury v. South Carolina Nat. Bank (S.C. 1977) 268 S.C. 40, 231 S.E.2d 306.

Where an individual commenced a will contest and died during the pendency thereof, the executor of the decedent had no individual right to appeal the judgment in the will contest. Asbury v. South Carolina Nat. Bank (S.C. 1977) 268 S.C. 40, 231 S.E.2d 306.

Committee, who was made party defendant in proceeding to adjudge ward sane, could appeal from order holding ward sane. Cobb v. South Carolina Nat. Bank (S.C. 1947) 210 S.C. 533, 43 S.E.2d 465.

No appeal having been taken from the finding of the probate court that a second appointee was decedent’s son, a nephew, first appointed and later revoked, could not complain of the appointment, though there was no citation, for he was not an interested party within the provisions of this section [Code 1962 Section 7‑202]. In re Jones’ Estate (S.C. 1915) 102 S.C. 110, 86 S.E. 203.

The language “any person interested in any final order, sentence or decree of any probate court and considering himself injured thereby may appeal therefrom,” must be regarded as referring only to persons who are parties to the proceedings in the court of probate, for no one can properly be said to be interested in any final order or decree made in a proceeding to which he is not a party, nor can he consider himself injured thereby; for nothing can be better established than the doctrine that judgments bind only parties and their privies. Witte Bros. v. Clarke (S.C. 1882) 17 S.C. 313.

13. —— Final order, under former Section 18‑5‑20

The Court of Common Pleas lacked subject matter jurisdiction over the appeal from the probate court of siblings whose 2 sisters were appointed special administrators of their mother’s estate where the order of the court was clearly temporary and appointed the sisters only “until such time as a Personal Representative(s) shall be formally appointed,” and the order (1) forbade distribution of the estate assets, (2) required the posting of a substantial bond, and (3) required that the sisters make monthly accountings. Estate of Boyce v. Work (S.C.App. 1991) 305 S.C. 43, 406 S.E.2d 184, dismissed 308 S.C. 234, 417 S.E.2d 597.

The appointment of an administrator is a final order from which an appeal lies under this section [Code 1962 Section 7‑202]. See Ex parte White 38 SC 41, 16 SE 286 (1892). Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40.

The “final order” here set out means final as to the rights of all parties to the proceedings. Robertson v. Curlee (S.C. 1901) 59 S.C. 454, 38 S.E. 116.

The denial of a motion that certain persons be made parties to the record is not a “final order” within the meaning of this section [Code 1962 Section 7‑202]. Robertson v. Curlee (S.C. 1901) 59 S.C. 454, 38 S.E. 116.

14. Under former Section 18‑5‑30

It is the general rule that jurisdiction of the circuit court in matters coming from the probate court is strictly appellate and review is taken on the record made in the probate court. Although an appeal from a decision of the probate court on the issue of “will” or “no will” is to be handled as a trial de novo of the factual issues in the circuit court, the plaintiffs in an action arising out of a dispute over the administration of an estate were not entitled to de novo review in the circuit court, and thus the appeal was properly dismissed since no record of the probate proceedings was provided the circuit court to review. Estate of Corley (S.C.App. 1989) 299 S.C. 525, 386 S.E.2d 264.

An important effect of the amendment of 1939 was to relieve the appellant of the burden and expense of procuring a certified copy of the record and filing it in the appellate court. Instead it was made the duty of the probate court to file the originals comprising the record, which shall constitute the return to the appellate court. The filing shall be within thirty days after filing in the probate court of notice and grounds of appeal and may be compelled by attachment. There is no provision for penalty upon appellant for failure of the probate judge to perform his duty under this section [Code 1962 Section 7‑203]. Howell v. Littlefield (S.C. 1947) 211 S.C. 462, 46 S.E.2d 47.

The appellants from the judgment of the probate court, having complied with Code 1962 Section 7‑202 respecting the taking of their appeal to the court of common pleas, are entitled to rely upon the presumption that the judge of probate would perform his duty in the time required by the provisions of this section [Code 1962 Section 7‑203]. The presumption continues until knowledge of the neglect is acquired. Howell v. Littlefield (S.C. 1947) 211 S.C. 462, 46 S.E.2d 47.

The jurisdiction of the probate court continues until the record shows that it is lost. Where the notice of appeal is revoked prior to the filing of the return as herein provided for, the probate court still has jurisdiction to revoke its grant of letters of administration. In re Jones’ Estate (S.C. 1915) 102 S.C. 110, 86 S.E. 203.

15. Under former Section 18‑5‑40

Pending appeal from probate decree declaring will invalid, a judgment debtor cannot enjoin an administrator cum testamento annexo from enforcing judgment by execution, as only proceedings in pursuance of decree rejecting the will are stayed under the provisions of this section [Code 1962 Section 7‑204]. Ex parte Bank of Anderson (S.C. 1924) 128 S.C. 174, 122 S.E. 592. Wills 369

An appeal from an order or decree of the probate court shall act as a supersedeas, therefore during the pendency of an appeal from the probate court of a decree of “no will,” the probate court cannot grant letters of administration, as that would involve a determination of the question on appeal. Appeal of Wessinger (S.C. 1902) 63 S.C. 130, 41 S.E. 17.

16. Under former Section 18‑5‑50—In general

It is the general rule that jurisdiction of the circuit court in matters coming from the probate court is strictly appellate and review is taken on the record made in the probate court. Although an appeal from a decision of the probate court on the issue of “will” or “no will” is to be handled as a trial de novo of the factual issues in the circuit court, the plaintiffs in an action arising out of a dispute over the administration of an estate were not entitled to de novo review in the circuit court, and thus the appeal was properly dismissed since no record of the probate proceedings was provided the circuit court to review. Estate of Corley (S.C.App. 1989) 299 S.C. 525, 386 S.E.2d 264.

As a general rule, the jurisdiction of the circuit court in matters coming from the court of probate is strictly appellate and review is had on the record made in the probate court without additional evidence. However, when an appeal is taken from a decision of the probate court on the issue of “will” or “no will,” the cause is transferred to the circuit court for a trial de novo of the factual issues as though it were an original cause in that court. In such cases, the appeal is in reality a special proceeding under the statute which affords the parties the right to a trial by jury in the circuit court, if properly claimed. If no jury is demanded, the case is tried de novo by the circuit judge sitting without a jury. No notice of demand for trial de novo is required. Where an appeal was taken on the issue of “will” or “no will,” and no jury trial was demanded, the proper procedure to follow in the circuit court would have been first to determine if the appeal raised an issue of fact. Where the testator’s signature was in dispute, the issue on appeal was one of fact and the statute gave the right to trial de novo. Next, the circuit court should have determined if the matter was at law or in equity. If it were in equity, then trial by jury would be discretionary even if demanded. In the appeal of a matter concerning probate of a will, the appeal was at law and a jury trial was demandable of right unless waived. Where the parties waived trial by jury, the circuit judge should have tried the case de novo without a jury. It was reversible error for the circuit judge to refuse to permit a trial on the basis that neither side had demanded a jury, and to treat the case as one for appellate review only, confining himself to the record made in the probate court. Martin v. Skinner (S.C.App. 1985) 286 S.C. 527, 335 S.E.2d 252.

On appeals from the probate court to the circuit court, S.C.R.Civ.P. 38(b) would require demand for a jury to be made within 10 days after service of the grounds of appeal pursuant to Section 18‑5‑20. Martin v. Skinner (S.C.App. 1985) 286 S.C. 527, 335 S.E.2d 252.

Review of probate judge’s finding under Section 18‑5‑50, where no jury trial was requested, was limited in review to evidence taken before probate judge, and circuit court had no authority to take additional evidence. Payton v. Payton (S.C. 1978) 270 S.C. 275, 241 S.E.2d 901, certiorari denied 99 S.Ct. 145, 439 U.S. 847, 58 L.Ed.2d 148.

The importance of the factual issue of where a deceased was last an inhabitant to a determination of a controversy over a will is not conclusive, and, when considered in the light of the broad discretion granted to the circuit judge in such cases, is insufficient alone to establish an abuse of such discretion. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

When the circuit court takes a case on appeal from the probate court, it “shall proceed to the trial and determination of the question, according to the rules of law,” that is, according to the rules regulating the hearing of appeals. Ex parte White (S.C. 1890) 33 S.C. 442, 12 S.E. 5.

17. —— Jury questions, under former Section 18‑5‑50

Where there is serious conflict in the testimony on a question of a material fact in the probate proceedings, the circuit court may, on appeal, refer the issue to a jury as provided for in this section [Code 1962 Section 7‑205]. Ex parte Gantt (S.C. 1906) 75 S.C. 364, 55 S.E. 892.

On appeal from the probate court, in proceedings to prove a will in solemn form, where the issue was raised that the will was fraudulent and void, it is proper for the circuit court to try the issue de novo on issues framed by the circuit court on notice. In re Huntley’s Will (S.C. 1903) 67 S.C. 55, 45 S.E. 132. Wills 374

The language in this section [Code 1962 Section 7‑205] as to right to trial by jury being permissive and not imperative implies that, when any question of fact arises under an appeal from the court of probate, the court to which the appeal is addressed may frame an issue for trial by jury; but it does not imply that, whenever any question of fact arises upon such an appeal, either party has a right to demand that such question shall be tried by a jury. Hughes v. Kirkpatrick (S.C. 1892) 37 S.C. 161, 15 S.E. 912.

This section [Code 1962 Section 7‑205] recognizes a right to jury trial of only “an issue of fact, in an action for the recovery of money only, or of specific real or personal property” as required to be so tried by Code 1962 Section 10‑1056 and it was error for a circuit court, on motion of one of the parties to an appeal from the probate court, to grant an order framing and referring to a jury an issue as to whether or not there was a will, without notice to the opposite party, as required by Cir Ct Rule 28. In re Shier’s Estate (S.C. 1892) 35 S.C. 417, 14 S.E. 931.

18. —— Jury discretionary, under former Section 18‑5‑50

With certain exceptions the granting of a jury trial under this section [Code 1962 Section 7‑205] is discretionary with the circuit judge, and his ruling thereon will not be disturbed except upon a clear showing of abuse of such discretion. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

The granting of a jury trial is discretionary with the court. Meier v Kornahrens, 113 SC 270, 102 SE 285 (1920). Hughes v Kirkpatrick 37 SC 161, 15 SE 912 (1892). Ex parte Blizzard (S.C. 1937) 185 S.C. 131, 193 S.E. 633.

It is not within the discretion of the court to refuse either party a jury trial where the appeal involves issues of fact as to the validity of a will, which right is given by a judicial construction of Cir Ct Rule 28. Meier v. Kornahrens (S.C. 1920) 113 S.C. 270, 102 S.E. 285.

Even where a jury trial may be had as a matter of right, it may be waived and is waived by failing to claim it within the time provided for in Cir Ct Rule 28. Meier v. Kornahrens (S.C. 1920) 113 S.C. 270, 102 S.E. 285.

Allowed issue is to be joined under direction of the court. Meier v. Kornahrens (S.C. 1920) 113 S.C. 270, 102 S.E. 285.

19. —— Motion for jury trial, under former Section 18‑5‑50

There is no specific time fixed for the making of the motion for jury trial, but as most of the issues of fact arising under this section [Code 1962 Section 7‑205] and the foregoing sections are issues in causes of an equitable nature, by common consensus of the bench and bar, Rule 28 of the circuit court, providing for ten days’ written notice “after issue is joined,” of intention to move for jury trial, has been applied to the framing of issues on such appeals. Rule 28 was not originally intended to apply to the framing of issues on appeals from the probate court, but in the absence of any statutory provision, it has been applied and has served the purpose fairly well. Meier v. Kornahrens (S.C. 1920) 113 S.C. 270, 102 S.E. 285.

20. Under former Section 18‑5‑70

The failure of the circuit court to certify to the probate court its affirmation of the judgment appealed therefrom is no ground for reversal of that judgment in the Supreme Court. Watson v. Pollitzer (S.C. 1905) 72 S.C. 387, 51 S.E. 914. Appeal And Error 1089(1)

Circuit court may certify to the probate court its affirmation of the probate judgment after an appeal has been had from the circuit court to the Supreme Court. Watson v. Pollitzer (S.C. 1905) 72 S.C. 387, 51 S.E. 914.

21. Under former Section 44‑23‑820

It was not the intent of the legislature by passage of this section [Code 1962 Section 32‑1047] to deny the right of appeal to a party litigant who would otherwise be so entitled. Cobb v. South Carolina Nat. Bank (S.C. 1947) 210 S.C. 533, 43 S.E.2d 465.

**SECTION 62‑1‑309.** Election and term of judges.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

CROSS REFERENCES

Election and term of probate judges, see Section 14‑23‑1020.

Library References

Judges 3, 7.

Westlaw Topic No. 227.

C.J.S. Judges Sections 20 to 29, 40 to 50, 54 to 57, 76.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Reference Section 8, Master‑In‑Equity.

Part 4

Notice, Parties, and Representation in Estate Litigation and Other Matters

**SECTION 62‑1‑401.** Notice; method and time of giving.

Section effective until January 1, 2019. See, also, Section 62‑1‑401 effective January 1, 2019.

 (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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 3, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

**SECTION 62‑1‑401.** Notice; method and time of giving.

Section effective January 1, 2019. See, also, Section 62‑1‑401 effective until January 1, 2019.

 (a) If notice of a hearing on a 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 a 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 must be given:

 (1) by mailing a copy of the notice at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail, or by a commercial delivery service that meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. Section 7502(f)(2) 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 of the notice 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 of the notice 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.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 3, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014; 2017 Act No. 87 (S.415), Section 4, eff January 1, 2019.

REPORTER’S COMMENTS

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 or commercial delivery 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 Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

The 2017 amendment authorizes notice to be made by a qualifying commercial delivery service and is similar to notice by registered mail or certified mail.

Editor’s Note

2017 Act No. 87, Section 6, provides as follows:

“(A) This act takes effect on January 1, 2019.

“(B) Except as otherwise provided in this act, on the effective date of this act:

“(1) this act applies to any conservatorships, guardianships, or protective orders for minors or persons under a disability created before, on, or after its effective date;

“(2) this act applies to all judicial proceedings concerning conservatorships, guardianships, or protective orders for minors or persons under a disability commenced on or after its effective date;

“(3) this act applies to judicial proceedings concerning conservatorships, guardianships, and protective orders for minors or persons under a disability 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 that particular provision of this act does not apply and the superseded law applies;

“(4) subject to item (B)(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 this 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.

“(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 suspended.”

CROSS REFERENCES

Acceptance of appointment, consent to jurisdiction, see Section 62‑5‑305.

Acceptance of appointment, consent to jurisdiction, see Section 62‑5‑411.

Allowance of claims, see Section 62‑3‑806.

Commencement of proceedings in probate court, see Section 14‑23‑280.

Filing of demand for notice by person who has financial or property interest in decedent’s estate, see Section 62‑3‑204.

Notice of hearing in formal testacy proceedings, see Section 62‑3‑403.

Notice requirements in guardianship proceedings, see Section 62‑5‑309.

Notice requirements in proceedings for protection of property of persons under a disability and minors, see Section 62‑5‑405.

Provision that interested persons may be bound by notice in conformity with this section, see Section 62‑3‑106.

Required filings with court, petition for order compelling personal representative to perform duties, court orders, see Section 62‑3‑1001.

Requirement that party applying for informal probate must give notice to persons demanding it, see Section 62‑3‑306.

Library References

Courts 202(2).

Westlaw Topic No. 106.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 14, Notice.

S.C. Jur. Guardian and Conservator Section 19, Notice.

S.C. Jur. Wills Section 62, Over Persons.

S.C. Jur. Wills Section 78, Notice Requirements.

S.C. Jur. Wills Section 104, Notice of Hearing on Petition.

**SECTION 62‑1‑402.** Notice; waiver.

 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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

CROSS REFERENCES

Acceptance of appointment, consent to jurisdiction, see Section 62‑5‑305.

Acceptance of appointment, consent to jurisdiction, see Section 62‑5‑411.

Library References

Courts 202(2).

Westlaw Topic No. 106.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Guardian and Conservator Section 14, Notice.

S.C. Jur. Guardian and Conservator Section 19, Notice.

**SECTION 62‑1‑403.** Pleadings; when parties bound by others; notice.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 5; 2010 Act No. 244, Section 4, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

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 Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP. 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.

Library References

Courts 202(2).

Westlaw Topic No. 106.

Part 5

Uniform Simultaneous Death Act

**SECTION 62‑1‑500.** Short title.

 This part may be cited as the “Uniform Simultaneous Death Act”.

HISTORY: 1986 Act No. 539, Section 1; 1976 Code Section 62‑1‑501; 2013 Act No. 100, Section 1, eff January 1, 2014.

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 Section 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 Section 62‑1‑506.

LAW REVIEW AND JOURNAL COMMENTARIES

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers. 12 SC LQ 491.

Selected Substantive Provisions of the South Carolina Probate Code: a Comparison with Previous South Carolina Law. 38 S.C. L. Rev. 611.

**SECTION 62‑1‑501.** Definitions.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 10, Survival Requirement.

S.C. Jur. Wills Section 188, Gift to One Deceased; Anti‑Lapse Rule.

Forms

South Carolina Legal and Business Forms Section 17:39 , Drafting Will.

South Carolina Legal and Business Forms Section 17:144 , Simultaneous Death‑Presumption in Event of.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 1.2, Requirement of Surviving the Decedent.

**SECTION 62‑1‑502.** Requirement of Survival by 120 Hours; individuals, two or more beneficiaries, class members.

 (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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

Editor’s Note

Prior Laws: Former Section 62‑1‑502 was titled Disposition of property when persons die simultaneously, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

The Uniform Determination of Death Act, see Sections 44‑43‑450 et seq.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 10, Survival Requirement.

**SECTION 62‑1‑503.** Requirement of survival by 120 hours under governing instruments.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

Editor’s Note

Prior Laws: Former Section 62‑1‑503 was titled Successive beneficiaries of disposition of property, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

The Uniform Determination of Death Act, see Sections 44‑43‑450 et seq.

**SECTION 62‑1‑504.** Co‑owners with right of survivorship; requirement of survival by 120 hours.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Editor’s Note

Prior Laws: Former Section 62‑1‑504 was titled Joint tenants or tenants by the entirety, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

The Uniform Determination of Death Act, see Sections 44‑43‑450 et seq.

**SECTION 62‑1‑505.** Right or benefit that depends on surviving the death of a decedent’s killer.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

Editor’s Note

Prior Laws: Former Section 62‑1‑505 was titled Insured and beneficiary, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

The Uniform Determination of Death Act, see Sections 44‑43‑450 et seq.

**SECTION 62‑1‑506.** Exceptions.

 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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

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.

Editor’s Note

Prior Laws: Former Section 62‑1‑506 was titled Part is not retroactive, and had the following history: 1986 Act No. 539, Section 1.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 10, Survival Requirement.

**SECTION 62‑1‑507.** Evidence of death or status.

 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.

HISTORY: 1986 Act No. 539, Section 1; Code 1976 Section 62‑1‑107; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Editor’s Note

Prior Laws: Former Section 62‑1‑507 was titled Part is not applicable if instrument provides otherwise, and had the following history: 1986 Act No. 539, Section 1.

CROSS REFERENCES

“Proof of death” defined, see Section 62‑6‑101.

Library References

Death 1 to 4.

Descent and Distribution 18.

Executors and Administrators 4.

Westlaw Topic Nos. 117, 124, 162.

C.J.S. Death Sections 1, 3 to 5, 8 to 14.

C.J.S. Executors and Administrators Section 13.

**SECTION 62‑1‑508.** Protection of payors, bona fide purchasers, and other third parties; personal liability of recipient.

 (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.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 10, Survival Requirement.

**SECTION 62‑1‑509.** Construction.

 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.

HISTORY: 1986 Act No. 539, Section 1; 1976 Code Section 62‑1‑508; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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