ARTICLE 2

Intestate Succession and Wills

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or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;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other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.”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

Intestate Succession

**SECTION 62‑2‑101.** Intestate estate.

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

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

REPORTER’S COMMENT

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

Library References

Descent and Distribution 6.

Westlaw Topic No. 124.

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

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Descent and Distribution Section 1, Nature of Descent and Distribution.

S.C. Jur. Descent and Distribution Section 3, Property Subject to Descent and Distribution.

S.C. Jur. Wills Section 141, Construction that Devise Passes Fee Simple‑That Will Passes All Property; After‑Acquired Property.

S.C. Jur. Wills Section 171, Specific Legacies.

S.C. Jur. Wills Section 202, Right of Elective Share by Surviving Spouse‑Effect of Divorce or Annulment on Status of Surviving Spouse; Decree of Separate Maintenance.

Forms

Am. Jur. Pl. & Pr. Forms Descent and Distribution Section 1 , Introductory Comments.

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

LAW REVIEW AND JOURNAL COMMENTARIES

“The Creation of Estates by Implication,” 11 SCLQ 352 (1959).

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

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

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

Cases decided under former law 2

1. In general

Failure to specifically devise proceeds of life insurance or to include residuary clause in will was not merely “scrivener’s error” that would preclude such proceeds from passing to testator’s children by intestacy, despite drafting attorney’s testimony that his understanding was that because testator had no real estate and university was to be recipient of entire estate, no residuary clause was needed, and that he thought sole devise in will would cover entire estate. Bob Jones University v. Strandell (S.C.App. 2001) 344 S.C. 224, 543 S.E.2d 251, rehearing denied. Wills 865(1)

2. Cases decided under former law

Section generally applies only where the ancestor dies entirely intestate. Richardson v Sinkler, 2 SC Eq 127 (1802) (ovrld on other grounds Watson v Wall, 229 SC 500, 93 SE2d 918). Snelgrove v Snelgrove, 4 SC Eq 274 (1812).

Terms imperative. Gaffney v Peeler, 21 SC 55 (1884). Youngblood v Norton, 20 SC Eq 122 (1845).

The court is not warranted in limiting the language of this section [Code 1962 Section 19‑52] to a narrower meaning than the words used import. It must be assumed that the legislature chose its language with care to express its intent and used the words in their ordinary and common acceptation. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321. Descent And Distribution 6

This section [Code 1962 Section 19‑52] is not unconstitutional for the reason of violating SC Const, Art 3, Section 17. McCollum v. Snipes (S.C. 1948) 213 S.C. 254, 49 S.E.2d 12.

When devise is made to heirs, and there is nothing in will to show contrary intention, the law presumes that testator intended that they should take in accordance with statute of distribution. Irvin v. Brown (S.C. 1931) 160 S.C. 374, 158 S.E. 733. Wills 506(2)

The second paragraph under subsec (1) of this section [Code 1962 Section 19‑52] should be read and construed with Code 1962 Section 19‑53. The instant section has been the law of South Carolina for more than a hundred years, and it is to be presumed that the legislature intended Code 1962 Section 19‑53 to fit into the body of the law already in force in South Carolina. Trout v. Burnette (S.C. 1914) 99 S.C. 276, 83 S.E. 684, Am.Ann.Cas. 1916E,911.

**SECTION 62‑2‑102.** Share of the spouse.

 The intestate share of the surviving spouse is:

 (1) if there is no surviving issue of the decedent, the entire intestate estate;

 (2) if there are surviving issue, one‑half of the intestate estate.

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

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Provisions relative to effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights, see Section 62‑2‑802.

Library References

Descent and Distribution 52 to 58.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 60 to 64.

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 7, Share of the Spouse.

Forms

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 2.2, Intestate Share of Surviving Spouse.

Restatement (3d) Property (Wills & Don. Trans.) Section 2.2 TD 2, Intestate Share of Surviving Spouse.

LAW REVIEW AND JOURNAL COMMENTARIES

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

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

“Widow’s Election Between Dower and Other Benefits,” 9 SCLQ 277 (1957).

NOTES OF DECISIONS

In general 1

Federal estate tax 2

1. In general

Widow inherits as heir at law under this section [Code 1962 Section 19‑52] where will gave her a life estate and left remainder to lawful heirs under Statutes of Distribution. White v. White (S.C. 1962) 241 S.C. 181, 127 S.E.2d 627.

Contingent remainders and executory devises are distributable under it among heirs existing at the death of a person entitled in expectancy. Hicks v. Peques (S.C. 1852).

Section has no application to legal estates in trust property, and the estate of a trustee descends to his heir at law. Martin v. Price (S.C. 1846).

2. Federal estate tax

The one third of an estate belonging to the widow under this section [Code 1962 Section 19‑52] after deduction of debts and expenses of administration, but without deduction of any portion of the Federal estate tax, may be taken as the marital deduction allowed under 26 USCA Section 812(e). Pitts v. Hamrick (C.A.4 (S.C.) 1955) 228 F.2d 486.

The widow’s intestate share in a decedent’s estate is exempt from the Federal estate tax under the marital deduction provision of 26 USCA Section 812(e)(1)(A), and does not bear any portion of the Federal estate tax assessed against decedent’s estate. Hamrick v. Pitts, 1955, 135 F.Supp. 835, affirmed 228 F.2d 486.

**SECTION 62‑2‑103.** Share of heirs other than surviving spouse.

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

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 10; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Where the surviving issue who are heirs are all of the same degree of kinship to the decedent, they take per capita, i.e., in equal shares. Where the surviving issue who are heirs are of unequal degrees, they take per capita with per capita representation, i.e., those in the nearest degree take per capita, equal shares, as before, while those in the more remote degrees take, by representation, the equal share which their deceased ancestor in the nearest degree would have taken had he survived the decedent. Such issue in more remote degrees take their deceased ancestor’s equal share, in turn, per capita with per capita representation. This section, read together with Section 62‑2‑106, minimizes the occurrence of unequal distributions among members of the same generation.

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

1. (X) dies intestate:

2. predeceased by two children, (A) and (B):

3. survived by two grandchildren, A’s child C, and B’s child D, and predeceased by one grandchild, B’s child (E):

4. predeceased by two great‑grandchildren, E’s children (F) and (G):

5. and survived by three great‑great grandchildren F’s child H, and G’s children I and J.

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

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

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

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

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

Effect of Amendment

The 2013 amendment deleted subsection (6) relating to stepchildren.

Library References

Descent and Distribution 20 to 43.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 23 to 49.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 72, Inheritance.

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 8, Shares of Those Other Than Spouse.

S.C. Jur. Descent and Distribution Section 9, Representation.

S.C. Jur. Funeral Directors and Embalmers Section 6, Distinctions and Limitations.

Forms

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 28.2, Class Gift to “Issue” or “Descendants”.

Restatement (3d) Property (Wills & Don. Trans.) Section 2.4, Intestate Share of Surviving Ancestors and Collateral Relatives.

LAW REVIEW AND JOURNAL COMMENTARIES

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

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

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Uncles and aunts and their descendants, particular applications; illegitimates of insured’s widow 8

1. Determining lineal consanguinity under former law

When it is desired to ascertain who the next of kin or heirs at law of intestate are, it is necessary to resort to this section [former Code 1962 Section 19‑52]. Gibson v Rikard, 143 SC 402, 141 SE 726 (1928). National Union Bank v McNeal, 148 SC 30, 145 SE 549 (1928).

In determining lineal consanguinity, each step up or down from the decedent counts as one degree. Simonton v. Edmunds (S.C. 1943) 202 S.C. 397, 25 S.E.2d 284.

2. Meaning of “any person”, “heritable blood”

“Any person” means any person with heritable blood [decided under former Code 1962 Section 19‑52]. Gibson v Rikard, 143 SC 402, 141 SE 726 (1928). North v Valk, (13 SC Eq) 212.

“Heritable blood” is that which is untainted by illegitimacy and only heirs or next of kin of such take under the law in the absence of specific statutory authorization. Evans v. Ravenel (S.C. 1944) 205 S.C. 224, 31 S.E.2d 347. Descent And Distribution 67.8

3. Particular applications; illegitimates of insured’s widow—In general

Under subsec (2) of this section [former Code 1962 Section 19‑52] and former Code 1962 Section 19‑53, illegitimate children of insured’s widow were entitled to one‑half interest in commuted installments to insured’s estate after the death of the beneficiary. National Union Bank of Rock Hill v. McNeal (S.C. 1928) 148 S.C. 30, 145 S.E. 549.

4. —— Half‑blood relatives, particular applications; illegitimates of insured’s widow

Brothers and sisters of the half blood do not take when there are those of the whole blood. Wren v Carnes, 4 SC Eq 405 (1813); City Council of Charleston v Hagermeyer, 12 SC Eq 117 (1837), nor when the intestate left a mother. Lawson v Perdriaux, 12 SCL 456 (1821).

Where an intestate dies leaving no spouse, child, lineal descendant or ancestors, but leaves a sister of the whole blood, two sisters of the half blood and the children of a predeceased brother of the half blood, the surviving sister of the whole blood takes the entire estate to the exclusion of the sisters of the half blood and the children of the predeceased brother of the half blood, under subsec (3) of this section [former Code 1962 Section 19‑52]. Bynum v. Bynum (S.C. 1960) 236 S.C. 185, 113 S.E.2d 748. Descent And Distribution 35

The Supreme Court has consistently rejected the frequently urged contention that half blood relatives are postponed to whole blood relatives by our statute of descent and distribution, and has limited such postponement to the specific instances enumerated in the statute. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321.

5. —— Fifth degree relatives, particular applications; illegitimates of insured’s widow

The kinship between a deceased intestate and the children of her first cousin is in the fifth degree. Simonton v. Edmunds (S.C. 1943) 202 S.C. 397, 25 S.E.2d 284.

6. —— First cousins, particular applications; illegitimates of insured’s widow

Under former subsec (6) first cousins take by representation of their respective parents—that is, per stirpes instead of per capita. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321.

First cousins of the whole blood and of the half blood are admitted equally to the succession of intestate estates. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321.

Proviso in former subsec (2) not repealed outright by former subsec. (6), but it is repealed to the extent of denying taking by representation by first cousins, with uncles or aunts who take per capita, when there is left no widow, child, lineal ancestor or descendant, father, mother, or brother or sister of the whole or half blood. The proviso contained in subsec (2) is not wholly inconsistent with this section [former Code 1962 Section 19‑52] and continues in force except so far as it conflicts therewith. McCollum v. Snipes (S.C. 1948) 213 S.C. 254, 49 S.E.2d 12.

7. —— Child born after intestate’s death, particular applications; illegitimates of insured’s widow

A child born alive after the death of the intestate is entitled to inherit. Pearson v. Carlton (S.C. 1882) 18 S.C. 47.

8. —— Uncles and aunts and their descendants, particular applications; illegitimates of insured’s widow

An uncle or aunt of the half blood excludes first cousins of whole blood. Karwon v Lowndes, 2 SC Eq 210 (1803). Perry v Logan, 26 SC Eq 202 (1853).

A maternal aunt inherits before the children of a paternal uncle. Shaffer v Nail, 4 SCL 160 (1807). Gilbert v Hendricks, 4 SCL 161 (1807).

The words “uncles and aunts” as used in former subsec (6) do not mean uncles and aunts of the whole blood only. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321.

Relatives more remote than children of deceased uncles or aunts are excluded. The court may not, by construction, extend the statute to include children of deceased children of deceased children of deceased uncles or aunts. Kinard v. Moore (S.C. 1951) 220 S.C. 376, 68 S.E.2d 321.

9. —— Grandchildren and great grandchildren, particular applications; illegitimates of insured’s widow

A grandchild of a deceased brother or sister does not take in right of representation. Poaug v Gadsden, 2 SCL 293 (1801). North v Valk, 13 SC Eq 212 (1838).

10. —— Children of brother of mother of illegitimate child, particular applications; illegitimates of insured’s widow

Children of the brother of the mother of an illegitimate child are held not to be “heirs at law” or “next of kin” of such child and therefore are not entitled to succeed to his estate, under this section [former Code 1962 Section 19‑52]. Gibson v Rikard, 143 SC 402, 141 SE 726 (1928). Dukes v Faulk, 37 SC 255, 16 SE 122 (1892).

**SECTION 62‑2‑104.** Requirement that individual survive decedent for one hundred twenty hours.

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 11; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Homestead exemption, see Sections 15‑41‑10 et seq.

Library References

Death 5.

Descent and Distribution 18.

Westlaw Topic Nos. 117, 124.

C.J.S. Death Sections 6, 15.

RESEARCH REFERENCES

Encyclopedias

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

LAW REVIEW AND JOURNAL COMMENTARIES

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

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

**SECTION 62‑2‑105.** No taker.

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

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

REPORTER’S COMMENT

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

CROSS REFERENCES

Constitutional provision relative to escheat of lands, see SC Const Art. XIV, Section 3.

Procedures regulating escheat, see Sections 27‑19‑10 et seq.

Requirement that individual survive decedent for one hundred twenty hours, see Section 62‑2‑104.

Library References

Escheat 4.

Westlaw Topic No. 152.

C.J.S. Escheat Sections 3 to 4.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 11, Escheat to the State.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 2.4 TD 2, Intestate Share of Ancestors and Collateral Relatives.

LAW REVIEW AND JOURNAL COMMENTARIES

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

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

**SECTION 62‑2‑106.** Representation; disclaimer by intestate beneficiary.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 12; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Library References

Descent and Distribution 43.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 27 to 28.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 9, Representation.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 28.2, Class Gift to “Issue” or “Descendants”.

Restatement (3d) Property (Wills & Don. Trans.) Section 2.3, Intestate Share of Surviving Descendants.

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 62‑2‑107.** Kindred of half blood.

 Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 13; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Library References

Descent and Distribution 35, 41.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 29, 40 to 42, 44 to 49.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 12, Half‑Blood Heirs.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 2.4, Intestate Share of Surviving Ancestors and Collateral Relatives.

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 62‑2‑108.** Afterborn heirs.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 14; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑2‑108 codifies South Carolina case law establishing the right of an afterborn child of an intestate decedent to inherit. Pearson v. Carlton, 18 S.C. 47 (1882). This section expands the principle to benefit other issue of the intestate decedent, more remotely related than his children, e.g., grandchildren. The section further expressly excepts collateral relatives of the decedent from the principle’s operation.

Library References

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Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 32, 34.

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S.C. Jur. Descent and Distribution Section 13, After‑Born Heirs.

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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 62‑2‑109.** Meaning of child and related terms.

 If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 4; 1990 Act No. 521, Section 15; 1997 Act No. 152, Section 6; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

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

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

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

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

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

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

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

CROSS REFERENCES

Beneficiaries of action for wrongful death, see Sections 15‑51‑20, 15‑51‑30.

Definitions of terms for purposes of the South Carolina Probate Code, generally, see Section 62‑1‑201.

Effect of final decree of adoption, see Section 63‑9‑760.

General provisions relative to marriage, see Sections 20‑1‑10 et seq.

Inapplicability of this section to adoption of adult person, see Section 63‑9‑1120.

Library References

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Children Out‑of‑Wedlock 84.

Descent and Distribution 25.

Westlaw Topic Nos. 17, 76H, 124.

C.J.S. Adoption of Persons Sections 152 to 154, 156 to 164.

C.J.S. Children Out‑of‑Wedlock Sections 63 to 66.

C.J.S. Descent and Distribution Sections 32 to 35.

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S.C. Jur. Adoption Section 10, Adoption of an Adult.

S.C. Jur. Adoption Section 19, Requirements as to Contents.

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

S.C. Jur. Descent and Distribution Section 14, Adopted Persons.

S.C. Jur. Descent and Distribution Section 15, Adopted Persons‑Adults.

S.C. Jur. Descent and Distribution Section 16, Persons Born Out of Wedlock.

S.C. Jur. Descent and Distribution Section 17, Termination of Parental Rights.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 25.2, Gifts to “Children”‑Children Born Out of Wedlock.

Restatement (2d) of Property, Don. Trans. Section 25.4, Gifts to “Children”‑Adopted Children.

Restatement (2d) of Property, Don. Trans. Section 25.5, Gifts to “Children”‑Child Adopted by Another.

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LAW REVIEW AND JOURNAL COMMENTARIES

“Devolution of Interests in Trust Estates,” 1 SCLQ 367 (1949).

Annual Survey of South Carolina Law: Property: Inheritance Rights of Illegitimates. 30 S.C. L. Rev. 143.

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Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers, 12 SCLQ 491.

Rights of Illegitimate Children Extended Under the Equal Protection Clause of the Fourteenth Amendment. 20 S.C. L. Rev. 825.

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

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1. In general

In probate proceeding, intestate’s siblings could not raise issue of whether child who was born before intestate’s marriage was intestate’s child and thus an heir; intestate, if alive, would have been barred from challenging paternity following divorce judgment, which adjudicated intestate as the father, and intestate’s siblings were barred from asserting claim that intestate would have been barred from asserting. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Divorce 172; Parent And Child 172

A father was entitled to receive half of the workers’ compensation benefits awarded for the death of his son although the father had minimal contact with his son while the son was living where no legal action was ever taken to formally establish that the father had abandoned his son nor had the father’s parental rights been terminated. Adkins v. Comcar Industries, Inc. (S.C.App. 1994) 316 S.C. 149, 447 S.E.2d 228, rehearing denied, certiorari granted, affirmed 323 S.C. 409, 475 S.E.2d 762. Workers’ Compensation 420.36

2. Adult adoption

Insurance agent did not, by means of adult adoption, legally qualify as “parent” of designated producer, for purposes of reinsurance facility statute allowing a designated producer to transfer his or her designated producer status to a parent; although adult adoption rendered agent a parent for purposes of intestate succession, he did not assume “all the rights, duties and other legal consequences” connected with the natural relationship of parent and child. Gorman v. South Carolina Reinsurance Facility (S.C.App. 1999) 333 S.C. 696, 511 S.E.2d 98, rehearing denied, certiorari granted. Insurance 1625

Adult adoption statute limits the legal effect of adult adoption to intestate succession. Gorman v. South Carolina Reinsurance Facility (S.C.App. 1999) 333 S.C. 696, 511 S.E.2d 98, rehearing denied, certiorari granted. Adoption 5; Adoption 21; Adoption 22; Adoption 23

3. Adjudication of paternity

For purposes of statute stating that person born out of wedlock may inherit from a father who dies intestate if it is determined, in an adjudication commenced before father’s death, that person is father’s child, paternity may be adjudicated in divorce proceeding. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Descent And Distribution 67.6; Divorce 6

Family court proceeding in which child custody, child support, and visitation rights are determined may constitute an adjudication of paternity, for purposes of statute stating that person born out of wedlock may inherit from a father who dies intestate if it is determined, in an adjudication commenced before the death of the father, that the person is the father’s child. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Child Custody 531(1); Child Support 224.2; Descent And Distribution 67.6

Intestate’s divorce proceeding constituted a prior adjudication of paternity, for purposes of statute stating that person born out of wedlock may inherit from a father who dies intestate if it is determined, in an adjudication commenced before father’s death, that person is father’s child, and thus child, who was born before intestate and child’s mother were married, was intestate’s heir; divorce court found that one child was born during the marriage and that intestate was parent of that child. Neely v. Thomasson (S.C. 2005) 365 S.C. 345, 618 S.E.2d 884. Descent And Distribution 67.6; Divorce 169

Divorce decree was final adjudication of paternity for purposes of establishing whether daughter born out of wedlock was former husband’s heir; wife’s complaint for divorce asserted that daughter was parties’ only child, which allegation husband never contested. Neely v. Thomasson (S.C.App. 2003) 355 S.C. 521, 586 S.E.2d 141, rehearing denied, certiorari granted, affirmed in part, reversed in part 365 S.C. 345, 618 S.E.2d 884. Divorce 172

Intestate landowner’s illegitimate child had no right to inherit from landowner, as landowner died prior to enactment of statute that permits illegitimate children to inherit from their fathers under certain circumstances, and child failed to present conclusive proof of paternity; while no party to instant quiet title action challenged assertion that landowner was child’s father, and, even though child’s birth certificate indicated that mother and father were married because they were listed as having same last name, there was no evidence of court order establishing paternity or of instrument signed by landowner prior to his death acknowledging child’s paternity. Pinckney v. Warren (S.C. 2001) 344 S.C. 382, 544 S.E.2d 620. Descent And Distribution 67.6; Descent And Distribution 67.9

The decedent’s wife, as personal representative of the decedent’s estate, waived (or was estopped from raising) any claim under Section 62‑2‑109 regarding the parentage of an alleged illegitimate heir of the decedent, where the alleged heir was listed as heir on the original petition for informal probate and participated in an agreement to retain the decedent’s wife as the personal representative, since the wife’s failure to challenge paternity gave the alleged heir no notice, and lulled her into a position where she could no longer defend her parentage under Section 62‑2‑109. Parker v. Parker (S.C. 1994) 313 S.C. 482, 443 S.E.2d 388.

4. Time or bringing action

If paternity is questioned by either the personal representative of deceased father or by another interested party, then such action must be brought within the statutory time frame of 6 months after the death of the father, pursuant to Section 62‑2‑109. Parker v. Parker (S.C. 1994) 313 S.C. 482, 443 S.E.2d 388. Parent And Child 155

5. Under former Section 21‑3‑30

Though this section [Code 1962 Section 19‑53] applies to a previous conveyance of land to a woman and her bodily heirs and enables her to convey a fee simple upon the birth of illegitimate issue, it is not retroactive, conveyances being made subject to alteration of the laws of descent. Crawford v Masters, 98 SC 458, 82 SE 793 (1914). Muldrow v Caldwell, 173 SC 243, 175 SE 501 (1934).

Application of section generally. Trout v Burnett, 99 SC 276, 83 SE 684 (1914). Hogg v Clemmons, 126 SC 469, 120 SE 96 (1923). Crawford v Masters, 98 SC 458, 82 SE 793 (1914).

The opinion in Wilson v Jones, 281 SC 230, 314 SE2d 341 (1984), in which the court held that the limitation in Section 21‑3‑30 allowing illegitimate children to inherit only from their mothers’ estates violated the constitutional guarantee of equal protection, would be modified to allow retroactive application of the decision in Trimble v Gordon, 430 US 762, 52 L Ed 2d 31, 97 S Ct 1459 (1977), in which the United States Supreme Court held that statutes which prohibit an illegitimate child from inheriting from his or her father’s estate violate the constitutional guarantee of equal protection, in the limited circumstances where the following conditions are met: (1) innocent persons will not be adversely affected because of their detrimental reliance on the old rule; (2) the paternity of the child has been conclusively established either by court order or decree issued prior to the death of the father or by an instrument signed by the father acknowledging paternity; and (3) the estate administration is subject to further resolution. Mitchell v. Hardwick (S.C. 1988) 297 S.C. 48, 374 S.E.2d 681.

Pursuant to Trimble v Gordon, 430 US 762, 52 L Ed 2d 31, 97 S Ct 1459, 4 Ohio Ops 3d 296 (1977), limitation in Section 21‑3‑30 allowing illegitimate children to inherit only from their mothers’ estates is unconstitutional, but Trimble should not be given retroactive effect and therefore only those illegitimate children whose fathers died after April 26, 1977 may inherit from their fathers’ estates. Wilson v. Jones (S.C. 1984) 281 S.C. 230, 314 S.E.2d 341. Courts 100(1)

This section [Code 1962 Section 19‑53] looks forward to the time when the distribution of the intestate’s estate is to be made, and not backward to the time when the illegitimate died, leaving children. Trout v. Burnette (S.C. 1914) 99 S.C. 276, 83 S.E. 684, Am.Ann.Cas. 1916E,911.

It is to be read and construed with the second paragraph of subsec (1) of Code 1962 Section 19‑52. Trout v. Burnette (S.C. 1914) 99 S.C. 276, 83 S.E. 684, Am.Ann.Cas. 1916E,911.

Statute which denies illegitimate right to inherit from putative father without giving child opportunity to establish paternity unconstitutionally discriminates against illegitimate child. Trimble v. Gordon, U.S.Ill.1977, 97 S.Ct. 1459, 430 U.S. 762, 52 L.Ed.2d 31, 4 O.O.3d 296.

6. —— Purpose of statute

The purpose of this section [Code 1962 Section 19‑53] was to create a new class of heirs of distributees to take the illegitimate intestate’s property, rather than let it escheat to the State. Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

The section was intended by the legislature to invest the illegitimate child, so far as his mother’s property is concerned, with inheritable blood, as if he had been born in wedlock. Trout v. Burnette (S.C. 1914) 99 S.C. 276, 83 S.E. 684, Am.Ann.Cas. 1916E,911.

This section [Code 1962 Section 19‑53] is an enabling and remedial statute, affecting the rights of those who have heretofore been under the ban of law, and giving a remedy where none existed before. In such cases it is to be presumed that the legislature intended the most beneficial construction of the act consistent with a proper regard for the ordinary canons of construction. Trout v. Burnette (S.C. 1914) 99 S.C. 276, 83 S.E. 684, Am.Ann.Cas. 1916E,911.

This section [Code 1962 Section 19‑53] was passed for the purpose of providing a remedy for the rule of law that a mother could not inherit from her illegitimate child. Croft v. Southern Cotton Oil Co. (S.C. 1909) 83 S.C. 232, 65 S.E. 216.

7. —— Validity and effect of 1934 amendment

The 1934 amendment of this section [Code 1962 Section 19‑53] put equality of inheritance upon legitimate and illegitimate brothers and sisters of an illegitimate who left intestate an estate coming within its terms, but not cousins. Evans v. Ravenel (S.C. 1944) 205 S.C. 224, 31 S.E.2d 347. Descent And Distribution 67.5; Descent And Distribution 67.8

The effect of the 1934 amendment to this section [Code 1962 Section 19‑53] was to give to the legitimate brothers and sisters of an illegitimate the same rights and interests as to his estate as were vested formerly in his illegitimate brothers and sisters. Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

Retroactive clause of 1934 amendment unconstitutional. A clause making this section [Code 1962 Section 19‑53] retroactive “as to any estate not finally and completely settled,” was held unconstitutional because of the “due process” provision of SC Const, Art 1, Section 5 (now Art 1, Section 3). Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

8. —— Particular applications

The contention that denying an illegitimate child the right to inherit from his putative father is a denial of the equal protection of law to illegitimate persons is manifestly without merit. Walker v. Walker (C.A.4 (S.C.) 1960) 274 F.2d 425, certiorari denied 80 S.Ct. 1626, 363 U.S. 849, 4 L.Ed.2d 1731, rehearing denied 81 S.Ct. 37, 364 U.S. 857, 5 L.Ed.2d 82.

Application and effect of this section [Code 1962 Section 19‑53] on Code 1962 Section 19‑54. In re Johnson’s Estate (S.C. 1930) 154 S.C. 359, 151 S.E. 573.

Children of brother of mother of illegitimate. Gibson v. Rikard (S.C. 1928) 143 S.C. 402, 141 S.E. 726.

An illegitimate whose mother predeceased her mother, the grandmother of the illegitimate, is entitled to inherit from the grandmother. Southall v. Glover (S.C. 1923) 124 S.C. 160, 117 S.E. 184. Descent And Distribution 67.7

An illegitimate child, whose mother died prior to the death of the mother’s sister, is not entitled to share in the estate of the sister; the mother owning no property at the time of her death. Carroll v. Burns (S.C. 1921) 116 S.C. 235, 107 S.E. 913.

A woman to whom a fee conditional on the birth of bodily heirs was conveyed may, after the birth of an illegitimate child, convey a fee simple. Crawford v. Masters (S.C. 1914) 98 S.C. 458, 82 S.E. 793.

9. Under former Section 21‑3‑40

This section [Code 1962 Section 19‑54] was enacted to prevent escheats of the intestate estates of illegitimates and make retroactive some of the provisions of Code 1962 Section 19‑53. Evans v. Ravenel (S.C. 1944) 205 S.C. 224, 31 S.E.2d 347.

The retroactive feature in this section [Code 1962 Section 19‑54] does not violate any constitutional provision. Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

The legislature, by enacting this section [Code 1962 Section 19‑54], surrendered the rights of the State in the property of a deceased illegitimate for failure of heirs or distributees to take the estate; it gave away property which would have come to the State, and did not thereby transfer, or attempt to transfer, from one person to another any property of the estate. (Distinguishing the retroactive feature of this section [Code 1962 Section 19‑54] from the retroactive clause of the 1934 amendment to Code 1962 Section 19‑53, which clause was held to be unconstitutional). Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

The purpose of this section [Code 1962 Section 19‑54] was not to create a new class of heirs or distributees, but to prevent an escheat. Muldrow v. Caldwell (S.C. 1934) 173 S.C. 243, 175 S.E. 501.

Application and effect of this section [Code 1962 Section 19‑54] on Code 1962 Section 19‑53. In re Johnson’s Estate (S.C. 1930) 154 S.C. 359, 151 S.E. 573.

**SECTION 62‑2‑110.** Advancements.

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

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

REPORTER’S COMMENT

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

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

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

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

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

Library References

Descent and Distribution 93 to 112.

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C.J.S. Descent and Distribution Sections 69, 95 to 107, 116.

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Forms

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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

1. In general

Money expended on the education of a child is no advancement. Cooner v May, 22 SC Eq 185 (1848). White v Moore, 23 SC 456 (1885).

Parting with the title in the subject advanced is necessary to make an advancement; mere permission to use is not. Ison v Ison, 26 SC Eq 15 (1852). Rickenbacker v Zimmerman, 10 SC 110 (1878). Wilson v Kelly, 21 SC 535 (1884).

Interest is charged on advancements where directed by will. Allen v Allen, 13 SC 512 (1880). McFall v Sullivan, 17 SC 504 (1882).

Slaves given, and emancipated before the intestate’s death, were no advancement. Hughey v Eichelberger, 11 SC 36 (1878). Ex parte Glenn, 20 SC 64 (1883). Wilson v Kelly, 21 SC 535 (1884).

What is or is not an advancement may depend upon the circumstances. Murrel v Murrel, 21 SC Eq 148 (1848). Cooner v May, 22 SC Eq 185 (1848). Ison v Ison, 26 SC Eq 15 (1852). M’Caw v Blewit, 7 SC Eq 90 (1827).

The loss of an advancement subsequent to the death of the intestate cannot affect the liability therefor. Manning v Manning, 33 SC Eq 410 (1866). McLure v Steele, 35 SC Eq 105 (1868). Rickenbacker v Zimmerman, 10 SC 110 (1878).

What is or is not an advancement is not a question of intention, and a mere declaration of the donor cannot alter the operation of the law, either as to the character of the gift or the mode of valuation. Youngblood v Norton, 20 SC Eq 122 (1845). Rees v Rees, 32 SC Eq 86 (1859). Rickenbacker v Zimmerman, 10 SC 110 (1878). Stokes v Wallace, 16 SC 619 (1882).

The doctrine of advancements applies solely to cases of intestacy. Newman v Wilbourne, 10 SC Eq 10 (1833). McDougald v King, 8 SC Eq 154 (1830).

Section is construed to mean that the estate of the ancestor is to be considered as a common fund, out of which each child is to draw, at the death, an equal portion. That part which has been given is to be estimated at its value at the death, relation being had as to its character at the time of the gift. M’Caw v Blewit, 7 SC Eq 90 (1827). McDougald v King, 8 SC Eq 154 (1830). Ison v Ison, 26 SC Eq 15 (1852). Youngblood v Norton, 20 SC Eq 122 (1845). Manning v Manning, 33 SC Eq 410 (1866). McLure v Steele, 35 SC Eq 105 (1868).

Nephews whose father predeceased their intestate uncle are entitled to their distributive shares, without any equity in the administrator to set off against their shares debts due the intestate by their father. Stokes v. Stokes (S.C. 1902) 62 S.C. 346, 40 S.E. 662.

A purchase of land by a father for his son is presumed to be an advancement. Catoe v. Catoe (S.C. 1890) 32 S.C. 595, 10 S.E. 1078.

Note of son to his father as surety for the purchase of land is a debt and not an advancement, as is the land conveyed to the son by the father therefor. White v. Moore (S.C. 1885) 23 S.C. 456. Descent And Distribution 93

The discharge of a bond against a son is an advancement. Rees v Rees, 32 SC Eq (1859). Ex parte Glenn (S.C. 1883) 20 S.C. 64.

Interest is charged on advancements from the time of distribution or death. Newman v Wilbourne, 10 SC Eq 10 (1833). Ex parte Glenn (S.C. 1883) 20 S.C. 64. Descent And Distribution 113

The gift of land by deed to a child, the parent using it for life, was an advancement as of the date of parent’s death. Hughey v. Eichelberger (S.C. 1878) 11 S.C. 36.

Insurance for a child and the premiums thereon are advancements. Rickenbacker v. Zimmerman (S.C. 1878) 10 S.C. 110, 30 Am.Rep. 37.

A child receiving an advancement is not obliged to bring it into hotchpot, unless he claims further share of the estate. Hamer v. Hamer (S.C. 1850). Descent And Distribution 107

**SECTION 62‑2‑111.** Debts to decedent.

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

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

REPORTER’S COMMENT

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

Library References

Descent and Distribution 80.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Section 70.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 27, Debts Owed to the Decedent.

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 62‑2‑112.** Alienage.

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

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

REPORTER’S COMMENT

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

CROSS REFERENCES

Aliens within coverage of workmen’s compensation statute, see Section 42‑1‑130.

Constitutional provision limiting ownership of land by aliens, see Const Art. III, Section 35.

Property ownership by aliens, see Sections 27‑13‑10 et seq.

Library References

Aliens, Immigration, and Citizenship 130(2), 131(8).

Westlaw Topic No. 24.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 18, Aliens.

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 62‑2‑113.** Persons related to decedent through two lines.

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

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

REPORTER’S COMMENT

Section 62‑2‑113 precludes possibility of a person related to the decedent through two lines of relationship, adopted and natural or either, from inheriting other than through the single line which will entitle him to the larger share.

Library References

Descent and Distribution 22.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 23, 26.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 19, Dual Relationships.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 2.5, Parent and Child Relationship.

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 62‑2‑114.** Limitation on parent’s entitlement as intestate heirs to estate proceeds; failure to provide support for decedent during minority.

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

HISTORY: 1996 Act No. 370, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Library References

Descent and Distribution 50.

Infants 157.

Westlaw Topic Nos. 124, 211.

C.J.S. Descent and Distribution Sections 56 to 59.

C.J.S. Infants Sections 19 to 22, 26 to 28, 40, 42, 44 to 45, 58 to 59.

Part 2

Elective Share of Surviving Spouse

**SECTION 62‑2‑201.** Right of elective share.

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

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

 (c) “Surviving spouse”, as used in this Part, is as defined in Section 62‑2‑802.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 5; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

See Section 62‑2‑802 for the definition of “spouse” which controls in this part.

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

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Federal Aspects

Federal estate tax provisions relative to allowance of marital deduction, see 26 U.S.C.A. Section 2056.

Library References

Descent and Distribution 64.

Wills 778, 785.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1843 to 1851.

RESEARCH REFERENCES

Encyclopedias

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

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

S.C. Jur. Wills Section 201, Right of Elective Share by Surviving Spouse.

Forms

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

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

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

South Carolina Legal and Business Forms Section 17:280 , Spouse’s Election to Take Under Will.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 186, Curtesy and Dower in the Beneficiary’s Interest.

Restatement (2d) of Property, Don. Trans. Section 34.1, Effect of Donative Transfer on Spouse of Donor.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.1 TD 3, Surviving Spouse’s Elective Share‑Noncommunity‑Property States Other Than Those that Have Adopted a Revised Uniform Probate Code‑Type Statute.

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 2

Estate of surviving spouse 3

Under former Section 21‑3‑70 4

Validity 1

1. Validity

Although 62‑2‑201 violates Article XVII, section 9 of the South Carolina Constitution in that married women are treated differently from unmarried women because unmarried women can dispose of their property however they wish, application of the constitutional provision would provide married women the same rights as single men and women but would allow the rights of married men to be restricted, which would violate the equal protection clause of the United States Constitution, and therefore is not permissible. Men and women are treated equally under Section 62‑2‑201, and the classification of married persons is reasonably related to the legislative purpose of providing for the surviving spouses, and therefore the requirements of equal protection are satisfied and the statute is valid under the United States Constitution. Matter of Patrick (S.C. 1991) 303 S.C. 559, 402 S.E.2d 664.

2. In general

On appeal from probate court’s decision granting testator’s widow’s request for elective share, personal representative of testator’s estate failed to properly raise his contention that elective share statute was unconstitutional, and thus Supreme Court would not address issue. Dreher v. Dreher (S.C. 2006) 370 S.C. 75, 634 S.E.2d 646. Wills 788(3)

Wife’s estate was entitled to receive elective share from husband’s estate, although wife died before amount of share could be determined, where she made election before her death. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Wills 785(2)

Elective‑share statute is a statute of creation, and strict compliance with its terms is mandatory in order to exercise the right to an elective share. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Wills 788(1)

Any benefits a surviving spouse may obtain through non‑probate assets of the deceased spouse’s estate are immaterial to the surviving spouse’s right to seek an elective share of the estate. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Wills 784

Individual who was not validly married to decedent, due to her failure to obtain divorces or annulments in at least two of her eight previous marriages, was not entitled to statutory elective share. Lovett v. Lovett (S.C.App. 1997) 329 S.C. 426, 494 S.E.2d 823, certiorari denied. Wills 785(1)

A trust was declared void as illusory, and the contents thereof included in the decedent’s estate for the purpose of calculating his widow’s elective share, where the trust was revocable, the trustee’s role was merely custodial and he could not transfer any of the trust property without the settlor’s permission, the settlor retained powers so extensive he had the same rights in the trust assets as he had before the trust was created, and the trust, which constituted the better part of his estate, was created in favor of his daughters from a former marriage to the exclusion of his wife. Seifert v. Southern Nat. Bank of South Carolina (S.C. 1991) 305 S.C. 353, 409 S.E.2d 337.

A husband was the legal spouse of the decedent and was therefore entitled to the elective share of her estate, even though the divorce decree for the husband’s previous marriage was not forwarded to the court of common pleas until after the husband’s marriage ceremony with the decedent, where the divorce decree was signed by the judge and filed with the family court prior to the marriage ceremony. Matter of Patrick (S.C. 1991) 303 S.C. 559, 402 S.E.2d 664.

The provisions concerning the elective share do not provide for the testator’s intent to the contrary. Matter of Patrick (S.C. 1991) 303 S.C. 559, 402 S.E.2d 664.

3. Estate of surviving spouse

A surviving spouse’s estate may recover the elective share when the surviving spouse dies after making the election but before the probate court determines the share. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Wills 785(2)

4. Under former Section 21‑3‑70

For cases as to whether or not the demandant in dower accepted a distributive share of her husband’s estate, see Anderson v Woodward, 41 SC 363, 19 SE 685 (1894). Moore v Robinson, 139 SC 393, 137 SC 697 (1927).

Under this section [former Code 1962 Section 19‑57], acceptance of dower bars the widow’s claim to a distributive share as heir. Glover v Glover, 45 SC 51, 22 SE 739 (1895). Buist v Dawes, 24 SC Eq 281 (1851). Evans v Pierson, 43 SCL 9 (1855).

Under the terms of this section [former Code 1962 Section 19‑57], distributive shares, if accepted, are in lieu and bar of all dower. Douglass v Clarke, 4 SC Eq 143 (1810). Avant v Robertson, 27 SCL 215 (1842). Buist v Dawes, 24 SC Eq 281 (1851). Evans v Pierson, 43 SCL 9 (1855).

There is dictum in the case of Lytle v Southern Ry., 152 SC 161, 149 SE 692 (1929), later app 171 SC 221, 171 SE 42, 90 ALR 915, cert den 290 US 645, 78 L Ed 560, 54 S Ct 63, to the effect that under this section [former Code 1962 Section 19‑57] the forfeiture is limited apparently to real estate. But under the act of 1891, the acceptance by a widow of her distributive share of personalty barred the widow’s dower. See Evans v Pierson, 43 SCL 9 (1855). Under the law then governing, however, it was held that it did not. Phinney v Johnson, 13 SC 25 (1880).

**SECTION 62‑2‑202.** Probate estate.

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 6; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

The 2013 amendment adds a new sub‑paragraph (b), which takes into account and leaves unchanged the provisions of Section 62‑7‑401(c) of the South Carolina Trust Code. SCTC Section 62‑7‑401(c) is the statutory descendant of former SCPC Section 62‑7‑112, which was enacted after the Siefert decision, Seifert v. Southern Nat’l Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991). Seifert found that the revocable trust before the court was “illusory” and, even though not a part of the settlor/decedent’s probate estate, assets owned by the trust were nevertheless subject to the elective share. The amendment means to leave intact Section 62‑7‑401(c), including the possibility that assets owned by a revocable inter vivos trust found not to be illusory are not subject to the elective share. The amendment clarifies that the only nonprobate assets subject to the elective share in South Carolina are assets in a revocable trust found to be illusory under Section 67‑7‑401(c).

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

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

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

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

Library References

Descent and Distribution 64.1.

Wills 801(5).

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1866 to 1868, 1872 to 1876.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 205, Definition of Probate Estate for Purposes of Elective Share.

Forms

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

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.1, Effect of Donative Transfer on Spouse of Donor.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.1 TD 3, Surviving Spouse’s Elective Share‑Noncommunity‑Property States Other Than Those that Have Adopted a Revised Uniform Probate Code‑Type Statute.

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

1. In general

A trust was declared void as illusory, and the contents thereof included in the decedent’s estate for the purpose of calculating his widow’s elective share, where the trust was revocable, the trustee’s role was merely custodial and he could not transfer any of the trust property without the settlor’s permission, the settlor retained powers so extensive he had the same rights in the trust assets as he had before the trust was created, and the trust, which constituted the better part of his estate, was created in favor of his daughters from a former marriage to the exclusion of his wife. Seifert v. Southern Nat. Bank of South Carolina (S.C. 1991) 305 S.C. 353, 409 S.E.2d 337.

**SECTION 62‑2‑203.** Exercise of right of election by surviving spouse.

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

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

REPORTER’S COMMENT

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

Library References

Descent and Distribution 65.

Wills 791.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Section 1841.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 206, Exercise of Right of Election by Surviving Spouse.

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

1. In general

Wife’s estate was entitled to receive elective share from husband’s estate, although wife died before amount of share could be determined, where she made election before her death. Gallagher v. Evert (S.C.App. 2002) 353 S.C. 59, 577 S.E.2d 217, rehearing denied, certiorari denied. Wills 785(2)

**SECTION 62‑2‑204.** Voluntary waiver of surviving spouse’s right to elective share, homestead allowance, and exempt property; property settlement in anticipation of divorce.

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

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

HISTORY: 1986 Act No. 539, Section 1; 2008 Act No. 173, Section 1, eff February 4, 2008, applicable to all waivers executed after that date; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Effect of Amendment

The 2008 amendment designated the first sentence as subsection (A) and rewrote it, adding the disclosure requirement; and designated the second sentence as subsection (B).

CROSS REFERENCES

Exempt property, see Section 62‑2‑401.

Right to homestead allowance, see Section 15‑41‑10.

Library References

Descent and Distribution 65.

Wills 785.5.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1858 to 1862.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 9.4, Premarital or Marital Agreement.

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

1. In general

The right of election of a surviving spouse may be waived by a written contract signed by the party making the waiver after fair disclosure. Geddings v. Geddings (S.C. 1995) 319 S.C. 213, 460 S.E.2d 376. Wills 785.5(1)

A widow was allowed to assert her right to an elective share of her husband’s estate, although she had signed a waiver of such right, where her husband had failed to fairly disclosed his financial holdings, she had no real or general knowledge of the total extent of her husband’s assets, she had no knowledge of the value of her husband’s estate, the attorney preparing the waiver document did not discuss assets with her when the waiver was executed, she was excluded from the annual corporate meetings held in her home at Christmas which included only the husband and his children, and the husband was secretive about his financial affairs. Geddings v. Geddings (S.C. 1995) 319 S.C. 213, 460 S.E.2d 376. Wills 785.5(2)

A husband’s acts did not constitute a waiver of his elective share in his deceased wife’s estate, even though he had conveyed his interest in the parties’ home to the wife and had offered to sign everything over to her if she would reconcile, where there was no indication that the husband knew that he was waiving his right to the elective share, the elective share provision was not in existence when the husband offered to sign everything over to the wife, and the parties reconciled after the alleged waiver occurred. Matter of Patrick (S.C. 1991) 303 S.C. 559, 402 S.E.2d 664. Wills 785.5(1)

**SECTION 62‑2‑205.** Proceedings for elective share; time limit.

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

 (b) The surviving spouse shall give notice of the time and place set for the hearing on the elective share claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the elective share.

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 7; 2010 Act No. 244, Section 5, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Library References

Descent and Distribution 65 to 67.

Wills 788 to 791.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1852 to 1857, 1863 to 1865.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. South Carolina Rules of Civil Procedure Section 5.2, Discussion.

S.C. Jur. Wills Section 206, Exercise of Right of Election by Surviving Spouse.

S.C. Jur. Wills Section 207, Exercise of Right of Election by Surviving Spouse‑Procedure; Time Limitations.

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

1. In general

The legislative purpose behind the elective share statute is to protect the family unit from becoming society’s ward by preventing impoverishment of the surviving spouse. Williams v. Williams (S.C. 1999) 335 S.C. 386, 517 S.E.2d 689. Wills 778

A decision permitting a husband to claim an elective share of his deceased wife’s estate would be reversed and remanded where the circuit court had failed to determine whether the husband had complied with the mailing requirement of Section 62‑2‑205; strict compliance with Section 62‑2‑205 was necessary, although the estate’s personal representative had actual knowledge of the husband’s intended claim. Simpson v. Sanders (S.C. 1994) 314 S.C. 413, 445 S.E.2d 93, rehearing denied.

Section 62‑2‑205 is a statute of creation since it created a new liability where there was none before, and established a time limit within which the action must be commenced; thus, strict compliance with its terms is mandatory in order to exercise the right to an elective share of a deceased spouse’s estate. Simpson v. Sanders (S.C. 1994) 314 S.C. 413, 445 S.E.2d 93, rehearing denied. Wills 778

**SECTION 62‑2‑206.** Effect of election on benefits by will or statute.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 16; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Library References

Descent and Distribution 67.

Wills 798.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1866 to 1879.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 207, Exercise of Right of Election by Surviving Spouse‑Procedure; Time Limitations.

S.C. Jur. Wills Section 208, Effect of Election on Benefits by Will or Statute.

Forms

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

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

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

South Carolina Legal and Business Forms Section 17:280 , Spouse’s Election to Take Under Will.

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 62‑2‑207.** Charging spouse with gifts received; liability of others for balance of elective share.

 (a) In the proceeding for an elective share, all property, including any beneficial interest, which passes or has passed to the surviving spouse, or would have passed to the surviving spouse, but was renounced or disclaimed, must be applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the probate estate, so long as the property is passed to the surviving spouse:

 (1) under the decedent’s will;

 (2) by intestacy;

 (3) by a homestead allowance;

 (4) by Section 62‑2‑401;

 (5) by a beneficiary designation in life insurance policies;

 (6) by a beneficiary designation of an Individual Retirement Account, qualified retirement plan, or annuity;

 (7) in a trust created by the decedent’s will; or

 (8) in a revocable inter vivos trust created by the decedent.

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

 (1) an interest as a beneficiary in a trust created by the decedent’s will;

 (2) an interest as a beneficiary in property passing under the decedent’s will to an inter vivos trust created by the decedent; and

 (3) an interest as a beneficiary in property contained at the decedent’s death in a revocable inter vivos trust found to be illusory, as provided in Section 62‑7‑401(c).

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

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

 (3) The electing spouse who is the income beneficiary of a trust, the value of which is treated, or could be treated, as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act.

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 8; 1990 Act No. 521, Section 17; 2010 Act No. 181, Section 1, eff May 28, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

The amendment leaves unchanged the law that the value of the electing spouse’s beneficial interest in any property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended (or, if the federal estate tax is not applicable at the decedent’s death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009), must be computed at the full value of any such qualifying property. Two comments are relevant here. First, the future of the federal estate tax is at best uncertain. The federal estate tax law in effect on December 31, 2009, as it pertained to the qualification for the federal estate tax marital deduction, was settled law, familiar to laymen and practitioners alike. Consequently, incorporation of the qualification requirements for the federal estate tax marital deduction then in effect, particularly with respect to the so called “QTIP” marital trust, is the measure least likely to cause confusion and error. Next, in rejecting the “augmented estate” while at the same time continuing to credit at full value the assets in an income only QTIP trust, this section takes into account the possibility that the consequences to a surviving spouse in the present and projected economy could be harsh as well as changes to South Carolina law since 1987, including adoption of the South Carolina version of the Uniform Prudent Investor Act (Section 62‑7‑933), predicated on Modern Portfolio Theory. Recognizing that simple, income only trusts may be disappointing and inadequate, the 2013 amendment provides that the electing spouse who is the beneficiary of an income trust, the value of which is treated (or could be treated) as qualifying property, shall have the right to require a conversion of the income trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act.

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

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

Effect of Amendment

The 2010 amendment rewrote the section to include language regarding trusts.

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Federal Aspects

Provisions of Section 2056 of the Internal Revenue Code of 1954, see 26 U.S.C.A. Section 2056.

Library References

Descent and Distribution 67.

Wills 801(5), 802.

Westlaw Topic Nos. 124, 409.

C.J.S. Wills Sections 1841, 1866 to 1868, 1872 to 1879.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 207, Exercise of Right of Election by Surviving Spouse‑Procedure; Time Limitations.

S.C. Jur. Wills Section 209, Effect of Election on Benefits by Will or Statute‑Charging Spouse With Gifts Received; Liability of Others for Balance of Elective Share.

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.

Part 3

Spouse and Children Unprovided for in Wills

**SECTION 62‑2‑301.** Omitted spouse.

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

 (1) it appears from the will that the omission was intentional; or

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 9; 1990 Act No. 521, Section 18; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

Library References

Descent and Distribution 52.

Westlaw Topic No. 124.

C.J.S. Descent and Distribution Sections 60 to 62, 64.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 20, Estate of Joint Tenancy.

S.C. Jur. Wills Section 202, Right of Elective Share by Surviving Spouse‑Effect of Divorce or Annulment on Status of Surviving Spouse; Decree of Separate Maintenance.

S.C. Jur. Wills Section 210, Omitted Spouse; Procedure for Claim.

Forms

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

Treatises and Practice Aids

28 Causes of Action 563, Cause of Action to Probate Will Presumptively Revoked or Altered as Result of Marriage, Divorce, Birth, or Adoption.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.5, Protection of Surviving Spouse Against Unintentional Disinheritance by a Premarital Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.5 TD 3, Protection of Surviving Spouse Against Unintentional Disinheritance by a Premarital Will.

Will Contests Section 8:7, Mistake in Inducement.

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.

The South Carolina Probate Code’s Omitted Spouse Statute and In re Estate of Timmerman. 50 S.C. L. Rev. 979 (Summer 1999).

NOTES OF DECISIONS

In general 1

Under former Section 21‑7‑220 2

1. In general

A wife was not “provided for” in her capacity as spouse under the omitted spouse statute, Section 62‑2‑301(a), and thus she was entitled to her share in the estate as if there had been no will, where the husband left her his car and a life estate in his home in a will executed one year prior to their marriage, but there was no evidence that such bequest was made in contemplation of marriage, since the wife had rejected numerous marriage proposals from him, and only agreed to marriage one year after the will was executed. Miles v. Miles (S.C. 1994) 312 S.C. 408, 440 S.E.2d 882, rehearing denied. Wills 782(3)

A spouse has not been “provided for” under Section 62‑2‑301(a) (the omitted spouse statute) in the absence of specific language in a will or sufficient extrinsic evidence that a bequest was made in contemplation of marriage. Miles v. Miles (S.C. 1994) 312 S.C. 408, 440 S.E.2d 882, rehearing denied.

Section 62‑2‑301, which allows a spouse who is omitted from a will to take a share of the testator’s estate, does not violate equal protection on the basis that it protects omitted spouses “while stripping away the rights of the class of persons who are devisees under a valid will”; the classification is within the legislative power. Mitchell v. Owens (S.C. 1991) 304 S.C. 23, 402 S.E.2d 888.

2. Under former Section 21‑7‑220

Where husband did not first obtain a divorce from his common‑law wife, his later marriage was invalid and did not operate as a revocation of his will. Campbell v Christian, 235 SC 102, 110 SE2d 1 (1959). Re Roton’s Will, 95 SC 118, 78 SE 711 (1913).

Allegation that a will was revoked by a subsequent marriage does not present an issue of construction, but goes to the validity of the entire will, and was within jurisdiction of Probate Court, and judgment of Probate Court to admit will became final, and not subject to collateral attack under guise of a declaratory action seeking construction of the terms of the will in the Court of Pleas, once time for contesting validity of the will passed. Jackson v. Cannon (S.C. 1976) 266 S.C. 198, 222 S.E.2d 494. Wills 421

Where there was no common‑law marriage between a testator and his alleged widow, who had been living with him, prior to the execution of his will, but they entered into a ceremonial marriage about four years after the will was executed and approximately seven months prior to the death of the testator, the will was revoked by the subsequent marriage, since none of the exceptions mentioned in this section [Code 1962 Section 19‑222] appeared in it. Johnson v. Johnson (S.C. 1960) 235 S.C. 542, 112 S.E.2d 647.

Testator must be legally married after execution of his will, and the wife survive without provision for her, in order for will to be revoked. Howell v. Littlefield (S.C. 1947) 211 S.C. 462, 46 S.E.2d 47.

Revocative provision of this section [Code 1962 Section 19‑222] is operative, notwithstanding that the second wife released all claims that she might have against the testator’s estate, whether by dower or by inheritance. McJunkin v. Moody (S.C. 1940) 194 S.C. 95, 9 S.E.2d 209.

The right to dispose of property may be limited and circumscribed. Marett v. Broom (S.C. 1931) 160 S.C. 91, 158 S.E. 216.

The will of a woman who, after making it, marries and then dies before her husband, is revoked by the marriage. In re Roton’s Will (S.C. 1913) 95 S.C. 118, 78 S.E. 711.

**SECTION 62‑2‑302.** Pretermitted children.

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

 (1) it appears from the will that the omission was intentional; or

 (2) when the will was executed the testator devised substantially all his estate to his spouse; or

 (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 10; 1990 Act No. 521, Section 19; 1997 Act No. 152, Section 7; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Library References

Descent and Distribution 25, 47.

Wills 535.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Sections 32 to 35, 50 to 54.

C.J.S. Wills Sections 1027 to 1028.

RESEARCH REFERENCES

Encyclopedias

96 Am. Jur. Proof of Facts 3d 107, Intentional Omission of Child from Will.

S.C. Jur. Wills Section 49, Generally; Right to Share.

S.C. Jur. Wills Section 50, Generally; Right to Share‑Procedure for Claim; Time Limitation.

Forms

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

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.2, Issue of Donor Omitted.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.6, Protection of Child or Descendant Against Unintentional Disinheritance.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.6 TD 3, Protection of Child or Descendant Against Unintentional Disinheritance.

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 1⁄2

Under former Section 21‑7‑450 1

Under former Section 21‑7‑460 2

1⁄2. In general

Statute authorizing testator’s living child to receive share of estate equal to value of that which child would have received if testator died intestate in cases when testator failed to provide for child solely because testator believed child to be dead did not apply to case where testator never learned of child’s existence before his death. Turner v. Daniels (S.C. 2013) 404 S.C. 430, 746 S.E.2d 40. Descent and Distribution 47(1)

1. Under former Section 21‑7‑450

A grandchild who was born after testatrix had executed her will but before her death could not share under the will which provided that testatrix’s estate was to be divided equally between her 3 specifically named grandchildren. Platt v. Romesburg (S.C.App. 1986) 290 S.C. 164, 348 S.E.2d 536. Descent And Distribution 47(3)

This section [former Code 1962 Section 19‑235] makes no provision for a child or children of a testator born after the making of the latter’s will, unless there is an older child or children, and unless some estate is given to the latter by the will. Weinberg v. Weinberg (S.C. 1946) 208 S.C. 157, 37 S.E.2d 507.

In determining whether child adopted after execution of will of adoptive parent shared equally with other adopted child, statute regarding provision for children born after will must be construed with statute giving posthumous children equal share and statute regarding adoption of children. Fishburne v. Fishburne (S.C. 1934) 171 S.C. 408, 172 S.E. 426. Adoption 21

The right to dispose of property by will may be limited and circumscribed. Marett v. Broom (S.C. 1931) 160 S.C. 91, 158 S.E. 216. Wills 1

2. Under former Section 21‑7‑460

This section [former Code 1962 Section 19‑236] and former Code 1962 Section 19‑235 state a rule of law which prevails, in case of conflict, even over the testator’s intention; and parol evidence is inadmissible in order to show such intention. Marett v. Broom (S.C. 1931) 160 S.C. 91, 158 S.E. 216.

Part 4

Exempt Property

**SECTION 62‑2‑401.** Exempt property.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 20; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑2‑401 sets aside an unencumbered twenty‑five thousand dollars worth of exempt personal property to a domiciliary decedent’s surviving spouse or minor or dependent children. Claimants must survive the decedent by one hundred twenty hours in order to qualify under Section 62‑2‑401.

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

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

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

Effect of Amendment

The 2013 amendment substituted “twenty‑five thousand dollars” for “five thousand dollars” throughout.

CROSS REFERENCES

Effect of surviving spouse’s election on right to exempt property, see Section 62‑2‑206.

Homestead exemption, see Sections 15‑41‑10 et seq.

Payment of claims against estate after provision is made for exempt property, etc., see Section 62‑3‑807.

Property of married women, see SC Const Art. XVII, Section 9.

Provision that, for purposes of Title 62, “exempt property” means that property of a decedent’s estate which is described in this section, see Section 62‑1‑201.

Requirement that heir survive decedent by one hundred twenty hours to take exempt property, see Section 62‑2‑104.

Waiver of right of surviving spouse to homestead allowance or exempt property, see Section 62‑2‑204.

Library References

Exemptions 30.

Westlaw Topic No. 163.

C.J.S. Exemptions Sections 22, 24, 28, 34.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 28, Debts Incurred by the Decedent.

S.C. Jur. Wills Section 175, Distribution in Kind; Method and Valuation.

S.C. Jur. Wills Section 207, Exercise of Right of Election by Surviving Spouse‑Procedure; Time Limitations.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.1, Effect of Donative Transfer on Spouse of Donor.

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 62‑2‑402.** Source, determination, and documentation.

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 11; 1990 Act No. 521, Section 21; 2010 Act No. 244, Section 6, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Homestead exemption, see Sections 15‑41‑10 et seq.

Library References

Exemptions 30.

Westlaw Topic No. 163.

C.J.S. Exemptions Sections 22, 24, 28, 34.

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 62‑2‑403.** Federal veteran payments shall be exempt from creditors’ claims.

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

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

REPORTER’S COMMENT

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

Library References

Armed Services 5(6), 13.5, 23.4, 55.

Westlaw Topic No. 34.

C.J.S. Armed Services Sections 1, 24, 27 to 30, 42, 46, 62, 111 to 112, 148 to 155, 160, 200 to 257, 260 to 263, 272, 275 to 280, 284 to 286, 341, 343 to 344.

Part 5

Wills

**SECTION 62‑2‑501.** Who may make a will.

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

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 8; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑2‑501 allows any individual of sound mind who is not a minor to make a will. An individual is not a minor if the individual is either (1) at least eighteen, (2) married, or (3) emancipated. An individual may make a will of his or her “estate.” The estate which may be so devised is defined in item (11) of Section 62‑1‑201 as “property”, in turn defined in item (37) of Section 62‑1‑201 as both real and personal and “anything that may be the subject of ownership.” No distinction on the question of capacity to make a will is drawn by Section 62‑2‑501 between men and women or between citizens and aliens.

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

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

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

Effect of Amendment

The 2013 amendment substituted “An individual” for “A person” and substituted “Section 62‑1‑201(27)” for “Section 62‑1‑201(24)”.

CROSS REFERENCES

Entitlement of aliens and foreign corporations to same property as natural born citizens, see Section 27‑13‑10.

Legal capacity of minors, see Sections 63‑5‑310 et seq.

Power of wife to bequeath and devise separate property, see Section 20‑5‑20.

Library References

Wills 21 to 50.

Westlaw Topic No. 409.

C.J.S. Conflict of Laws Sections 65, 84.

C.J.S. Wills Sections 2, 4 to 19.

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Encyclopedias

38 Am. Jur. Proof of Facts 3d 227, Proof of Testamentary Incapacity of Mentally Retarded Person.

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

Forms

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

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

Treatises and Practice Aids

28 Causes of Action 2d 99, Cause of Action to Invalidate Testamentary Instrument on Ground of Lack of Testamentary Capacity in Its Execution.

Restatement (2d) of Property, Don. Trans. Section 34.4, Capacity of a Minor to Make a Donative Transfer.

Restatement (2d) of Property, Don. Trans. Section 34.5, Donor Mentally Incompetent.

Restatement (3d) Property (Wills & Don. Trans.) Section 8.1, Requirement of Mental Capacity.

Restatement (3d) Property (Wills & Don. Trans.) Section 8.1 TD 3, Requirement of Mental Capacity.

LAW REVIEW AND JOURNAL COMMENTARIES

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

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

Attorney General’s Opinions

A “living will” is of doubtful validity in South Carolina (interpreting former Section 21‑7‑10). 1975‑76 Op. Atty Gen, No 4517, p 379.

NOTES OF DECISIONS

In general 1

1. In general

Homestead laws are held not to affect this section [Code 1962 Section 19‑201], since to hold that a widow and children could invoke homestead exemption if the testator owed debts would be to deny the testator the right to dispose of his property at his own free will and pleasure. Dorn v Stidham, 139 SC 66, 137 SE 331 (1927). Sloan v Hunter, 65 SC 235, 43 SE 788 (1903). Beaty v Richardson, 56 SC 173, 34 SE 73 (1899).

Any form of words that expresses an intention to dispose of one’s estate at death is a will. Lyles v Lyles, 11 SCL 531 (1820). Brown v Shand, 12 SCL 409 (1821). McGee v McCants, 12 SCL 517 (1821). Welch v Kinard, 17 SC Eq 256 (1842).

In a will contest challenging the capacity of the testator on grounds that he was an habitual drunkard, the challenger must show either that at the time the will was made the testator’s use of intoxicants had so impaired his mind that he lacked capacity even when he was not under the influence, or that he was intoxicated at the time of the making of the will. Hellams v. Ross (S.C. 1977) 268 S.C. 284, 233 S.E.2d 98. Wills 52(6)

Neither unwise contemporaneous business dealings or a belief that a gift of his estate to the church would get him into heaven are, under this record, probative evidence that the testator did not have sufficient capacity. Hellams v. Ross (S.C. 1977) 268 S.C. 284, 233 S.E.2d 98.

Although the testator was often violent while drunk, there was no evidence that his mind was deranged when not intoxicated, including when he executed his will. Hellams v. Ross (S.C. 1977) 268 S.C. 284, 233 S.E.2d 98.

The mere fact that the testator disposed of his estate by disinheriting his family is not alone sufficient to prove incompetency. Hellams v. Ross (S.C. 1977) 268 S.C. 284, 233 S.E.2d 98. Wills 82

Statutory right of a competent person to dispose of her property as she wishes may not be thwarted by disappointed relatives or by one who thinks the testatrix used bad judgment or was misled; fact that the testator gave one daughter one‑half of her property in fee while leaving the other daughter’s share in trust, as may have been urged upon her, does not invalidate the will; this would not constitute undue influence. Mock v. Dowling (S.C. 1976) 266 S.C. 274, 222 S.E.2d 773.

The right to dispose of property by will is one given by law, and the same authority which creates and bestows it may limit and circumscribe it in such manner as may be deemed fit. Marett v. Broom (S.C. 1931) 160 S.C. 91, 158 S.E. 216.

The testator’s capacity to know his estate, the object of his affections, and to whom he wished to give it, is the test of mental capacity to make a will. Matheson v. Matheson (S.C. 1923) 125 S.C. 165, 118 S.E. 312. Wills 50

An instruction that, to execute a valid will, the testator must be of sound mind with reference to what is involved in the transaction, and that that varies according to the extent and value of the property and the character of the disposition, was held error, in view of this section [Code 1962 Section 19‑201], as testamentary capacity does not vary with the size of the estate. Matheson v. Matheson (S.C. 1923) 125 S.C. 165, 118 S.E. 312. Wills 31

Capacity required to make a will is a question of law; whether the testator had that much is a question of fact. Ex parte McKie (S.C. 1917) 107 S.C. 57, 91 S.E. 978. Wills 324(2)

As to application of section to personalty prior to the 1951 amendment, see Major v. Hunt (S.C. 1902) 64 S.C. 97, 41 S.E. 816.

A municipal corporation may take by devise. McIntosh v. City of Charleston (S.C. 1896) 45 S.C. 584, 23 S.E. 943.

No definite form is required provided the will be formally executed. Carter v. King (S.C. 1857) 11 Rich. 125.

**SECTION 62‑2‑502.** Execution.

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

 (1) in writing;

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 22; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

The effect of Section 62‑2‑502 is that every will must be in an integrated writing, signed and witnessed as described, except only as provided in Sections 62‑2‑505 (written wills duly executed elsewhere) and 62‑2‑512 (writings disposing of tangible personal property).

Effect of Amendment

The 2013 amendment made nonsubstantive changes.

CROSS REFERENCES

Provision that will which has required signatures and contains attestation clause showing compliance with this section and Section 62‑2‑505 shall be probated without further proof, see Section 62‑3‑303.

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Wills 108, 111, 113.1 to 123(5).

Westlaw Topic No. 409.

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S.C. Jur. Wills Section 5, Wills of Special Type.

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

S.C. Jur. Wills Section 76, Required Proof and Findings.

Forms

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

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

South Carolina Legal and Business Forms Section 17:157 , Signature.

South Carolina Legal and Business Forms Section 17:163 , Attestation Clause‑General Form.

Treatises and Practice Aids

2 Causes of Action 2d 389, Causes of Action to Probate Will Over Claim of Invalidity for Lack of Due Execution.

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1, Attested Wills.

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Probate reform for South Carolina: an introduction to the Uniform Probate Code. 29 S.C. L. Rev. 397.

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Undue influence 2

Wills to be in writing and signed by testator, under former Section 21‑7‑50 7

1. In general

A probate judge had the power to open a judgment under Rule 60 where (1) at the original hearing 2 witnesses testified that a will was not executed properly and thus the judge declined to admit the will to probate, (2) during a subsequent malpractice action against the attorney who prepared the will, the 2 witnesses were deposed and testified that their earlier testimony was confused and that the will was properly executed, and (3) the proponent of the will moved to open the judgment within a month of the witnesses’ depositions. Coleman v. Dunlap (S.C. 1992) 306 S.C. 491, 413 S.E.2d 15.

2. Undue influence

Finding that will was product of undue influence by testator’s son, the sole beneficiary under will, was supported by testimony of son’s daughter‑in‑law that testator did not like living with son but that he and his wife had threatened to put her in a nursing home if she didn’t do what they said, by evidence that son and wife monitored all of testator’s conversations with a baby monitor, that son had testator’s power of attorney and managed all her finances, that son controlled execution of will by picking up will from attorney’s office and selecting witnesses for execution of will, that son’s wife stayed with testator constantly while she was in the hospital to prevent her from being alone with her other son, and by testimony of testator’s sister‑in‑law that, two months after executing will in question, testator said she wanted her children to sell her things when she died and divide proceeds equally, that she did not think it was right to leave her property to one child when she had nine children, that son had asked her to give him her home, but she refused, and that he then asked her to sell him her home, but she again refused. In re Estate of Cumbee (S.C.App. 1999) 333 S.C. 664, 511 S.E.2d 390. Wills 166(2)

In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker’s exercise of judgment and free choice. In re Estate of Cumbee (S.C.App. 1999) 333 S.C. 664, 511 S.E.2d 390. Wills 155.1

Undue influence, the influence necessary to void a will, must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment or the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. In re Estate of Cumbee (S.C.App. 1999) 333 S.C. 664, 511 S.E.2d 390. Wills 155.3

In order to void a will on ground of undue influence, there must be proof that the act was obtained by force and coercion, by importunity which could not be resisted, that it was done by testator merely for the sake of peace, so that the motive was tantamount to force and fear. In re Estate of Cumbee (S.C.App. 1999) 333 S.C. 664, 511 S.E.2d 390. Wills 155.3

3. Conditional will

Parents’ joint will, which provided for disposition to survivor if one predeceased other or, in alternative, to their children other than contestant, if parents died simultaneously or within short time of each other, was clearly and unambiguously conditioned on event which did not occur, and was therefore void. In re Estate of Blankenship (S.C.App. 1999) 336 S.C. 103, 518 S.E.2d 615. Wills 80; Wills 849

Conditional or contingent will is will that conditions its validity upon occurrence of specific event. In re Estate of Blankenship (S.C.App. 1999) 336 S.C. 103, 518 S.E.2d 615. Wills 80

If will is conditioned upon occurrence of specific event, and event does not take place, will is void and decedent’s estate passes under laws of intestacy. In re Estate of Blankenship (S.C.App. 1999) 336 S.C. 103, 518 S.E.2d 615. Wills 849

Whether will is conditional depends upon facts of each case. In re Estate of Blankenship (S.C.App. 1999) 336 S.C. 103, 518 S.E.2d 615. Wills 80

Courts will not regard will as conditional or contingent unless intention of testator to make it so clearly appears, either expressly or by necessary implication, from language of will as a whole. In re Estate of Blankenship (S.C.App. 1999) 336 S.C. 103, 518 S.E.2d 615. Wills 80

3.5. Third party beneficiaries

Beneficiaries of an existing will or estate planning document, who are named in the instrument or otherwise identified in the instrument by their status, are required to prove by clear and convincing evidence their entitlement to relief as third‑party beneficiaries against an attorney whose drafting error defeats or diminishes the client’s intent under legal malpractice or breach of contract theories. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Attorney and Client 26

Beneficiaries of an existing will or estate planning document may recover as third‑party beneficiaries against an attorney whose drafting error defeats or diminishes the client’s intent under legal malpractice or breach of contract theories, but recovery is limited to those persons who are named in the instrument or otherwise identified in the instrument by their status. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Attorney and Client 26

Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third‑party is not, as such, recoverable by the plaintiff; however, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Contracts 186(1); Contracts 187(1)

4. Under former Section 21‑7‑50

Wills of personalty must be executed according to the law governing at the death of the testator. Houston v Houston, 14 SCL 491 (1826). Re Elcock’s Will, 15 SCL 39 (1826).

In the absence of a statute requiring it, it is not necessary that the testator should publish his will, or that the witnesses should know at the time they attested the will that the instrument was a will. South Carolina Nat. Bank of Charleston (Columbia Branch) v. Copeland (S.C. 1966) 248 S.C. 203, 149 S.E.2d 615.

Generally, no formal publication of the will, or even a declaration of the nature of the instrument, is necessary. Black v Ellis, 21 SCL 68 (1836). Verdier v Verdier, 42 SCL 135 (1855). South Carolina Nat. Bank of Charleston (Columbia Branch) v. Copeland (S.C. 1966) 248 S.C. 203, 149 S.E.2d 615.

An instrument reciting that the person executing it gave and bequeathed to a person named land described, and declared that on the death of the person named, without issue, the legacy should be returned to the children of the person executing it, and signed and sealed, and delivered to a third person and witnessed by three attesting witnesses, is a will, within the meaning of this section [Code 1962 Section 19‑205]. Rountree v. Rountree (S.C. 1910) 85 S.C. 383, 67 S.E. 471. Wills 87

5. —— Separate or detached sheets

This section [Code 1962 Section 19‑205] does not require that the separate sheets composing a will be signed by the testator and attested and subscribed by three witnesses, but the will itself must be executed in accordance with the formalities prescribed by the section. Goethe v. Browning (S.C. 1928) 146 S.C. 7, 143 S.E. 362.

When a will is composed of more than one sheet, it may become a question of fact for a jury, in a trial of will or no will, to determine whether the unsigned sheet or sheets, composing the purported will, is or are in fact a part of the will of a testator. Goethe v. Browning (S.C. 1928) 146 S.C. 7, 143 S.E. 362.

Where the formal execution of a will was proved, the burden was on the contestants to prove that the detached unsigned sheet complained of was in fact not part of the will. Goethe v. Browning (S.C. 1928) 146 S.C. 7, 143 S.E. 362. Wills 289

6. —— Testator’s capacity and knowledge of contents of purported will

Ordinarily, proof of a writing purporting to be a will and signed and witnessed according to this section [Code 1962 Section 19‑205] raises the presumption that the testator knew the contents thereof, and the burden is on contestant to show the contrary. Ex parte McKie (S.C. 1917) 107 S.C. 57, 91 S.E. 978. Wills 288(1)

Where the circumstances surrounding the transaction cast doubt on whether testator knew the contents of the purported will, there should be some proof apart from mere execution of the instrument that testator knew its contents, and the jury must determine whether testator had such knowledge. Ex parte McKie (S.C. 1917) 107 S.C. 57, 91 S.E. 978. Wills 324(4)

7. —— Wills to be in writing and signed by testator

The testator must sign in the presence of the witnesses, or so acknowledge his signature. Turnipseed v Hawkins, 12 SCL 272 (1821). Black v Ellis, 21 SCL 68 (1836). Tucker v Oxner, 46 SCL 141 (1859).

All wills must be in writing, except nuncupative wills, as prescribed by this chapter. Ex parte Turner (S.C. 1886) 24 S.C. 211.

8. —— Attestation

Since the act of 1824, wills of both realty and personalty are required to have three alleged witnesses. Houston v Houston, 14 SCL 491 (1826). Johnson v Clarkson, 24 SC Eq 305.

“Credible” means witnesses who are competent at the time. Garland v Executors of Crow, 18 SCL 24 (1830). Taylor v Taylor, 30 SCL 531 (1844). Workman v Dominick, 34 SCL 589 (1846). Noble v Burnett, 44 SCL 505 (1857). Harleston v Corbett, 46 SCL 604 (1860).

It is imperative that the witnesses sign in the presence of the testator where he may see them; otherwise the will is void. Reynolds v Reynolds, 28 SCL 253 (1843). Wright v Lewis, 39 SCL 212 (1851). Tucker v Oxner, 46 SCL 141 (1859).

The only requirement provided in this section [Code 1962 Section 19‑205] is that a will shall be attested and subscribed in the presence of the testator and of each other by three or more credible witnesses. South Carolina Nat. Bank of Charleston (Columbia Branch) v. Copeland (S.C. 1966) 248 S.C. 203, 149 S.E.2d 615. Wills 119

Knowledge on the part of the witnesses that the instrument is a will is not made necessary by statutes providing that wills shall be attested and subscribed by witnesses. South Carolina Nat. Bank of Charleston (Columbia Branch) v. Copeland (S.C. 1966) 248 S.C. 203, 149 S.E.2d 615.

Comparison made of attestation of will and attestation of mortgage. Farmers’ Bank & Trust Co. v. Fudge (S.C. 1919) 113 S.C. 25, 100 S.E. 628.

Where a testatrix declared an instrument to be her will, and requested the witnesses to sign, and she and the witnesses signed each in the presence of all the others, and each immediately after the preceding one, it is immaterial that the witnesses signed before the testatrix, under this section [Code 1962 Section 19‑205]. Kaufman v. Caughman (S.C. 1897) 49 S.C. 159, 27 S.E. 16, 61 Am.St.Rep. 808. Wills 123(4)

The person signing for the testator may also sign as a witness. Ex parte Leonard (S.C. 1893) 39 S.C. 518, 18 S.E. 216.

Prior to the amendment to this section [Code 1962 Section 19‑205] in 1882, the attesting witnesses need not have signed in the presence of each other. Tucker v. Oxner (S.C. 1859) 12 Rich. 141.

The three alleged witnesses to a lost will must be proved; the jury cannot say another subscribed in the place of one who denied it. Bauskett v. Keitt (S.C. 1885) 22 S.C. 187.

9. Under former Section 21‑7‑60

A letter written by a soldier, in actual military service, to his foster mother, willing certain war risk insurance to his foster parents, was held sufficient to effect a change of the beneficiary, notwithstanding the fact that no effort was made to probate the letter as his last will in accordance with this section [Code 1962 Section 19‑206]. Morgan v. U.S., 1926, 13 F.2d 763. Armed Services 77(5)

A letter written by a soldier who was killed while on active duty in Korea, which was admitted to probate as a holographic will, did not, because of the fact that it was admitted to probate as the last will and testament of the deceased, change the beneficiaries from those designated in a National Service Life Insurance policy, since change of beneficiary of National Service Life Insurance cannot be made by a last will and testament. Lane v. U.S., 1953, 116 F.Supp. 606.

**SECTION 62‑2‑503.** Attestation and self‑proving.

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

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

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

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

The State of \_\_\_\_\_\_\_\_\_\_ County of \_\_\_\_\_\_\_\_\_\_ We, \_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_, the testator and at least one of the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and to the best of his knowledge the testator was at that time eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 12; 1988 Act No. 659, Section 15; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

Effect of Amendment

The 2013 amendment, in each form, inserted the parenthetical regarding age, marriage and emancipation.

CROSS REFERENCES

Act not to contradict requirements of Section 62‑2‑503, see Section 26‑1‑240.

Library References

Wills 111, 113, 123, 206.

Westlaw Topic No. 409.

C.J.S. Wills Sections 226 to 314, 457 to 460, 463 to 465.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Notaries Section 21, Proof of Deeds.

S.C. Jur. Wills Section 25, Simultaneous Execution, Attestation, and Self‑Proof.

S.C. Jur. Wills Section 26, Simultaneous Execution, Attestation, and Self‑Proof‑Self‑Proof Subsequent to Execution and Attestation.

Forms

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

South Carolina Legal and Business Forms Section 17:46 , Self‑Proved Will.

South Carolina Legal and Business Forms Section 17:47 , Affidavit of Attesting Witness.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1, Attested Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1 TD 2, Attested Wills.

Will Contests Section 5:3, Improper Execution‑Signature.

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 62‑2‑504.** Subscribing witnesses not incompetent because of interest; effect on gifts to them.

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 23; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Wills 116.

Westlaw Topic No. 409.

C.J.S. Wills Sections 253 to 255, 260 to 274.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Death and Right to Die Section 37, Actions Involving Incompetent Persons.

S.C. Jur. Wills Section 27, Interest of Subscribing Witness; Competency.

Forms

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

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1, Attested Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1 TD 2, Attested Wills.

Will Contests Section 5:4, Improper Execution‑Attestation.

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

1. In general

Beneficiaries under will whose wives were witnesses to it can take no more than they would have gotten had the testator died intestate and the void portion of the will, that which would have gone to such beneficiaries, is intestate property and distributable among the heirs at law of the testator, except that the interest of such beneficiaries shall not exceed in value any property, estate or interest to which they would be entitled upon the failure to establish such will. Davis v. Davis (S.C. 1946) 208 S.C. 182, 37 S.E.2d 530. Wills 712; Wills 866

A void devise or legacy, which is part of the residuary clause of a will, does not pass under the remaining portion of the same clause, but it becomes intestate property and distributable to the heirs at law of the testator. Davis v. Davis (S.C. 1946) 208 S.C. 182, 37 S.E.2d 530.

Where a devisee of a life estate is a witness, the remainders are accelerated and take effect at once. Key v. Weathersbee (S.C. 1895) 43 S.C. 414, 21 S.E. 324, 49 Am.St.Rep. 846.

**SECTION 62‑2‑505.** Choice of law as to execution.

 A written will is valid if:

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 13; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

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

Effect of Amendment

The 2013 amendment added the subsection designators and made other nonsubstantive changes.

CROSS REFERENCES

Provision that will which has required signatures and contains attestation clause showing compliance with this section and Section 62‑2‑502 shall be probated without further proof, see Section 62‑3‑303.

Library References

Wills 70.

Westlaw Topic No. 409.

C.J.S. Conflict of Laws Sections 72, 84, 86, 89.

C.J.S. Wills Section 196.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 24, Execution‑Choice of Law as to Execution.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1, Attested Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.1 TD 2, Attested Wills.

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 62‑2‑506.** Revocation by writing or by act.

 (a) A will or any part thereof is revoked:

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

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

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

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

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

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

REPORTER’S COMMENT

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

The elaborate body of case law developed in the application of former Section 21‑7‑210 will continue to supply guidance in the application of Section 62‑2‑506. S. Alan Medlin, The Law of Wills and Trusts (S.C. Bar 2002) Sections 310, 310.1. That case law stressed the necessity to meet the statute’s requirements in order to effect a revocation, Madden v. Madden, 237 S.C. 629, 118 S.E.2d 443 (1961); distinguished intended revocations from the accidental inclusion of express language of revocation in subsequent wills, Owens v. Fahnestock, 110 S.C. 130, 96 S.E. 557 (1918), and the accidental destruction of wills, such accidents involving no revocation in the eyes of the law unless, perhaps, the accident was later confirmed as an intended revocation, Davis v. Davis, 214 S.C. 247, 52 S.E.2d 192 (1949). It distinguished unmistaken, unconditional revocations from cases of dependent relative revocation, i.e., mistaken revocations, not effective as revocations at law, Pringle v. McPherson’s Executors, 4 S.C.L. 279 (2 Brev.) (1809), Johnson v. Brailsford, 2 Nott and McC. 272 (S.C. 1820) Charleston Library Society v. C. & S. Nat. Bank, 200 S.C. 96, 20 S.E.2d 623 (1942), Stevens v. Royalls, 223 S.C. 510, 77 S.E.2d 198 (1953). It allowed partial revocations by either one of the two broad methods of revocation, Brown v. Brown, 91 S.C. 101, 74 S.E. 135 (1912). It gave effect to revocations by implication from the inconsistency between the provisions of the will being revoked and the subsequent will and also determined whether any such inconsistency existed, Starratt v. Morse, 332 F. Supp. 1038 (D.S.C. 1971) and Werber v. Moses, 117 S.C. 157, 108 S.E. 396 (1921). It governed revocations by physical act, including those accomplished “by another person in his (the testator’s) presence and by his direction,” Means v. Moore, 16 S.C.L. 314 (Harp. L.) (1824), and those rebuttably presumed to have occurred in cases of mutilated wills, Johnson v. Brailsford, supra, and in cases of missing wills, Lowe v. Fickling, 207 S.C. 442, 36 S.E.2d 293 (1945).

Effect of Amendment

The 2013 amendment inserted subsection designator (a); in subsection (a)(1) inserted “executing” before “a subsequent will”; added subsection (b), relating to a subsequent will not expressly revoking a previous will; and made other nonsubstantive changes.

Library References

Wills 167 to 195.

Westlaw Topic No. 409.

C.J.S. Wills Sections 386 to 428, 1621, 2026, 2030, 2036, 2039 to 2046, 2057 to 2062.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 42, Revocation by Writing or by Act.

Forms

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

South Carolina Legal and Business Forms Section 17:94 , Revocation‑Of Prior Wills and Codicils.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.2, Multiple Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 4.1, Revocation of Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 4.1 TD 2, Revocation of Wills.

LAW REVIEW AND JOURNAL COMMENTARIES

Construction and Interpretation of a Will: Implied Revocation by Codicil. 24 S.C. L. Rev. 683.

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

Instructions 4

Presumptions and burden of proof 2

Sufficiency of evidence 3

Under former Section 21‑7‑210 5

1. In general

A will may be freely modified or revoked by a mentally competent testator, acting of the testator’s own volition, until the testator’s death. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 167

Revocation of will by act or by subsequent instrument must be accompanied by intention to revoke, and, without intention, revocation does not take place. Golini v. Bolton (S.C.App. 1997) 326 S.C. 333, 482 S.E.2d 784. Wills 170

When testator takes possession of will and it cannot be found at his death, law presumes that testator destroyed will animo revocandi. Golini v. Bolton (S.C.App. 1997) 326 S.C. 333, 482 S.E.2d 784. Wills 290

2. Presumptions and burden of proof

Proof that a testator, whose will cannot be found after death, entertained a kindly or loving feeling toward the beneficiaries under the will carries weight and tends toward the conclusion of non‑revocation of the will by the testator. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 306

The mere fact a person who would benefit from destruction of a will possessed it or had access to it, standing alone, is not sufficient to rebut the presumption the testator himself revoked the will by destroying it. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 290

The person contesting the validity of a will usually bears the burdens of proof and persuasion; however, these burdens are reversed in cases of lost or missing wills, in which case the person asserting that an original will was, in fact, valid but mistakenly lost or destroyed by another, bears the burden of presenting clear and convincing evidence to rebut the presumption the testator destroyed the will with an intent to revoke it. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 290

Once presumption that will has been destroyed and revoked arises, the person attempting to rebut the presumption and submit a copy of the lost or missing will to the probate court for administration must present clear and convincing evidence (1) the original will existed at the time of the testator’s death, and (2) the original will was lost after his death or destroyed by a third party without the testator’s knowledge or consent. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 290

When a testator takes possession of his original will and the same cannot be found after his death, the law presumes the testator destroyed it animo revocandi, i.e., with an intent to revoke it; this is merely a presumption of fact and may be rebutted by the evidence the will existed at the time of his death, was lost subsequent thereto, or had been destroyed by another without authority to do so, and the same presumption arises where it is shown the testator, while not having the will in his actual possession, had ready access to it. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 290

3. Sufficiency of evidence

Clear and convincing evidence supported conclusion that testatrix’s original will existed at time of her death, and that it was either lost after her death or destroyed by a third party without her knowledge or consent; primary and first contingent beneficiaries of will were same persons testatrix had named in her prior wills, there was no evidence that testatrix had expressed any desire to change or revoke her will in order not to pass assets to primary and first contingent beneficiaries, testatrix’s nephew knew about will, admitted he was displeased with its terms, called attorney who had prepared will to complain about it, had unfettered access to testatrix’s apartment, and knew where she kept financial and investment records, and he had acted decisively to ensure that he received his “inheritance” from testatrix, by transferring about $713,000 in assets from testatrix to himself three days before testatrix’s death. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 306

4. Instructions

Will contestants were not entitled to instruction in case involving lost will to effect that law did not presume that will had been destroyed by another person without knowledge or consent of the maker, for that would be a crime and a crime was never presumed; jury had been properly instructed on law governing lost wills, the rebuttable presumption that a testator destroyed his will with intent to revoke it if it could not be found after his death, and burden of proponent of will to rebut this presumption by clear and convincing evidence, and the instruction requested had been included in general instructions. In re Estate of Pallister (S.C. 2005) 363 S.C. 437, 611 S.E.2d 250, rehearing denied. Wills 331(2)

5. Under former Section 21‑7‑210

If there is an irreconcilable conflict between a will and a codicil, the latter must prevail. Werber v Moses, 117 SC 157, 108 SE 396 (1921). Starratt v Morse, 332 F Supp 1038 (1971, DC SC).

For additional related cases, as to revocation by written instrument, see Legare v Ashe, 1 SCL 464 (1795). Johnson v Brailsford, 11 SCL 272 (1820). Taylor v Taylor, 11 SCL 482 (1820). O’Neall v Farr, 30 SCL 80 (1844). Peeples v Smith, 42 SCL 90 (1854). Godbold v Vance, 14 SC 458 (1881). Johnson v Brailsford, 11 SCL 272 (1820). Durant v Ashmore, 31 SCL 184 (1845). Watkins v Watkins, 47 SCL 66 (1860). Bauskett v Keitt, 22 SC 187 (1885). Pringle v McPherson, 4 SCL 279 (1809). Pringle v McPherson, 2 SC Eq 524 (1807). Means v Moore, 16 SCL 314 (1824). Scaife v Thomson, 15 SC 337 (1881). Prater v Whittle, 16 SC 40 (1881). Gregg v McMillan, 54 SC 378, 32 SE 447 (1899).

Revocation must be intended, to be effectual. Johnson v Brailsford, 11 SCL 272 (1820). Taylor v Taylor, 11 SCL 482 (1820). Means v Moore, 16 SCL 314 (1824). O’Neall v Farr, 30 SCL 80 (1844). Durant v Ashmore, 31 SCL 184 (1845).

The burden of proving absolute and irreconcilable inconsistency between the will and a codicil alleged to have revoked the former or a part thereof is on the contestant who asserts the revocation. Starratt v. Morse (D.C.S.C. 1971) 332 F.Supp. 1038. Wills 290

The wording of the codicil was not legally sufficient to accomplish the revocation of certain sections of the will under this section [Code 1962 Section 19‑221], where the codicil neither declared that those sections of the will were revoked, nor did it create an irresistible inference that such was the unmistakable intention of the testatrix, who could revoke it only by one of the methods prescribed in this section [Code 1962 Section 19‑221]. Starratt v. Morse (D.C.S.C. 1971) 332 F.Supp. 1038.

Stringent requirements for proof of lost or destroyed wills are imposed to avoid fraud and the courts should proceed with extreme care in the matter of proving a lost will and should be thoroughly satisfied that no fraud is being attempted. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28.

To establish an alleged destruction of a will so as to entitle it to probate, there must be sufficient evidence of its destruction, which under the circumstances would defeat an inference of cancellation by the testator. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Wills 306

One who seeks to establish as a valid will one that is destroyed and unrevoked must produce evidence that is clear and convincing, especially where the proponent of the will is one who will receive more under the will then under the intestate laws. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Wills 302(8)

Self‑serving testimony about the destruction of a will, whether the testimony is negative or positive as to the presence and direction of the testator, is proscribed by the Dead Man’s Statute. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Witnesses 164(2)

Testimony of will proponent as to her destruction of the will pertained to a transaction or communication with the deceased, was also self‑serving, and therefore proscribed by the Dead Man’s Statute. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Witnesses 164(2)

When a testator takes possession of his will, and when that will cannot be found at the time of his death, a presumption arises that the testator destroyed his will animo revocandi, which means he destroyed the will with the intent to revoke it, and once this presumption arises, the proponent of the missing will has the burden of rebutting it by showing either that the will existed at the time of the testator’s death, was lost after his death, or was destroyed by a third party without the testator’s knowledge or consent. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Wills 290

Neither retention by the testator of an earlier will, nor his uncertainty as to whether he might ultimately decide to use the earlier will instead of the later, nor his decision to use the earlier will, may effect a revocation. The later will may be revoked only by one of the methods prescribed in this section [Code 1962 Section 19‑221]. Madden v. Madden (S.C. 1961) 237 S.C. 629, 118 S.E.2d 443.

That will of testator was destroyed by fire and there was evidence that he stated he was planning to make another, is no evidence whatsoever that he intended to adopt the destruction of the will accidentally as a revocation thereof, for the obvious reason that it could just as well be presumed that it was his intention to republish the will in the same terms. Davis v. Davis (S.C. 1949) 214 S.C. 247, 52 S.E.2d 192.

If the codicil is reasonably reconcilable with the will, it must be presumed that the testator so intended, and the court will give effect to such intention. Werber v. Moses (S.C. 1921) 117 S.C. 157, 108 S.E. 396.

The act of the testator in erasing separate clauses of the will by means of interlineation is a revocation pro tanto; for this section [Code 1962 Section 19‑221] specifically allows the revocation of isolated clauses. Brown v. Brown (S.C. 1912) 91 S.C. 101, 74 S.E. 135.

Intention to revoke may be implied. Hill v. Thomas (S.C. 1879) 11 S.C. 346.

**SECTION 62‑2‑507.** Revocation by divorce, annulment, and order terminating marital property rights; no revocation by other changes of circumstances.

 (a) In this section:

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

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

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

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

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

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

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

 (1) revokes any revocable:

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

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

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

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

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

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

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 24; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Wills 190, 193.

Westlaw Topic No. 409.

C.J.S. Wills Sections 415 to 416, 420.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 44, Revocation by Divorce, Annulment, and Order Terminating Marital Property Rights.

S.C. Jur. Wills Section 45, Revocation by Divorce, Annulment, and Order Terminating Marital Property Rights‑Revival.

Forms

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

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 4.1, Revocation of Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 4.2 TD 2, Revival of Revoked Wills.

Will Contests Section 5:17, Revocation‑Revocation by Operation of Law.

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 62‑2‑508.** Revival of revoked will.

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

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

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

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

REPORTER’S COMMENT

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

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

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

There is a presumption in favor of revival (of the revoked part or parts of the previous will) where a subsequent will partially revoked the previous will. The justification is that where the subsequent will only partially revoked the previous will, the subsequent will is only a codicil to the previous will and the testator should know that the previous will has continuing effect.

Library References

Wills 196 to 202.

Westlaw Topic No. 409.

C.J.S. Wills Sections 429 to 440.

RESEARCH REFERENCES

Encyclopedias

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

Forms

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

Treatises and Practice Aids

18 Causes of Action 415, Cause of Action to Invalidate Will on Ground of Its Revocation by Act of Testator.

Restatement (2d) of Property, Don. Trans. Section 33.2, Multiple Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 4.2, Revival of Revoked Wills.

Restatement (3d) Property (Wills & Don. Trans.) Section 4.2 TD 2, Revival of Revoked Wills.

NOTES OF DECISIONS

In general 1

1. In general

Statutory presumption that third will’s revocation of second will does not revive first will did not apply in case where subsequent wills were void ab initio due to exercise of undue influence over testator. In re Estate of Cumbee (S.C.App. 1999) 333 S.C. 664, 511 S.E.2d 390. Wills 290

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.

**SECTION 62‑2‑509.** Incorporation by reference.

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

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

REPORTER’S COMMENT

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

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

Library References

Wills 477.

Westlaw Topic No. 409.

C.J.S. Wills Sections 796 to 797, 878.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.6, Incorporation by Reference.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.6 TD 2, Incorporation by Reference.

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 62‑2‑510.** Additions to trusts.

 (A) A devise made by a will to the trustee of a trust to a trust is valid so long as:

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

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

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

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

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

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

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

 (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator.

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

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

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

 (H) In the event no trustee makes proper claim to the proceeds payable as provided in subsections (F) and (G) of this section from the insurance company or the obligor within a period of one year after the date of the death of the insured, employee, or annuitant, or if satisfactory evidence is furnished to the insurance company or other obligor within such one year period that there is or will be no trustee to receive the proceeds, payment must be made by the executors or administrators of the person making such designations, unless otherwise provided by agreement.

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

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

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

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Wills 669 to 678.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1425 to 1447.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 29, Generally‑Reference to Trusts.

S.C. Jur. Wills Section 30, Generally‑Reference to Death Benefits.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 107, Recent Statutes Regarding Testamentary Additions to Trusts.

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.8, Pour‑Over Devises.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.8 TD 2, Pour‑Over Devises.

**SECTION 62‑2‑511.** Events of independent significance.

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

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

REPORTER’S COMMENT

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

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

Effect of Amendment

The 2013 amendment made nonsubstantive changes.

Library References

Wills 639 to 668.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1380 to 1424.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 6, Events of Independent Significance.

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 62‑2‑512.** Separate writing identifying bequest of tangible property.

 A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator’s death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect upon the dispositions made by the will.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 25; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Effect of Amendment

The 2013 amendment deleted “, evidences of indebtedness, documents of title (as defined in Section 36‑1‑201(15)), securities (as defined in Section 36‑8‑102(1)(A)),” and made other nonsubstantive changes.

CROSS REFERENCES

Provisions which generally govern execution of wills after June 27, 1984, except for writings within this section, inter alia, see Section 62‑2‑502.

Library References

Wills 477.

Westlaw Topic No. 409.

C.J.S. Wills Sections 796 to 797, 878.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Cotenancies Section 19, Presumption Against Joint Tenancy.

S.C. Jur. Wills Section 7, Separate Writing Identifying Bequest of Tangible Property.

S.C. Jur. Wills Section 20, Estate of Joint Tenancy.

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

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 33.1, Meaning of a Will.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.7, Independent Significance.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.9, Testamentary Disposition by Unattested Writing.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.7 TD 2, Independent Significance.

Restatement (3d) Property (Wills & Don. Trans.) Section 3.9 TD 2, Testamentary Disposition by Unattested Writing.

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.

Part 6

Construction

**SECTION 62‑2‑601.** Rules of construction and intention; reformation of will.

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

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

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

REPORTER’S COMMENT

Section 62‑2‑601 states the first principle of the construction of wills, that the testator’s intention as expressed in the will controls, a codification of South Carolina case law. See King v. S.C. Tax Comm., 253 S.C. 246, 173 S.E.2d 92 (1970). Only in the absence of expression in the will of the testator’s intention do the rules of construction of this Part (6) control.

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

Effect of Amendment

The 2013 amendment added subsection designator (A), added subsection (B), relating to reformation of will, and made other nonsubstantive changes.

Library References

Wills 437, 439.

Westlaw Topic No. 409.

C.J.S. Wills Sections 796 to 797, 820, 831 to 832, 836 to 837.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 139, Rules of Construction Under Probate Code.

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

LAW REVIEW AND JOURNAL COMMENTARIES

Admissibility of Testator’s Declarations of Intention. 17 S.C. L. Rev. 276.

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

Under provisions of former Section 21‑7‑480 limiting legacies to bastard children or women living in adultery 1

1. Under provisions of former Section 21‑7‑480 limiting legacies to bastard children or women living in adultery

This statute deals only with legacies and devises and refers only to the administration and distribution of a decedent’s estate, and the proceeds of a life insurance policy payable to a named beneficiary constitute no part of the estate of the insured. Bynum v. Prudential Ins. Co. of America, 1948, 77 F.Supp. 56.

The South Carolina Probate Code’s rules of construction will be applied to determine a testator’s intent unless the testator’s will indicates a contrary intent. Bowles v. Bradley (S.C. 1995) 319 S.C. 377, 461 S.E.2d 811. Wills 437(1)

The South Carolina Probate Code’s rules of construction apply only to wills; thus, the Supreme Court of South Carolina will not rely on these rules to interpret trusts. Bowles v. Bradley (S.C. 1995) 319 S.C. 377, 461 S.E.2d 811.

This section does not prohibit a testator from giving his property to strangers. Ray v. Tate (S.C. 1979) 272 S.C. 472, 252 S.E.2d 568.

Section 21‑7‑480 will not apply so as to limit devise to illegitimate child when testator is not married or has no lawful children at time child is begotten. Williford v. Downs (S.C. 1978) 270 S.C. 110, 240 S.E.2d 654.

This section [Code 1962 Section 19‑238] and Code 1962 Section 57‑310 are companion statutes. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

Consanguineous marriage, which was voidable under Code 1962 Section 20‑1 but had not been avoided during the lifetime of the parties, was a lawful marriage and the parties did not live in adultery within the provisions of this section [Code 1962 Section 19‑238]. Bennett v. Bennett (S.C. 1940) 195 S.C. 1, 10 S.E.2d 23.

The right to dispose of property by will may be limited and circumscribed. Marett v. Broom (S.C. 1931) 160 S.C. 91, 158 S.E. 216. Wills 1

The part of the father’s estate within the State which the bastard can take under his will is unaffected by what estate the father has out of the State, or how the will disposes of it. Humphries v. Settlemeyer (S.C. 1912) 91 S.C. 389, 74 S.E. 892.

A husband living in a sister state, deserted his wife and daughter there, and purchased land in South Carolina and had the same conveyed to a trustee for his benefit and to those whom he might direct by will. He subsequently executed a will whereby he gave all his property to a bastard child. His legitimate daughter died during his lifetime. It was held that under this section [Code 1962 Section 19‑238] the surviving wife was entitled to a half of three fourths of his entire estate, so that only the remainder would pass under the will. Williams v. Newton (S.C. 1910) 86 S.C. 248, 68 S.E. 693. Wills 17

Action brought to set aside so much of will as gives more than one fourth of testator’s property to a bastard child, and to have excess partitioned among heirs at law, is in equity. Williams v. Newton (S.C. 1909) 84 S.C. 98, 65 S.E. 959.

A devise of a life estate to a mistress, though void as to the excess, under this section [Code 1962 Section 19‑238], is a particular estate sufficient to support a remainder. Beaty v. Richardson (S.C. 1899) 56 S.C. 173, 34 S.E. 73.

Under this section [Code 1962 Section 19‑238], where a testator, having lawful children, after devising to his illegitimate children one fourth of his estate, devised a sum to his executor with an understanding that the latter should use such legacy, also, for the benefit of such illegitimate children, the legacy is void. McIver, C.J., dissenting. Gore v. Clarke (S.C. 1892) 37 S.C. 537, 16 S.E. 614. Wills 17

**SECTION 62‑2‑602.** Construction that will passes all property; after‑acquired property.

 A will is construed to pass all property which the testator owns at the testator’s death including property acquired after the execution of the will and all property acquired by the testator’s estate after the testator’s death.

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

REPORTER’S COMMENT

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

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

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

Effect of Amendment

The 2013 amendment inserted “and all property acquired by the testator’s estate after the testator’s death” and made nonsubstantive changes.

Library References

Wills 449, 482.

Westlaw Topic No. 409.

C.J.S. Wills Sections 796 to 797, 864, 1099 to 1100.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 139, Rules of Construction Under Probate Code.

S.C. Jur. Wills Section 141, Construction that Devise Passes Fee Simple‑That Will Passes All Property; After‑Acquired Property.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 27.1, Class Member Dies Before the Date the Dispositive Instrument is Executed.

LAW REVIEW AND JOURNAL COMMENTARIES

“The Creation of Estates by Implication.” 11 SCLQ 352 (1959).

Construction and Interpretation of a Will: Intention of Testator. 24 S.C. L. Rev. 680.

NOTES OF DECISIONS

In general 1

Ambiguities 2

Under former Section 21‑7‑410 3

1. In general

Provision of will which devised to testator’s three children any and all property which testator may have received by reason of inheritance from his mother’s estate did not contain latent ambiguity, even though children’s vested remainder interest in certain securities, though subject to mother’s life estate, was at no time part of mother’s actual estate, and without the remainder interest, devise was left unfunded, and thus extrinsic evidence that testator frequently referred to vested remainder interest as property that would come from his mother’s estate was not admissible, where at the time testator created his will, his mother had a considerable estate she conceivably could have left to testator if the contingency of her death before his had been met; giving language of will its plain meaning did not render it incapable of application. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.2)

2. Ambiguities

In order to find a latent ambiguity, the extrinsic evidence must reflect that the words of the will, when applied to the object or subject which they describe, are incapable of application as they stand; the mere showing that a testator may have intended a testamentary construction in direct contradiction to the plain meaning of the will’s language is not enough. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.1)

Once a court finds a latent ambiguity in a will, extrinsic evidence is permitted to help the court determine the testator’s true intent and resolve the ambiguity. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.2)

In construing a will, a court may admit extrinsic evidence to determine whether a latent ambiguity exists. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.2)

Latent ambiguities in a will arise, 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. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.1)

Patent ambiguities in a will are ones which arise 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. In re Estate of Hyman (S.C.App. 2004) 362 S.C. 20, 606 S.E.2d 205. Wills 487(1.1)

3. Under former Section 21‑7‑410

For additional related cases, as to application of section where the will was executed before the section took effect, see Means v Evans, 4 SC Eq 242 (1812). Garrett v Garrett, 21 SC Eq 272 (1848). Bell v Towell, 18 SC 94 (1882). Moore v Davidson, 22 SC 92 (1884). Welborn v Townsend, 31 SC 408, 10 SE 96 (1889). Laurens v Read, 35 SC Eq 245 (1868). Moore v Davidson, 22 SC 92 (1884). McFadden v Hefley, 28 SC 317, 5 SE 812 (1888). Scaife v Thomson, 15 SC 337 (1881).

Provision of will making bequests subject to terms and conditions including provision that testator’s son and co‑executor, and holder of three out of ten shares in corporation, act in concert with executors holding other seven shares to enable corporation to transfer specified property to named beneficiaries did not require son to convey his three shares to estate to be distributed as though part of testator’s property, either as condition precedent to carrying out of will provisions or as condition precedent to son taking under will. Bankers Trust of South Carolina v. Truesdale (S.C. 1977) 269 S.C. 191, 237 S.E.2d 45.

Phrase “subject to following terms and conditions” following bequest to co‑executors of testator’s entire holding in corporation was not condition precedent but rather terms and conditions directed at co‑executors telling them what to do as constructive trustees in their executor capacity with testator’s shares of stock; phrase should be interpreted as meaning “for the following purposes.” Bankers Trust of South Carolina v. Truesdale (S.C. 1977) 269 S.C. 191, 237 S.E.2d 45.

Where apparent intent of testator was not that beneficiaries named in item 5 of will be deprived of inheritance because co‑executors, or sole surviving executor, did not comply with direction that specified transactions be carried out in no event later than 24 months after testator’s death, 24‑month stipulation was merely precatory. Bankers Trust of South Carolina v. Truesdale (S.C. 1977) 269 S.C. 191, 237 S.E.2d 45.

After‑acquired property passes under the will if there is any provision of the will covering it. Cornelson v. Vance (S.C. 1951) 220 S.C. 47, 66 S.E.2d 421. Wills 578(1)

Where a will gave the residue of the testator’s property to his wife “during her life to be used as her own but subject to the following conditions,” without making disposition of the remainder as to certain of such residue, under this section [Code 1962 Section 19‑231] the widow took a fee simple title to an undivided one‑half interest as heir at law and distributee in the residue, not specifically devised or effectually disposed of under the will, including after‑acquired property, lapsed legacies, and remainders. Busby v. Busby (S.C. 1927) 142 S.C. 395, 140 S.E. 801.

Under this section [Code 1962 Section 19‑231], every presumption is against intestacy. MacDonald v. Fagan (S.C. 1922) 118 S.C. 510, 111 S.E. 793.

As provisions of this section [Code 1962 Section 19‑231] have made a will ambulatory in character as to realty as well as to personalty, it is enough for that purpose if the terms of the will, considered as speaking at the death of the testator, are sufficiently broad and comprehensive to cover and convey all the lands owned by him at that time, without reference to when or how they were acquired. Welborn v. Townsend (S.C. 1889) 31 S.C. 408, 10 S.E. 96.

**SECTION 62‑2‑603.** Anti‑lapse; deceased devisee; class gifts.

 (A) Unless a contrary intent appears in the will, if a devisee, who is a great‑grandparent or a lineal descendant of a great‑grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation.

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

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

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

REPORTER’S COMMENT

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

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

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

CROSS REFERENCES

Ademption by satisfaction, see Section 62‑2‑610.

Library References

Wills 536 to 557, 774 to 777.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1029 to 1084, 1791 to 1821.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 189, Effect of Failure of Testamentary Provision; Residuary Estate.

Forms

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

South Carolina Legal and Business Forms Section 17:238 , Lapses and Gifts Over‑Bequest Not to Lapse on Death of Beneficiary Before Death of Testator.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 182, Construction‑Beneficiaries and Their Interests.

Restatement (2d) of Property, Don. Trans. Section 27.1, Class Member Dies Before the Date the Dispositive Instrument is Executed.

Restatement (2d) of Property, Don. Trans. Section 34.6, Donee Dies Before Donor.

Restatement (3d) Property (Wills & Don. Trans.) Section 5.5, Antilapse Statutes.

Restatement (3d) Property (Wills & Don. Trans.) Section 5.5 TD 2, Antilapse Statutes.

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.

Attorney General’s Opinions

Where residue of estate was devised to decedent’s two sons and share of one son failed because he predeceased his mother but was survived by children, share of deceased son would pass to his issue. 1993 Op. Atty Gen No. 93‑48.

NOTES OF DECISIONS

Under former Section 21‑7‑470 1

1. Under former Section 21‑7‑470

Prior to the amendment of 1883 a devise of land lapsed and this section [Code 1962 Section 19‑237] was restricted to legacies. Pratt v McGhee, 17 SC 428 (1882). Logan v Brunson, 56 SC 7, 33 SE 737 (1899).

For additional related cases, see Roundtree v Roundtree, 26 SC 450, 2 SE 474 (1887). Regues v Regues, 32 SC Eq 554 (1860). Mathis v Hammond, 30 SC Eq 137 (1856).

This section [Code 1962 Section 19‑237] does not attempt to define the right of an adopted child to inherit. Cox v. Cox (S.C. 1974) 262 S.C. 8, 202 S.E.2d 6.

A final decree of adoption completely severs all ties between the adopted child and the natural parents and effectively bars any right of the child to inherit from them. Cox v. Cox (S.C. 1974) 262 S.C. 8, 202 S.E.2d 6. Adoption 18; Adoption 21

By the express terms of this section [Code 1962 Section 19‑237], its provisions are limited to a case where a father or mother by will gives a legacy or a devise to a child, and such child dies in the lifetime of the parents leaving issue. Padgett v. Black (S.C. 1956) 229 S.C. 142, 92 S.E.2d 153. Wills 536

Under the terms of the will in question, the children of a son dying several years before the testator and not mentioned in the will are not included in the term, “all my children,” in the connection in which they are here used. Suber v. Nash (S.C. 1909) 84 S.C. 12, 65 S.E. 947.

The term “children” does not include grandchildren and great‑grandchildren. Logan v. Brunson (S.C. 1899) 56 S.C. 7, 33 S.E. 737. Wills 552(3)

**SECTION 62‑2‑604.** Failure of testamentary provision.

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

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

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

REPORTER’S COMMENT

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

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

Effect of Amendment

The 2013 amendment changed the subsection designators from lower case to upper case, and made other nonsubstantive changes.

CROSS REFERENCES

Ademption by satisfaction, see Section 62‑2‑610.

Library References

Wills 852, 858, 860.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1822 to 1824, 1829 to 1832, 1837 to 1840.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 189, Effect of Failure of Testamentary Provision; Residuary Estate.

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.

Attorney General’s Opinions

Where residue of estate was devised to decedent’s two sons and share of one son failed because he predeceased his mother but was survived by children, share of deceased son would pass to his issue. 1993 Op. Atty Gen No. 93‑48.

NOTES OF DECISIONS

In general 1

1. In general

Section 62‑2‑604(b) is a rule of construction, and therefore it applied to the construction of a will which was executed prior to the effective date of the probate code, where there was no clear indication of an intent to dispose of the decedent’s property contrary to the disposition which would occur under the Section 62‑2‑604(b) rule of construction. McDaniel v. Gregory (S.C. 1990) 303 S.C. 500, 401 S.E.2d 863.

**SECTION 62‑2‑605.** Change in securities; accessions; nonademption.

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

 (1) as much of the devised securities as is a part of the testator’s estate at the time of the testator’s death;

 (2) any additional or other securities of the same organization owned by the testator by reason of action initiated by the organization or any successor, related or acquiring organization excluding any acquired by exercise of purchase options;

 (3) securities of another organization owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the organization or any successor, related or acquiring organization;

 (4) any additional securities of the organization owned by the testator as a result of a plan of reinvestment in the organization.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 26; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

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

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

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

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

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

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

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

Library References

Wills 578(2), 766.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1085, 1099 to 1104, 1743 to 1744, 1753.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 193, Specific Devise of Securities; Nonademption.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 5.3, Effect of Stock Splits, Stock Dividends, and Other Distributions on Devises of a Specified Number of Securities.

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

Stock splits 2

1. In general

If a legatee is not awarded the additional shares of stock created by a stock split, the value of the specific bequest would be substantially reduced, contrary to the testatrix’s intent. Polson v. Craig (S.C.App. 2002) 351 S.C. 433, 570 S.E.2d 190. Wills 754

2. Stock splits

The legatee of a specific bequest of shares of corporate stock, as distinguished from the legatee of a general bequest, is entitled to any accretions to the bequeathed shares which are received by the testatrix, as a result of a stock split, subsequent to the making of such bequest. Polson v. Craig (S.C.App. 2002) 351 S.C. 433, 570 S.E.2d 190. Wills 754

A stock split in no way alters a substance of the testatrix’s total interest or rights in a corporation; it is merely a dividing up of the outstanding shares of a corporation into a greater number of units, without disturbing the stockholder’s original proportional participating interest in the corporation. Polson v. Craig (S.C.App. 2002) 351 S.C. 433, 570 S.E.2d 190. Wills 754

Devise of stock under testator’s will was a specific devise, not a general devise, and thus devisee was entitled to additional shares created by stock split; testator referred to certain shares she obtained by inheritance from her husband, intended to follow husband’s wishes in giving stock to devisee, and kept this stock separate from the rest of her stock portfolio, and devisee was entitled under probate statute to number of shares increased by split. Polson v. Craig (S.C.App. 2002) 351 S.C. 433, 570 S.E.2d 190. Wills 751

**SECTION 62‑2‑606.** Nonademption of specific devises in certain cases; unpaid proceeds of sale, condemnation or insurance; sale by conservator.

 (a) A specific devisee has the right to the specifically devised property in the testator’s estate at the testator’s death and to:

 (1) any balance of the purchase price (together with any mortgage or other security interest) owed by a purchaser to the testator at the testator’s death by reason of sale of the property;

 (2) any amount of a condemnation award for the taking of the property unpaid at the testator’s death;

 (3) any proceeds unpaid at the testator’s death on fire or casualty insurance or on other recovery for injury to the property;

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

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

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

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

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

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

REPORTER’S COMMENT

Section 62‑2‑606 establishes the rule that a specific devise of any property, including securities also governed by Section 62‑2‑605, is construed to pass, not only as much of the specifically devised property as remains at testator’s death, but also the proceeds of sale, subsection (a)(1), and condemnation, subsection (a)(2), of the property, and the proceeds of policies of insurance against fire or casualty to the property, subsection (a)(3), but only if such proceeds are yet unpaid to the testator at the testator’s death, Section 62‑2‑606(a), or if such proceeds have been paid to an agent acting within the authority of a durable power of attorney or to a conservator, defined at Section 62‑1‑201(6), of the testator during the testator’s life, provided less than one year separates the death of the testator and a prior adjudication that his disability had ceased, Section 62‑2‑606(b). Further, a specific devise of a secured obligation passes the products of foreclosure, or settlement in lieu of foreclosure, of such security, Section 62‑2‑606(a)(4). Section 62‑2‑606 applies unless the decedent’s will provides otherwise, Section 62‑2‑601.

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

Library References

Wills 764 to 771.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1742 to 1761, 1770 to 1773.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 194, Nonademption of Specific Devises in Certain Cases.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 5.2, Failure (“Ademption”) of Specific Devises by Extinction.

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 62‑2‑607.** Nonexoneration.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 27; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

Library References

Wills 835.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1943, 1945 to 1956, 1958 to 1969, 1971 to 1972.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 144, Nonexoneration of Lien on Devise of Property.

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 62‑2‑608.** Exercise of power of appointment.

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

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

REPORTER’S COMMENT

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

CROSS REFERENCES

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

Library References

Wills 589.

Westlaw Topic No. 409.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 19, Power of Appointment.

LAW REVIEW AND JOURNAL COMMENTARIES

Construction and Interpretation of a Will: Intention of Testator. 24 S.C. L. Rev. 680.

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

**SECTION 62‑2‑609.** Construction of generic terms to accord with relationships as defined for intestate succession.

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

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

REPORTER’S COMMENT

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

Half Blood:

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

Adopted Persons:

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

Persons Born Out of Wedlock:

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

CROSS REFERENCES

Beneficiaries of action for wrongful death, see Sections 15‑51‑20, 15‑51‑30.

Effect of final decree of adoption, see Section 63‑9‑760.

Library References

Wills 492 to 510.

Westlaw Topic No. 409.

C.J.S. Wills Sections 902 to 905, 908 to 921, 926 to 959, 964 to 966.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 168, Construction of Generic Terms to Accord With Relationships for Purposes of Class Gift Terminology and Intestate Succession.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 25.2, Gifts to “Children”‑Children Born Out of Wedlock.

Restatement (2d) of Property, Don. Trans. Section 25.4, Gifts to “Children”‑Adopted Children.

Restatement (2d) of Property, Don. Trans. Section 25.8, Gifts to “Grandchildren,” “Brothers and Sisters,” “Nephews and Nieces,” “Cousins,” and Other Similar Terms.

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

Action by committee of lunatic wife, under former Section 21‑23‑100 6

Action by grandchildren, under former Section 21‑23‑100 7

Actions to avoid gifts, under former Section 21‑23‑100 5

Construction, under former Section 21‑23‑100 2

Deed in consideration of future illicit cohabitation, under former Section 21‑23‑100 10

Gift by donor without wife or lawful issue, under former Section 21‑23‑100 8

Gift to children of bastard daughter who take as purchasers, under former Section 21‑23‑100 9

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In general 1

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Construction 2

Deed in consideration of future illicit cohabitation 10

Gift by donor without wife or lawful issue 8

Gift to children of bastard daughter who take as purchasers 9

Inapplicability of section to certain insurance policies 4

View that gifts are voidable 3

View that gifts are voidable, under former Section 21‑23‑100 3

1. Under former Section 21‑23‑100—In general

This section [Code 1962 Section 57‑310] and Code 1962 Section 19‑238 affect only such property as would constitute a part of the decedent’s estate. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

2. —— Construction

This section [Code 1962 Section 57‑310] must be construed so as to suppress the evil therein stated. Bradley v Lowry, 17 SC Eq 1 (1842). Massey v Wallace, 32 SC 149, 10 SE 937 (1890).

3. —— View that gifts are voidable

Such gift is only voidable. Such gift is not absolutely void but only voidable at the election of the wife or legitimate children, and such right must be exercised in their lifetime. Breithaupt v Bauskett, 18 SC Eq 465 (1838). Ford v McElray, 18 SC Eq 474 (1844). Hull v Hull, 21 SC Eq 174 (1848).

A gift or devise is not absolutely void under this section [Code 1962 Section 57‑310] and Code 1962 Section 19‑238, but only voidable at the election of the lawful wife or legitimate children. The right of action is personal to them and does not inure to the benefit of any other party. Bynum v. Prudential Ins. Co. of America, 1948, 77 F.Supp. 56.

The gift or devise to a mistress or illegitimate children is not absolutely void, but is only voidable at the election of the wife or legitimate children. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189. Descent And Distribution 69; Marriage And Cohabitation 611; Wills 17

4. —— Inapplicability of section to certain insurance policies

This section [Code 1962 Section 57‑310] is not applicable to the proceeds of a life insurance policy payable to a named beneficiary, where the insurance contract was entered into in another state at a time when insured was not married. Bynum v. Prudential Ins. Co. of America, 1948, 77 F.Supp. 56.

The issuance of a policy of insurance at the instance and request of the insured, where the policy designates the illegitimate daughter of the insured as beneficiary, does not constitute a gift as contemplated by this section [Code 1962 Section 57‑310] and Code 1962 Section 19‑238, since the proceeds of such insurance do not belong to the insured’s estate. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

5. —— Actions to avoid gifts

The right of action is personal and accrues when the conveyance or gift took effect. Williams v Halford, 73 SC 119, 53 SE 88 (1905). Bynum v Prudential Ins. Co., 77 F Supp 56 (1948, DC SC).

In determining whether the gift is in excess of one‑fourth part of the donor’s estate, the time of valuation is when the gift takes effect in possession. Bynum v. Prudential Ins. Co. of America, 1948, 77 F.Supp. 56.

When this section [Code 1962 Section 57‑310] is invoked the testator dies intestate as to three fourths of his estate, which is subject to distribution as provided by law upon intestacy. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

The children of a deceased child of a testator, against whose estate this section [Code 1962 Section 57‑310] has been invoked, inherit their parent’s share of the three‑fourths part of which testator is deemed to have died intestate. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

A consanguineous marriage, which was voidable under Code 1962 Section 20‑1 but not avoided during the lifetime of the parties, was a lawful marriage and the parties did not live in adultery within the provisions of this section [Code 1962 Section 57‑310]. Bennett v. Bennett (S.C. 1940) 195 S.C. 1, 10 S.E.2d 23.

An action to recover three fourths of the value of lands so conveyed is one in equity. Williams v. Halford (S.C. 1902) 64 S.C. 396, 42 S.E. 187.

Court will not permit avoidance when the effect thereof would not be to the benefit of the wife. Taylor v. McRa (S.C. 1850).

6. —— Action by committee of lunatic wife

Committee of lunatic wife may avoid gift under control of the court. Taylor v. McRa (S.C. 1850).

7. —— Action by grandchildren

The grandchildren of the testator have no legal standing to avoid a gift or devise to the testator’s illegitimate children or his mistress. White v. White (S.C. 1948) 212 S.C. 440, 48 S.E.2d 189.

Grandchildren cannot avoid gift to illegitimate children. Taylor v. McRa (S.C. 1850).

8. —— Gift by donor without wife or lawful issue

Donor having neither wife nor lawful issue can give his property to his bastard child. Harten v. Gibson (S.C. 1810).

9. —— Gift to children of bastard daughter who take as purchasers

Gift to children of bastard daughter who take as purchasers and not through her is not a gift to her use or benefit within this section [Code 1962 Section 57‑310]. Hull v. Hull (S.C. 1848). Wills 17

10. —— Deed in consideration of future illicit cohabitation

This section [Code 1962 Section 57‑310] does not give validity to deed to a woman in consideration of future illicit cohabitation. Cusack v. White (S.C. 1818) 12 Am.Dec. 669. Deeds 73

**SECTION 62‑2‑610.** Ademption by satisfaction.

 (a) Property which a testator gave in the testator’s lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if:

 (i) the will provides for deduction of the lifetime gift;

 (ii) the testator declared in a contemporaneous writing that the gift is to be deducted from the devise; or

 (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

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

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

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

REPORTER’S COMMENT

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

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

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

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

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

Library References

Wills 766, 772.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1743 to 1744, 1753, 1762 to 1769.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 192, Ademption by Satisfaction.

Forms

South Carolina Legal and Business Forms Section 15:1 , Legal Principles.

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

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

South Carolina Legal and Business Forms Section 17:229 , Ademption and Substitution‑Cash Bequest in Lieu of Bequest or Devise Adeemed by Extinction.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 5.4, Ademption by Satisfaction.

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 62‑2‑611.** Construction that devise passes fee simple.

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

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

Library References

Wills 596.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1197 to 1225.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 140, Construction that Devise Passes Fee Simple.

LAW REVIEW AND JOURNAL COMMENTARIES

Construction and Interpretation of a Will: Intention of Testator. 24 S.C. L. Rev. 680.

NOTES OF DECISIONS

Under former Section 21‑7‑420 1

1. Under former Section 21‑7‑420

Construction of the clause “unless such a construction be inconsistent with the will of the testator.” ‑ Joyce v Bode, 74 SC 164, 54 SE 239 (1906). Owings v Wood, 105 SC 176, 89 SE 667 (1916).

Section is retroactive ‑ Hall v Goodwyn, 15 SCL 442 (1828). Peyton v Smith, 15 SCL 476 (1828). Dunlap v Crawford, 7 SC Eq 171 (1827). Bowers v Newman, 27 SCL 472 (1842).

In will which left wife use of land “also any cash on hand in banks or otherwise may be used to pay any just debts caused by illness or any other emergency condition but may not be desbursed [sic] to any other person except as provided below” and which left sons all cash on hand and all land and other property, “also” meant “in addition” or “besides”; thus, will devised to wife not only use of land, but in addition, use of cash to pay any debt caused by her illness or any other emergency condition occurring during her lifetime, and effect of devise of cash on hand to sons was simply to give them any cash remaining at death of wife. Doyle v. Doyle (S.C. 1979) 273 S.C. 398, 256 S.E.2d 862. Wills 471; Wills 614(8)

Where, by virtue of this section [Code 1962 Section 19‑232], the language used in the first part of the residuary clause of a will was sufficient, standing alone, to pass an absolute or fee simple estate, yet the language immediately following disclosed an intent to limit the use and enjoyment of the estate to the life of the widow, this qualifying language, which was not of doubtful import, was given its qualifying effect. Shevlin v. Colony Lutheran Church (S.C. 1955) 227 S.C. 598, 88 S.E.2d 674.

Where a will provided that the testator’s granddaughter should have and hold certain property during her lifetime, and that, if she should die without issue, the property should go back and be the property of the testator’s other children, one who had received title through several mesne conveyances from the granddaughter, and had a quitclaim deed from persons who could take interest in property at the death of the granddaughter, was held to have a fee simple title to the property. Murchison Nat. Bank v. McInnis (S.C. 1929) 153 S.C. 382, 150 S.E. 895.

A clause, which is inconsistent with both the preceding and following provisions of a will, should not be deemed sufficient to create such an inconsistency as would defeat construction thereof as devising an estate in fee simple under this section [Code 1962 Section 19‑232]. Bomar v. Corn (S.C. 1929) 150 S.C. 111, 147 S.E. 659.

“To hold and defend rights forever” creates fee. A will devising a third of the testatrix’s land, on her husband’s remarriage or death, to her son and his children during their lives, “to hold and defend the rights unto them forever,” devised an absolute fee simple title. Bomar v. Corn (S.C. 1929) 150 S.C. 111, 147 S.E. 659. Wills 601(1)

In a will leaving the residue to four daughters equally, and on the death of any without “issue or heirs” her share to go to the survivors equally, the word “heirs” meant “issue,” and on the death of three of the daughters without issue, the estate vested in the survivor in fee under this section [Code 1962 Section 19‑232]. Rish v. Wingard (S.C. 1916) 105 S.C. 38, 89 S.E. 400. Wills 506(1)

Where the second paragraph of a testator’s will devised certain lands to his wife for life, with remainder to his daughter, and the third paragraph devised all the rest of his land to his daughter for life, with the provision that after her death all the property, real and personal, should be equally divided among testator’s grandchildren; where also this daughter was the mother of a number of children, some of which were legitimate, and others not, it was held that, in view of Code 1962 Section 19‑53, providing that an intestate woman’s illegitimate children shall share equally with her legitimate children, the testator’s devise in the second paragraph was, under the instant section, a devise in fee notwithstanding the expressions of the third paragraph which tended to cut down the estate; it being possible that this devise was to permit the daughter to provide for those children who could not take as the testator’s grandchildren. Smith v. Smith (S.C. 1912) 93 S.C. 213, 76 S.E. 468.

The General Assembly has not seen fit to extend this section [Code 1962 Section 19‑232] to deeds, and the courts are powerless to do so. McMillan v. Hughes (S.C. 1911) 88 S.C. 296, 70 S.E. 804.

A testator bequeathed to his son certain land for life; at his death to his children, or their children who might be living. The provision of the will gave to the children of the life tenant a fee simple estate, which vested in them on the death of the testator, with possession postponed until the death of the life tenant. Charleston & W. C. R. Co. v. Reynolds (S.C. 1904) 69 S.C. 481, 48 S.E. 476.

**SECTION 62‑2‑612.** Proceeding to determine decedent’s intent regarding application of certain federal tax formulas.

 The personal representative, trustee, or any affected beneficiary under a will, trust, or other instrument of a decedent who dies or did die after December 31, 2009, and before January 1, 2011, may bring a proceeding to determine the decedent’s intent when the will, trust, or other instrument contains a formula that is based on the federal estate tax or generation‑skipping tax.

HISTORY: 2010 Act No. 251, Section 1, eff June 11, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Code Commissioner’s Note

This section was codified at the direction of the Code Commissioner.

Editor’s Note

2010 Act No. 251, Section 2, provides:

“This act takes effect upon approval by the Governor and applies with respect to decedents dying after December 31, 2009, and before January 1, 2011.”

Effect of Amendment

The 2013 amendment deleted the former last sentence relating to when the proceeding must be commenced.

Federal Aspects

Estate tax, see 26 U.S.C.A. Section 2001 et seq.

Generation‑skipping transfer tax, see 26 U.S.C.A. Section 2601 et seq.

Part 7

Contractual Arrangements Relating to Death

**SECTION 62‑2‑701.** Contracts concerning succession.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 28; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

The policies basing Section 62‑2‑701 and Sections 62‑2‑502 (execution of wills), 62‑2‑506 (revocation of wills), and 62‑2‑509 (incorporation of other matter by reference in wills) are the same. All of these sections are aimed at protecting the integrity of the process of succession to the estates of decedents in accordance with their own true wills. Each of these sections requires that the decedent’s will be expressed either in some writing or by way of a physical act done to some writing; the writings are required in the expectation of increasing the reliability of the proof of the decedent’s true will. See K. Walsh, Note: The Statute of Frauds’ Lifetime and Testamentary Provisions: Safeguarding Decedents’ Estates, 50 Ford. L. Rev. 239 (1981) (hereinafter Walsh).

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

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

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

Extrinsic evidence is freely admissible under Section 62‑2‑701 to prove the important terms of a contract whose mere existence is proved by a signed writing. However, as a brake on the provision’s liberality with respect to extrinsic evidence, Section 19‑11‑20 of the 1976 Code, the “Dead man’s” statute, will continue to limit the admissibility of that extrinsic evidence which is subject to its application, this notwithstanding the enactment of Section 62‑2‑701. See Brown v. Golightly, supra.

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

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

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

CROSS REFERENCES

Agreements required to be in writing and signed pursuant to statutes of frauds, see Section 32‑3‑10.

“Dead man’s” statute, see Section 19‑11‑20.

Statute of frauds applicable to contracts for sale of goods, see Section 36‑2‑201.

Time limits upon presentation of claims against decedent’s estate, including claims arising out of contract concerning succession, see Section 62‑3‑803.

Library References

Wills 56 to 68.

Westlaw Topic No. 409.

C.J.S. Wills Sections 133 to 165, 2026 to 2038, 2047 to 2062.

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

S.C. Jur. Wills Section 31, Generally; Requirements for Contract’s Validity.

S.C. Jur. Wills Section 32, Generally; Requirements for Contract’s Validity‑Statutory Requirement of Written Contract.

S.C. Jur. Wills Section 35, Joint or Mutual Wills‑Prohibition Against Presumption of Contract Not to Revoke Joint Will or Mutual Wills.

Forms

South Carolina Legal and Business Forms Section 17:48 , Agreement‑To Execute Joint or Mutual Wills‑By Husband and Wife‑Estate to Survivor.

South Carolina Legal and Business Forms Section 17:85 , Separate Mutual Will‑By Spouse Pursuant to Agreement With Other Spouse‑Entire Estate to Survivor and to Children on Death of Survivor.

Treatises and Practice Aids

Will Contests Section 8:25, Alternatives to Will Contests.

LAW REVIEW AND JOURNAL COMMENTARIES

Lifetime Remedies for Breach of a Contract to Make a Will. 50 S.C. L. Rev. 965 (Summer 1999).

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

Power to dispose 2

1. In general

Since grandfather and grandson entered into oral agreement by which grandson agreed to manage grandfather’s cattle ranch in exchange for devise of ranch, cattle, and equipment before effective date of Probate Code, Probate Code provision governing contracts concerning succession did not apply. Wright v. Trask (S.C.App. 1997) 329 S.C. 170, 495 S.E.2d 222. Wills 57

2. Power to dispose

Surviving spouse, as donee of testamentary power of appointment, could not in a contract to will bind herself to exercise power in certain manner, and therefore contract to will testator’s undivided half‑interest in farm in favor of spouse’s son was invalid and spouse could not make inter vivos transfer of fee simple interest to son. Carmichael v. Heggie (S.C.App. 1998) 332 S.C. 624, 506 S.E.2d 308. Wills 58.5(1); Wills 692(5)

Although provision of will granting surviving spouse a power of appointment over testator’s interest in farm property in which she also received life estate did not restrict spouse’s power to dispose of property during her lifetime, she could not convey or transfer greater interest than what she presently held. Carmichael v. Heggie (S.C.App. 1998) 332 S.C. 624, 506 S.E.2d 308. Wills 692(1)

Surviving spouse could not use general powers granted to her as executor to convey fee simple interest to son in property in which, under will, she had life estate and general testamentary power of appointment; executor powers had to be exercised to carry out will’s purpose, precluding their use to achieve appointment of property during her lifetime. Carmichael v. Heggie (S.C.App. 1998) 332 S.C. 624, 506 S.E.2d 308. Wills 692(5)

Part 8

General Provisions

**SECTION 62‑2‑801.** Disclaimer.

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

 (b) For purpose of this section:

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

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

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

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

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

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

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

 (i) in writing;

 (ii) declare the writing as a disclaimer;

 (iii) describe the interest or power disclaimed; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 70 Section 7; 1990 Act No. 521, Section 29; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

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

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

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Effect of disclaimer on estate tax, see Section 12‑16‑1910.

Library References

Descent and Distribution 72.

Wills 717.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Sections 69, 77, 116.

C.J.S. Wills Sections 1708 to 1710, 1713 to 1717.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 25, Renunciation.

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

S.C. Jur. Wills Section 196, Generally‑Intent of Disclaimer Provisions.

S.C. Jur. Wills Section 197, Waiver.

S.C. Jur. Wills Section 198, Effect of Disclaimer; Transfer of Interest.

S.C. Jur. Wills Section 199, Effect of Disclaimer; Transfer of Interest‑Date of Effectiveness of Transfer.

S.C. Jur. Wills Section 200, Disclaimer of Powers Granted to Personal Representative, Trustee, or Fiduciary.

Forms

South Carolina Legal and Business Forms Section 17:285 , Renunciation or Disclaimer of Devise or Bequest in Will.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 171, Disclaimer Statutes.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, trusts and estates. 42 S.C. L. Rev. 267 (Autumn 1990).

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

Revocation 2

1. In general

The failure of a surviving spouse to disclaim an interest in an intestate’s estate while her children did so and an attorney’s letter stating that the children disclaimed their interest in favor of the spouse were incompetent as parol evidence on validity of unambiguous disclaimers and, therefore, were improperly considered, even though no one objected. In re Estate of Holden (S.C. 2000) 343 S.C. 267, 539 S.E.2d 703. Evidence 385; Trial 105(5)

2. Revocation

Children’s disclaimers of any interest in their father’s intestate estate were “qualified disclaimers” within the meaning of the Internal Revenue Code and were effective to transfer the children’s interest to the grandchildren, even though the surviving spouse did not disclaim an interest, an attorney’s letter accompanying the disclaimers indicated an intent to pass the entire interest to the spouse, and the children attempted to revoke the disclaimers when they realized the grandchildren would inherit their shares. In re Estate of Holden (S.C. 2000) 343 S.C. 267, 539 S.E.2d 703. Internal Revenue 4177.20

Qualified disclaimers of an interest in an estate were irrevocable. In re Estate of Holden (S.C. 2000) 343 S.C. 267, 539 S.E.2d 703. Descent And Distribution 72

**SECTION 62‑2‑802.** Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.

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

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

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 9; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Valid Divorce and Annulment.

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

Marital Conditions Other than Divorce or Annulment.

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

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

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

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

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

CROSS REFERENCES

Persons who may bring, or be beneficiaries of, action for wrongful death, see Section 15‑51‑20.

Provision that divorced wife shall be barred of dower, see Section 20‑3‑190.

Revocation by divorce, annulment, and order terminating marital property rights, no revocation by other changes of circumstances, see Section 62‑2‑507.

Right of elective share of “surviving spouse”, as defined in this section, see Section 62‑2‑201.

Library References

Wills 193.

Westlaw Topic No. 409.

C.J.S. Wills Section 420.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Descent and Distribution Section 20, Effect of Divorce or Annulment; Common‑Law Spouses.

S.C. Jur. Wills Section 44, Revocation by Divorce, Annulment, and Order Terminating Marital Property Rights.

S.C. Jur. Wills Section 202, Right of Elective Share by Surviving Spouse‑Effect of Divorce or Annulment on Status of Surviving Spouse; Decree of Separate Maintenance.

Forms

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

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

Waiver of rights to other party’s retirement 2

1. In general

Intestate decedent’s estranged wife was not estopped from challenging validity of divorce decree, signed after decedent’s death, simply because she initiated divorce action and her attorney filed final order, in proceeding to recover spousal share of estate and to be appointed as personal representative. Hatchell‑Freeman v. Freeman (S.C.App. 2000) 340 S.C. 552, 532 S.E.2d 299. Divorce 168

2. Waiver of rights to other party’s retirement

Wife waived her expectancy interest as named beneficiary of husband’s Individual Retirement Accounts (IRAs) through separation agreement that specifically provided that the parties waived anyinterest they may have had in the other party’s retirement, divided marital assets into columns, listed the IRAs in husband’s column, and provided that husband would receive all assets in his column. Stribling v. Stribling (S.C.App. 2006) 369 S.C. 400, 632 S.E.2d 291. Divorce 925

**SECTION 62‑2‑803.** Effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations.

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

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

 (c) A named beneficiary of a bond, life insurance policy, retirement plan, annuity, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the individual upon whose life the policy is issued is not entitled to any benefit under the bond, policy, retirement plan, annuity, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

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

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

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

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

 (h) If an individual feloniously and intentionally kills the decedent, and if the killer dies within one hundred twenty hours of the decedent’s death, then the decedent shall be deemed to have survived the killer for purposes of distributing the killer’s estate, including, but not limited to, property passing by intestacy, the killer’s will, any trust of which the killer is a grantor, joint tenancy with right of survivorship and benefits payable under a life insurance policy, retirement plan, annuity or other contractual arrangement.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 10; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Former Section 21‑1‑50 of the 1976 Code was enacted, importantly, in supplementation of the common law maxim disabling a killer from taking in succession to his victim, and was enacted merely in order to establish a conclusive presumption of the disablement of the killer in the single specified case of his criminal court conviction of an unlawful killing, Sections 16‑3‑10 and 16‑3‑50 of the 1976 Code and Rasor v. Rasor, 173 S.C. 365, 175 S.E. 545 (1934), presumably because of the higher standard of proof bound to have been imposed in that proceeding; not including coroner’s convictions, Smith v. Todd, supra, nor including, of course, complete acquittals, Leggette v. Smith, supra, nor involuntary manslaughter convictions, Keels, supra, Sections 16‑3‑50 and 16‑3‑60 of the 1976 Code, but, perhaps, including other reckless homicide convictions, Section 56‑5‑2910 of the 1976 Code, unlawful albeit unintended, i.e., nonmalicious and involuntary. See Fowler v. Fowler, supra, at 254 and C. Karesh, Survey of South Carolina Law, 8 S.C.L.Q. 150 (1955) and E. McCrackin, Inheritance—Unintentional Killing, 7 S.C.L.Q. 475 (1955).

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

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

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

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

Effect of Amendment

The 2013 amendment rewrote subsection (a), rewrote subsection (c), added subsection (e) and redesignated subsections accordingly, rewrote subsection (f), rewrote subsection (h), and made other nonsubstantive changes.

CROSS REFERENCES

Civil action for wrongful act causing death, see Section 15‑51‑10.

Murder, manslaughter, and involuntary manslaughter, see Sections 16‑3‑10, 16‑3‑50, 16‑3‑60.

Payment of bank deposits made in name of two or more persons, see Section 34‑11‑10.

Persons who may bring, or be beneficiaries of, wrongful death action, see Section 15‑51‑20.

Reckless homicide by person operating motor vehicle, see Section 56‑5‑2910.

Revocation by divorce, annulment, and order terminating marital property rights, no revocation by other changes of circumstances, see Section 62‑2‑507.

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

Library References

Descent and Distribution 51.

Insurance 3484.

Joint Tenancy 6.

Wills 711.

Westlaw Topic Nos. 124, 217, 226, 409.

C.J.S. Descent and Distribution Sections 56 to 59.

C.J.S. Insurance Section 1429.

C.J.S. Joint Tenancy Sections 2 to 4, 6, 9 to 17, 21 to 22.

C.J.S. Wills Sections 99 to 100.

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Encyclopedias

S.C. Jur. Action Section 21, Illegal or Immoral Transactions and in Pari Delicto Doctrine.

S.C. Jur. Civil Conspiracy Section 8, Overt Act.

S.C. Jur. Descent and Distribution Section 21, Killing the Decedent.

S.C. Jur. Wills Section 17, Person Killing Testator.

S.C. Jur. Wills Section 18, Person Killing Testator‑Rights of Person Who Purchases Property from Killer.

Forms

South Carolina Legal and Business Forms Section 17:4 , Rules of Intestate Inheritance.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 478, Property Acquired by Killing Another.

Restatement (2d) of Property, Don. Trans. Section 34.8, Donee Criminally Causes the Death of the Donor.

Restatement (3d) Property (Wills & Don. Trans.) Section 8.4, Homicide‑The Slayer Rule.

Restatement (3d) Property (Wills & Don. Trans.) Section 8.4 TD 3, Slayer Rule.

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

Instructions 2

Under former Section 21‑1‑50 3

1. In general

Although Section 62‑2‑803, preventing anyone who feloniously and intentionally kills an insured from receiving insurance proceeds as a result of the murder, is broad enough to include not only the actual killer, but those who may have conspired to kill the insured, the insurer failed to show that the beneficiary actually conspired to kill the insured where the insurer merely presented evidence that the beneficiary may have had knowledge that the murder would take place; prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of conspiracy. Wilson v. Wilson (S.C. 1995) 319 S.C. 370, 461 S.E.2d 816.

The named beneficiary of a life insurance policy was entitled to the proceeds of the policy, despite having killed the insured (her husband), where the undisputed facts established that she had killed him in self‑defense; the mere fact that she stayed with the insured after he began physically abusing her did not lead to the logical inference that she do so in order to feloniously kill him. Metropolitan Life Ins. Co. v. Fogle (S.C.App. 1992) 309 S.C. 64, 419 S.E.2d 825. Insurance 3484

2. Instructions

Although statute that prevented a person who murdered another from benefiting from the death was a civil statute, it only applied in situations where the deceased was intentionally and feloniously killed, which was a crime, and thus, any conspiracy triggering the statute would have to be criminal, rather than civil; therefore, son’s widow was not entitled to a jury instruction that proof of an overt act was required to prove the alleged conspiracy to kill son in son’s parents’ action against widow to prevent her from benefiting from his murder. Pinion ex rel. Montague v. Pinion (S.C.App. 2005) 363 S.C. 564, 611 S.E.2d 271, rehearing denied. Conspiracy 7; Conspiracy 21

3. Under former Section 21‑1‑50

When person named as primary beneficiary in life insurance policy is excluded from receiving policy benefits by Section 21‑1‑50, contingent beneficiary who is named in policy is entitled to benefits notwithstanding provision of statute that primary beneficiary’s interest vests in and becomes property of estate of person unlawfully killed. Lewis v. Lewis (S.C.App. 1984) 281 S.C. 388, 315 S.E.2d 816.

Neither expressly, nor by implication, does this section [Code 1962 Section 19‑5] permit one who has been acquitted in a court of competent jurisdiction, on a charge of unlawful killing, to show such acquittal in the trial of a civil case in which his guilt or innocence may be a question at issue. Legette v. Smith (S.C. 1955) 226 S.C. 403, 85 S.E.2d 576.

This section [Code 1962 Section 19‑5] does not abrogate the common‑law rule barring a beneficiary under a policy of life insurance, who has unlawfully and feloniously killed the insured, from taking thereunder; it merely extends and supplements the common‑law rule by making the fact of such conviction sufficient of itself to establish the legal status of the person so convicted with respect of receiving “any benefit from the death of the person unlawfully killed.” Legette v. Smith (S.C. 1955) 226 S.C. 403, 85 S.E.2d 576. Descent And Distribution 51; Descent And Distribution 63

Where one intentionally and unlawfully kills another, he shall not be permitted to inherit from the person so killed; but neither the principles of the common law nor considerations of justice, morality, and public policy require that such right be denied where one who, in the course of an unlawful assault upon one person, kills another to whom he bears no malice and to whom his criminal intent is not directed. Legette v. Smith (S.C. 1955) 226 S.C. 403, 85 S.E.2d 576.

A contract of insurance procured upon the life of another by the beneficiary thereof, with the predetermined intent to murder the insured, is wholly void at its inception as being repulsive to every humane instinct, repugnant to public policy, and involving such a risk as the insurer should not be charged with assuming; such a defense, in an action upon the policy, is not precluded by the incontestable clause. Henderson v. Life Ins. Co. of Va. (S.C. 1935) 176 S.C. 100, 179 S.E. 680.

Where a son murders his father, the word “immediately” should be interpreted to mean the slayer’s children should take directly from the murdered grandfather and not by descent from their father, the committed slayer. Rasor v. Rasor (S.C. 1934) 173 S.C. 365, 175 S.E. 545.

Where testator’s son was convicted of the murder of his father and sentenced to life imprisonment, the son was held to be “civiliter mortuus,” and the trust fund set up for the son in the will went, under statute, to such son’s children, free of the trust. Rasor v. Rasor (S.C. 1934) 173 S.C. 365, 175 S.E. 545. Wills 849

Where testator’s son was convicted of murdering testator, the son’s children were held, under statute, to take the interest which the son would have taken, but subject to the executor’s right, under the doctrine of equitable retainer, to retain the amount the son owed deceased. Rasor v. Rasor (S.C. 1934) 173 S.C. 365, 175 S.E. 545. Executors And Administrators 294

Judgment convicting wife of involuntary manslaughter for killing insured does not conclusively establish her right to an insurance fund. Keels v. Atlantic Coast Line R. Co. (S.C. 1931) 159 S.C. 520, 157 S.E. 834. Judgment 648

A judgment roll showing wife’s conviction was inadmissible in action to recover insurance fund brought by deceased’s father, who alleged that the death of his son resulted from a knife wound intentionally and feloniously inflicted by deceased’s wife, and that she thereby forfeited her right to the fund, and that plaintiff, as father of deceased, was entitled to it. Keels v. Atlantic Coast Line R. Co. (S.C. 1931) 159 S.C. 520, 157 S.E. 834.

A complaint alleging that a husband killed his wife, that the coroner’s court investigated and found by its verdict that he feloniously killed her, was insufficient under this section [Code 1962 Section 19‑5], since the verdict of the coroner’s jury was not intended to fulfill the requirements of the section as to “conviction.” Smith v. Todd (S.C. 1930) 155 S.C. 323, 152 S.E. 506, 70 A.L.R. 1529.

**SECTION 62‑2‑804.** Effect of provision for survivorship on succession to joint tenancy.

 When any individual is seized or possessed of any real property held in joint tenancy at the time of the individual’s death, the joint tenancy is deemed to have been severed by the death of the joint tenant and the real property is distributable as a tenancy in common unless the instrument which creates the joint tenancy in real property, including any instrument in which one individual conveys to himself and one or more other persons, or two or more persons convey to themselves, or to themselves and another or others, expressly provides for a right of survivorship, in which case the severance does not occur. While other methods for the creation of a joint tenancy in real property may be utilized, an express provision for a right of survivorship is conclusively considered to have occurred if the will or instrument of conveyance contains the names of the devisees or grantees followed by the words “as joint tenants with right of survivorship and not as tenants in common”.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 14; 1996 Act No. 405, Section 1; 2000 Act No. 398, Section 3; 2010 Act No. 266, Section 1, eff June 24, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Effect of Amendment

The 2010 amendment substituted “real property held in” for “estate of”, substituted “real property” for “estate”, twice inserted “in real property” and substituted “considered” for “deemed”.

The 2013 amendment made nonsubstantive changes.

Library References

Joint Tenancy 5, 6.

Westlaw Topic No. 226.

C.J.S. Joint Tenancy Sections 2 to 4, 6, 9 to 22.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Cotenancies Section 2, Historical Overview.

S.C. Jur. Cotenancies Section 8, Conveyance.

S.C. Jur. Cotenancies Section 19, Presumption Against Joint Tenancy.

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

S.C. Jur. Wills Section 20, Estate of Joint Tenancy.

LAW REVIEW AND JOURNAL COMMENTARIES

Cotenancies, Estates of in South Carolina. 11 SCLQ 520 (1959).

Devolution of Interests in Trust Estates. 1 SCLQ 367 (1949).

NOTES OF DECISIONS

In general 1

Under former Section 21‑3‑50 2

1. In general

A deed which purports to create a joint tenancy with rights of survivorship will not be severed at the death of one of the joint tenants even if the grantor failed to utilize an intervening conveyance, so long as the deed expressly provides for a right of survivorship. Estate of Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass (S.C.App. 2004) 359 S.C. 407, 597 S.E.2d 850. Joint Tenancy 6

2. Under former Section 21‑3‑50

Estates in entirety between husband and wife. Green v Cannady, 77 SC 193, 57 SE 832 (1907). M’Meekin v Brummet, 11 SC Eq 638 (1837).

Necessity of interest being actually vested. Executors of Herbemont v Thomas, 15 SC Eq 21 (1839). Ball v Deas, 21 SC Eq 24 (1848).

This section [Code 1962 Section 19‑55] only abolished survivorship as an incident of the common‑law estate of joint tenancy, and was never intended to prevent the creation of the right of survivorship when expressly provided for in a will or deed. Davis v. Davis (S.C. 1953) 223 S.C. 182, 75 S.E.2d 46.

Section is inapplicable to joint tenants of an unvested remainder. Free v. Sandifer (S.C. 1925) 131 S.C. 232, 126 S.E. 521. Joint Tenancy 4

**SECTION 62‑2‑805.** Presumption of ownership of tangible personal property; exceptions.

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

 (1) acquired by either spouse before marriage;

 (2) acquired by either spouse by gift or inheritance during the marriage;

 (3) used by the decedent spouse in a trade or business in which the surviving spouse has no interest;

 (4) held for another; or

 (5) specifically devised in a will or devised in a written statement or list disposing of tangible personal property pursuant to Section 62‑2‑512.

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

HISTORY: 2010 Act No. 266, Section 2, eff June 24, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment in subsection (A)(5) inserted “specifically devised in a will or”.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Cotenancies Section 19, Presumption Against Joint Tenancy.

S.C. Jur. Wills Section 20, Estate of Joint Tenancy.

**SECTION 62‑2‑806.** Modification to achieve testator’s tax objectives.

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

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

REPORTER’S COMMENT

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

Part 9

Delivery and Suppression of Wills

**SECTION 62‑2‑901.** Delivery of will to judge of probate; filing.

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 15; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Wills 211.

Westlaw Topic No. 409.

C.J.S. Wills Sections 453 to 456.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Descent and Distribution Section 4, Effect of a Will.

S.C. Jur. Wills Section 53, Obligation to Deliver Will to Judge of Probate Court; Filing.

S.C. Jur. Wills Section 54, Obligation to Deliver Will to Judge of Probate Court; Filing‑Failure to Deliver; Liability.

Part 10

Uniform Fiduciary Access to Digital Assets

Editor’s Note

2016 Act No. 260, Section 1, provides as follows:

“SECTION 1. This act may be cited as the ‘South Carolina Uniform Fiduciary Access to Digital Assets Act’.”

CROSS REFERENCES

Powers of conservator in administration, see Section 62‑5‑422.

**SECTION 62‑2‑1010.** Definitions.

 As used in this part:

 (1) “Account” means an arrangement under a terms‑of‑service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

 (2) “Agent” means an attorney‑in‑fact granted authority under a durable or nondurable power of attorney.

 (3) “Carries” means engages in the transmission of an electronic communication.

 (4) “Catalogue of electronic communications” means information that identifies each person with whom a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

 (5) “Conservator” means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator.

 (6) “Content of an electronic communication” means information concerning the substance or meaning of the communication that:

 (a) has been sent or received by a user;

 (b) is in electronic storage by a custodian providing an electronic‑communication service to the public or is carried or maintained by a custodian providing a remote‑computing service to the public; and

 (c) is not readily accessible to the public.

 (7) “Court” has the meaning specified in Section 62‑1‑201(5).

 (8) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

 (9) “Designated recipient” means a person chosen by a user using an online tool to administer digital assets of the user.

 (10) “Digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

 (11) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

 (12) “Electronic communication” has the meaning as specified in 18 U.S.C. Section 2510(12), as amended.

 (13) “Electronic‑communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

 (14) “Fiduciary” means an original, additional, or successor personal representative, conservator, agent, or trustee.

 (15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

 (16) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms‑of‑service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

 (17) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

 (18) “Personal representative” has the meaning specified in Section 62‑1‑201(33).

 (19) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

 (20) “Principal” means an individual who grants authority to an agent in a power of attorney.

 (21) “Protected person” has the meaning specified in Section 62‑5‑101(3). The term includes an individual for whom an application for the appointment of a conservator is pending.

 (22) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

 (23) “Remote‑computing service” means a custodian that provides to a user computer‑processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14), as amended.

 (24) “Terms‑of‑service agreement” means an agreement that controls the relationship between a user and a custodian.

 (25) “Trustee” has the meaning specified in Section 62‑7‑103(19). The term includes a successor trustee.

 (26) “User” means a person who has an account with a custodian.

 (27) “Will” has the meaning specified in Section 62‑1‑201(52).

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

Editor’s Note

ARTICLE 5 of Title 62 was rewritten by 2017 Act No. 87, Section 5.A, effective January 1, 2019. For Section 62‑5‑101(3), referenced in (21), see now, Section 62‑5‑101(18).

**SECTION 62‑2‑1015.** Application of part.

 (A) This part applies to a:

 (1) fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this act;

 (2) personal representative acting for a decedent who died before, on, or after the effective date of this act;

 (3) conservatorship proceeding, commenced before, on, or after the effective date of this act; and

 (4) trustee acting under a trust created before, on, or after the effective date of this act.

 (B) This part applies to a custodian if the user resides in this State or resided in this State at the time of the user’s death.

 (C) This part does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1020.** User direction for disclosure of digital assets.

 (A) A user may use an online tool to direct the custodian to disclose or not to disclose to a designated recipient some or all of the user’s digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

 (B) If a user has not used an online tool to give direction under subsection (A) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user’s digital assets, including the content of electronic communications sent or received by the user.

 (C) A user’s direction under subsection (A) or (B) overrides a contrary provision in a terms‑of‑service agreement that does not require the user to act affirmatively and distinctly from the user’s assent to the terms of service.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

CROSS REFERENCES

Fiduciary duty and authority, see Section 62‑2‑1075.

**SECTION 62‑2‑1025.** Terms‑of‑service agreement.

 (A) This part does not change or impair a right of a custodian or a user under a terms‑of‑service agreement to access and use digital assets of the user.

 (B) This part does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

 (C) A fiduciary’s or designated recipient’s access to digital assets may be modified or eliminated by a user, by federal law, or by a terms‑of‑service agreement if the user has not provided direction under Section 62‑2‑1020.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1030.** Procedure for disclosing digital assets.

 (A) When disclosing digital assets of a user under this part, the custodian may at its sole discretion:

 (1) grant a fiduciary or designated recipient full access to the user’s account;

 (2) grant a fiduciary or designated recipient partial access to the user’s account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

 (3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

 (B) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this part.

 (C) A custodian need not disclose under this part a digital asset deleted by a user.

 (D) If a user directs or a fiduciary requests a custodian to disclose under this part some, but not all, of the user’s digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

 (1) a subset limited by date of the user’s digital assets;

 (2) all of the user’s digital assets to the fiduciary or designated recipient;

 (3) none of the user’s digital assets; or

 (4) all of the user’s digital assets to the court for review in camera.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1035.** Disclosure of content of electronic communications of deceased user.

 If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) a certified copy of the death certificate of the user;

 (3) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order;

 (4) unless the user provided direction using an online tool, a copy of the user’s will, trust, power of attorney, or other record evidencing the user’s consent to disclosure of the content of electronic communications; and

 (5) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;

 (b) evidence linking the account to the user; or

 (c) a finding by the court that:

 (i) the user had a specific account with the custodian, identifiable by the information specified in subitem (a);

 (ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701, et seq., as amended, 47 U.S.C. Section 222, as amended, or other applicable law;

 (iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

 (iv) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1040.** Disclosure of other digital assets of deceased user.

 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) a certified copy of the death certificate of the user;

 (3) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order; and

 (4) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;

 (b) evidence linking the account to the user;

 (c) an affidavit stating that disclosure of the user’s digital assets is reasonably necessary for administration of the estate; or

 (d) a finding by the court that:

 (i) the user had a specific account with the custodian, identifiable by the information specified in subitem (a); or

 (ii) disclosure of the user’s digital assets is reasonably necessary for administration of the estate.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1045.** Disclosure of content of electronic communications of principal.

 To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

 (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

 (4) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal’s account; or

 (b) evidence linking the account to the principal.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1050.** Disclosure of other digital assets of principal.

 Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

 (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

 (4) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal’s account; or

 (b) evidence linking the account to the principal.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1055.** Disclosure of digital assets held in trust when trustee is original user.

 Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1060.** Disclosure of contents of electronic communications held in trust when trustee not original user.

 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) a certified copy of the trust instrument or a certification of the trust under Section 62‑7‑1013 which includes consent to disclosure of the content of electronic communications to the trustee;

 (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

 (4) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust’s account; or

 (b) evidence linking the account to the trust.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1065.** Disclosure of other digital assets held in trust when trustee not original user.

 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) a certified copy of the trust instrument or a certification of the trust under Section 62‑7‑1013;

 (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

 (4) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust’s account; or

 (b) evidence linking the account to the trust.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1070.** Disclosure of digital assets to conservator of protected person.

 (A) After an opportunity for a hearing under Article 5 of this title, the court may grant a conservator access to the digital assets of a protected person.

 (B) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:

 (1) a written request for disclosure in physical or electronic form;

 (2) a certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

 (3) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or

 (b) evidence linking the account to the protected person.

 (C) A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the conservator authority over the protected person’s property.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1075.** Fiduciary duty and authority.

 (A) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the:

 (1) duty of care;

 (2) duty of loyalty; and

 (3) duty of confidentiality.

 (B) A fiduciary’s or designated recipient’s authority with respect to a digital asset of a user:

 (1) except as otherwise provided in Section 62‑2‑1020, is subject to the applicable terms of service;

 (2) in the case of a fiduciary, is subject to other applicable law, including copyright law;

 (3) is limited by the scope of the fiduciary’s duties; and

 (4) may not be used to impersonate the user.

 (C) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital asset in which the decedent, protected person, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms‑of‑service agreement.

 (D) A fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including this state’s law on unauthorized computer access.

 (E) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal, or settlor:

 (1) has the right to access the property and any digital asset stored in it; and

 (2) is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including this state’s law regarding unauthorized computer access.

 (F) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

 (G) A fiduciary of a user may request a custodian to terminate the user’s account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

 (1) if the user is deceased, a certified copy of the death certificate of the user;

 (2) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order, power of attorney, or trust giving the fiduciary authority over the account; and

 (3) if requested by the custodian:

 (a) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;

 (b) evidence linking the account to the user; or

 (c) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subitem (a).

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1080.** Custodian compliance and immunity.

 (A) Not later than sixty days after receipt of the information required under Sections 62‑2‑1035 through 62‑2‑1075, a custodian shall comply with a request under this part from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

 (B) An order under subsection (A) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. Section 2702, as amended.

 (C) A custodian may notify the user that a request for disclosure or to terminate an account was made under this part.

 (D) A custodian may deny a request under this part from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary’s request.

 (E) This part does not limit a custodian’s ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this part to obtain a court order which:

 (1) specifies that an account belongs to the protected person or principal;

 (2) specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

 (3) contains a finding required by law other than this part.

 (F) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this part.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1085.** Uniformity of application and construction.

 In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

**SECTION 62‑2‑1090.** Relation to Electronic Signatures in Global and National Commerce Act.

 This uniform act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

HISTORY: 2016 Act No. 260 (S.908), Section 2, eff June 3, 2016.

Federal Aspects

Electronic Signatures in Global and National Commerce Act (E‑Sign Act); Pub.L. 106‑229, June 30, 2000, 114 Stat. 464. Short title, see 15 U.S.C.A. Section 7001 note.