ARTICLE 3

Probate of Wills and Administration

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or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;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other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.”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

General Provisions

**SECTION 62‑3‑101.** Devolution of estate at death; restrictions.

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 16; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

CROSS REFERENCES

Applicability of provisions of this article with respect to a nonresident decedent, see Section 62‑4‑207.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Descent and Distribution 1 to 8.

Executors and Administrators 1.

Wills 1, 203.

Westlaw Topic Nos. 124, 162, 409.

C.J.S. Conflict of Laws Sections 71, 84.

C.J.S. Descent and Distribution Sections 1 to 12.

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

C.J.S. Right of Privacy and Publicity Section 41.

C.J.S. Wills Sections 1, 3, 174, 445, 447 to 450.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 16, Restrictions on Power to Leave Property by Will.

S.C. Jur. Wills Section 22, Devolution of Real and Personal Property.

S.C. Jur. Wills Section 80, Necessity of Appointment for Administration.

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

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Claims Against the Estate; Attorneys’ Fees and Administrators’ Commissions. 24 S.C. L. Rev. 684.

The Creation of Estates by Implication. 11 SCLQ 352.

Attorney General’s Opinions

Title to real property passes upon death, and that date is date to determine transfer of title from decedent to heirs or devisees. 1990 Op. Atty Gen No. 90‑11.

NOTES OF DECISIONS

In general 1

Under former Section 21‑15‑80 2

1. In general

Caregiver’s claim for $100,000 bequest had not yet arisen, and thus, did not fall within the statutory provision that authorized prejudgment interest, in action by caretaker seeking a specific bequest, where, because of caregiver’s action, estate representative was forced to delay closing estate, additional expenses for the estate’s administration were created, and the rights of creditors, taxing authorities, and the final expenses of administration had not yet been finally determined. Church v. McGee (S.C.App. 2011) 391 S.C. 334, 705 S.E.2d 481, rehearing denied. Interest 39(2.20)

Following testator’s widow prevailing in action that was brought in probate court by testator’s children and that sought imposition of constructive trust on funds that widow withdrew from joint accounts prior to testator’s death, widow was not entitled to have her attorney fees paid out of testator’s estate; widow did not defend an action for recovery, preservation, protection, or increase of a common fund. Kemp v. Rawlings (S.C. 2004) 358 S.C. 28, 594 S.E.2d 845. Executors And Administrators 456(2)

2. Under former Section 21‑15‑80

Where a will containing devises of real estate as well as bequests of personal property has been admitted to probate, whether before or after the passage of the act of 1858, it was held that such probate is admissible to prove the execution of the will in reference to the devises as well as the bequests. Rumph v. Hiott (S.C. 1892) 35 S.C. 444, 15 S.E. 235.

**SECTION 62‑3‑102.** Necessity of order of probate for will.

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

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

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment inserted “and except as to a will that has been admitted to probate in another jurisdiction which is filed as provided in Article 4”, and substituted “nominate a personal representative” for “nominate an executor”.

CROSS REFERENCES

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

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Wills 205.

Westlaw Topic No. 409.

C.J.S. Wills Sections 451 to 452.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 52, Necessity of Order of Probate for Will.

Treatises and Practice Aids

Will Contests Section 12:21, Settlement Agreements.

**SECTION 62‑3‑103.** Necessity of appointment for administration.

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

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

REPORTER’S COMMENT

Before one acquires the status of personal representative, he must be appointed by the court, qualify, and be issued letters. Failure to secure appointment by one who possesses the goods of a decedent makes him liable as executor in his own wrong, Sections 62‑3‑619, 62‑3‑620, 62‑3‑621.

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

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

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

Library References

Executors and Administrators 20(9), 27.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 65, 79.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 80, Necessity of Appointment for Administration.

**SECTION 62‑3‑104.** Claims against decedent; necessity of administration.

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

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

REPORTER’S COMMENT

This section requires creditors of decedents to assert their claims against a duly appointed personal representative. Notice to creditors, time limitations, payment of claims, and other provisions relating to creditors’ claims are in Part 8 of Article 3. Creditors are interested persons who may seek appointment either in informal proceedings for appointment of a personal representative, Section 62‑3‑301, or in formal proceedings for appointment, Section 62‑3‑414. A creditor may seek appointment as personal representative and has priority for appointment if no other interested person has applied for appointment within forty‑five days after death, Section 62‑3‑203, and may do so at any time within ten years of decedent’s death, Section 62‑3‑108. If a personal representative has been appointed and has closed the estate under circumstances which leave a creditor’s claim unbarred and unpaid, the creditor may recover from the distributees, Section 62‑3‑1004, or from the former personal representative individually liable for breach of fiduciary duty as provided in Sections 62‑3‑807 and 62‑3‑1003, subject to the limitations of Section 62‑3‑1005. A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article. The 2013 amendment to Section 62‑3‑104 relates to the process for a creditor seeking appointment as personal representative. Pursuant to Section 62‑3‑804(1)(b), a creditor seeking appointment must attach a written statement of its claim to the application or petition for appointment.

CROSS REFERENCES

Actions against executors or administrators when one or more is out of State, see Section 15‑5‑120.

Manner of presentation of claims, see Section 62‑3‑804.

Representative of deceased nonresident motor vehicle operator, see Sections 15‑5‑130, 15‑5‑140.

Library References

Descent and Distribution 119 to 130.

Executors and Administrators 423, 437.

Westlaw Topic Nos. 124, 162.

C.J.S. Descent and Distribution Sections 112 to 114, 116 to 120, 123.

C.J.S. Executors and Administrators Sections 710, 747 to 768.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 186, Claims After Distribution; Recovery from Distributees or Personal Representative.

**SECTION 62‑3‑105.** Proceedings affecting devolution and administration; jurisdiction of subject matter.

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

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

CROSS REFERENCES

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

Library References

Courts 198, 202.

Executors and Administrators 420 to 430.

Westlaw Topic Nos. 106, 162.

C.J.S. Executors and Administrators Sections 278, 706 to 711, 725 to 730.

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

RESEARCH REFERENCES

Encyclopedias

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

**SECTION 62‑3‑106.** Proceedings within the jurisdiction of court; service; jurisdiction over persons.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 30; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Probate notices or citations not being published in any newspaper if estate does not exceed five hundred dollars, see Section 15‑29‑70.

Library References

Descent and Distribution 71.

Executors and Administrators 20(4), 20(9).

Wills 269, 417.

Westlaw Topic Nos. 124, 162, 409.

C.J.S. Descent and Distribution Sections 77, 82 to 88.

C.J.S. Executors and Administrators Sections 53, 58, 65.

C.J.S. Wills Sections 553 to 556, 796 to 797, 817.

RESEARCH REFERENCES

Encyclopedias

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

**SECTION 62‑3‑107.** Scope of proceedings; proceedings independent; exception.

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

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

REPORTER’S COMMENT

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

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

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

Library References

Executors and Administrators 20.

Wills 222.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 35, 53 to 69.

C.J.S. Wills Sections 500 to 502.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 97, Scope.

**SECTION 62‑3‑108.** Probate, testacy, and appointment proceedings; ultimate time limit.

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

(2) Notwithstanding any other provision of this section:

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 17; 1990 Act No. 521, Section 31; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Applicability of the time limits prescribed by this section to a petition to vacate a formal testacy order, see Section 62‑3‑412.

Requirement, in formal testacy proceedings, of preliminary finding that proceeding was commenced within the limitation period prescribed by this section, see Section 62‑3‑409.

Library References

Executors and Administrators 20(2).

Wills 259 to 261.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 35, 53, 56.

C.J.S. Wills Sections 530 to 535.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 67, General Application and Contents.

S.C. Jur. Wills Section 75, Informal Probate, Generally; Effect.

S.C. Jur. Wills Section 100, Statutory Time Limit for Probate, Testacy, or Appointment Proceedings.

S.C. Jur. Wills Section 116, Scope and Content of Formal Testacy Order.

Treatises and Practice Aids

Will Contests Section 4:7, Post‑Probate Will Contests.

NOTES OF DECISIONS

Limitations 1

1. Limitations

Eight‑month limitations period governing action to challenge validity of will admitted to informal probate applied with respect to will that was informally probated in New Jersey. Theisen v. Theisen (S.C. 2009) 382 S.C. 213, 676 S.E.2d 133, rehearing denied. Wills 260

Provision in probate practice manual that eight‑month limitations period governing will contest did not apply to proceedings in cases in which death of decedent was in doubt or was recently discovered after decedent had been missing, absent, or had disappeared, did not negate statutory requirement that action to challenge validity of will informally probated in New Jersey be brought within eight months of will’s admission to probate. Theisen v. Theisen (S.C. 2009) 382 S.C. 213, 676 S.E.2d 133, rehearing denied. Wills 260

Eight‑month limitations period governing will contestants’ challenge to validity of will informally probated in New Jersey began to run from date will was admitted to probate, not date that probate was closed. Theisen v. Theisen (S.C. 2009) 382 S.C. 213, 676 S.E.2d 133, rehearing denied. Limitation Of Actions 44(6)

Application of eight‑month limitations period to will contestants’ challenge to validity of will informally probated in New Jersey did not violate due process or equal protection; contestants had notice of probate proceedings and opportunities to object to them both in South Carolina and New Jersey, yet contestants failed to perfect appeal from order denying contestants’ Designation of Forum petition or file challenge within eight months after will was admitted to probate. Theisen v. Theisen (S.C. 2009) 382 S.C. 213, 676 S.E.2d 133, rehearing denied. Constitutional Law 3454; Constitutional Law 3971; Wills 260

**SECTION 62‑3‑109.** Statute of limitations on decedent’s cause of action.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 32; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Executors’ or administrators’ actions against trespassers, see Section 15‑5‑110.

Recovery of funeral expenses as element of damages, see Section 15‑5‑100.

Survival of right of action, see Section 15‑5‑90.

Library References

Limitation of Actions 80, 82.

Westlaw Topic No. 241.

C.J.S. Limitations of Actions Section 118.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 69, Death of a Person Entitled to Sue.

S.C. Jur. Wills Section 101, Statutory Time Limit for Probate, Testacy, or Appointment Proceedings‑On Decedent’s Cause of Action; Suspension Period.

S.C. Jur. Wrongful Death Section 32, Statute of Limitations.

LAW REVIEW AND JOURNAL COMMENTARIES

Limitation of Actions. 25 S.C. L. Rev. 437.

The Statute of Limitations and the Doctrine of “Relation Back.” 22 S.C. L. Rev. 607.

NOTES OF DECISIONS

In general 1

Under former Section 15‑3‑70 2

1. In general

Statute tolling statute of limitations on cause of action belonging to decedent for eight months after decedent’s death did not apply to claim for underinsured motorist (UIM) benefits brought by conservator for permanently comatose insured. Medlin v. South Carolina Farm Bureau Mut. Ins. Co. (S.C. 1997) 325 S.C. 195, 480 S.E.2d 739. Limitation Of Actions 80

2. Under former Section 15‑3‑70

This section [Code 1962 Section 10‑107] applies only to cases where the statute commenced to run in the lifetime of decedent and the statutory period expired before administration. Strain v Babb, 30 SC 342, 9 SE 271 (1889). Gaston v Gaston, 80 SC 157, 61 SE 393 (1908). Foggette v Gaffney, 33 SC 303, 12 SE 260 (1890).

Part 2

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

**SECTION 62‑3‑201.** Venue for first and subsequent estate proceedings; location of property.

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent’s death is:

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

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

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

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

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

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

REPORTER’S COMMENT

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

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

CROSS REFERENCES

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

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

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

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

Suits by or against certain fiduciaries, see Sections 15‑7‑40, 15‑7‑50.

Venue where a proceeding could be held in more than one county under this section, see Section 62‑1‑303.

Library References

Executors and Administrators 8.

Wills 258.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 12 to 15.

C.J.S. Wills Section 529.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 75, Informal Probate, Generally; Effect.

Forms

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

South Carolina Legal and Business Forms Section 17:90 , Introductory Clause‑Identification of Testator‑General Form.

LAW REVIEW AND JOURNAL COMMENTARIES

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

NOTES OF DECISIONS

In general 1

Inhabitancy, under former Section 21‑15‑10 3

Under former Section 21‑15‑10 2, 3

Inhabitancy 3

Under former Section 21‑15‑1610 4

1. In general

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

2. Under former Section 21‑15‑10

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

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

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

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

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

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

3. —— Inhabitancy

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

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

The word “inhabitant” is defined as a person who dwells or resides permanently in a place as distinguished from a transient lodger or visitor. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

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

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

Further references to the meaning of the word “inhabitant” may be found in 43 CJS 389; 95 CJS, Wills, Section 352(b), footnotes 3 and 4. O’Neill’s Estate v. Tuomey Hospital (S.C. 1970) 254 S.C. 578, 176 S.E.2d 527.

4. Under former Section 21‑15‑1610

An action for an accounting against an executor or administrator concerns the settlement of the estate, and has to be brought in the county in which the estate is being administered. Irby v. Kidder (S.C. 1955) 226 S.C. 396, 85 S.E.2d 405.

This section [Code 1962 Section 19‑551] is not applicable to an action against a surety on an administrator’s bond for breach of the bond. Beatty v. National Surety Co. (S.C. 1925) 132 S.C. 45, 128 S.E. 40.

Suit to remove an executor should be brought in the county in which the testatrix lived, owned real and personal property, and in which her will was duly filed for probate. Smith v. Heyward (S.C. 1917) 107 S.C. 542, 93 S.E. 195.

Under the provisions of this section [Code 1962 Section 19‑551] an action against a personal representative of an executor’s estate for an accounting of the management of testatrix’s estate by the deceased executor must be brought in the probate court which probated the testatrix’s will and first obtained jurisdiction. French v. Way (S.C. 1912) 93 S.C. 522, 76 S.E. 617.

This section [Code 1962 Section 19‑551] is said to give to the probate judge important judicial functions. Hodges v. Fabian (S.C. 1889) 31 S.C. 212, 9 S.E. 820, 17 Am.St.Rep. 25.

**SECTION 62‑3‑202.** Appointment or testacy proceedings; conflicting claim of domicile in another state.

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

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

REPORTER’S COMMENT

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

Library References

Abatement and Revival 4.

Executors and Administrators 8.

Wills 218.

Westlaw Topic Nos. 2, 162, 409.

C.J.S. Abatement and Revival Sections 2 to 3, 6 to 10, 13 to 14, 16 to 19.

C.J.S. Executors and Administrators Sections 12 to 15.

C.J.S. Wills Sections 476, 499.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 64, Generally‑Conflicting Claim of Domicile in Another State.

**SECTION 62‑3‑203.** Priority among persons seeking appointment as personal representative.

(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

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

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

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

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

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

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

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

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

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

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

(c) Conservators of the estates of protected persons or, if there is no conservator, any guardian for the protected person or the custodial parent of a minor, except a court‑appointed guardian ad litem of a minor or incapacitated person may exercise the same right to be appointed as personal representative, to object to another’s appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

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

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

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

(3) in formal proceedings.

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

(1) under the age of eighteen;

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

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

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 18; 1990 Act No. 521, Sections 33, 34; 1993 Act No. 181, Section 1606; 1995 Act No. 15, Section 3; 1997 Act No. 152, Sections 11, 12; 2010 Act No. 244, Section 7, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Formal proceedings to determine who is entitled to appointment under this section, see Section 62‑3‑414.

General authority for bank to act as fiduciary, see Section 34‑15‑10.

Manner of presentation of claims, see Section 62‑3‑804.

Persons not included within definition of “surviving spouse” for purposes of this section, see Section 62‑2‑802.

Power of court to waive bond for nominee of personal representative, see Section 62‑3‑603.

Provisions relative to personal representatives, generally, see Sections 62‑3‑601 et seq., 62‑3‑701 et seq.

Requirement that application for informal appointment of administrator in intestacy shall include names of persons having prior or equal right to appointment under this section, see Section 62‑3‑301.

Service on nonresident individual fiduciaries, see Section 15‑9‑450.

Library References

Executors and Administrators 17.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 34 to 37.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 104, Bank Acting as Fiduciary.

S.C. Jur. Wills Section 57, Estate Upon Which No Action Performed; Duty of Probate Judge to Notify Department of Revenue.

S.C. Jur. Wills Section 83, Qualifications for Personal Representative.

S.C. Jur. Wills Section 84, Proceeding for Appointment.

S.C. Jur. Wills Section 85, Priority Among Persons Seeking Appointment.

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

S.C. Jur. Wills Section 87, Appointment of One Without Priority.

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 17:39 , Drafting Will.

South Carolina Legal and Business Forms Section 17:147 , Executors‑Appointment‑General Clause.

Attorney General’s Opinions

A court would likely find associate and elected probate judges alike are prohibited from serving as the personal representative for an estate with the exception that he or she can serve as the personal representative of the estate of a “family member”. S.C. Op.Atty.Gen. (August 28, 2014) 2014 WL 4491434.

In light of the Constitutional Amendment of 1975 lowering legal age to eighteen, a person eighteen years of age may serve as an executor under 1962 Code Section 19‑417 [1976 Code Section 21‑15‑140]. 1975‑76 Op. Atty Gen, No 4269, p 86.

NOTES OF DECISIONS

In general 1

Coadministrators, under former Section 21‑15‑30 6

Discretion in making grant, disqualifications, under former Section 21‑15‑30 8

Effect of grant, liabilities of administrators, under former Section 21‑15‑30 7

Objections and errors, under former Section 21‑15‑30 9

Particular persons, under former Section 21‑15‑30 10

Under former Section 21‑13‑310 2

Under former Section 21‑13‑320 3

Under former Section 21‑15‑110 11

Under former Section 21‑15‑30 4‑10

Coadministrators 6

Discretion in making grant, disqualifications 8

Effect of grant, liabilities of administrators 7

Objections and errors 9

Particular persons 10

When section mandatory 5

When section mandatory, under former Section 21‑15‑30 5

1. In general

Estranged wife of decedent had priority for appointment as personal representative for intestacy proceedings over decedent’s father and, thus, trial court acted within its discretion in removing father as personal representative and appointing wife based on her petition for appointment, even though wife did not file petition seeking father’s removal or establish grounds for removal. Hatchell‑Freeman v. Freeman (S.C.App. 2000) 340 S.C. 552, 532 S.E.2d 299. Executors And Administrators 35(1); Executors And Administrators 35(14)

A disbarred attorney was properly terminated from his appointment as the personal representative of his former client’s estate where his disbarment had been based on dishonesty, fraud, deceit, and misrepresentation, and his conduct had been described as “patently shocking” and “manifestly unconscionable”; however, a disbarred attorney is not per se disqualified from serving as a personal representative. Parkman v. Hanna (S.C. 1992) 311 S.C. 20, 426 S.E.2d 743.

2. Under former Section 21‑13‑310

A nonresident administrator is not considered as a South Carolina administrator for the purpose of giving jurisdiction to the Federal courts on the ground of diversity of citizenship. Mason v. Helms, 1951, 97 F.Supp. 312.

This section (Code 1962 Section 19‑591) deals with the appointment of administrators without regard to whether the appointment be a “primary or domestic” one, or whether it be ancillary. Stubbs v. Ratliff (S.C. 1943) 202 S.C. 67, 24 S.E.2d 127.

A nonresident can be appointed the primary or domestic administrator of a person who at the time of his death was domiciled in South Carolina. Stubbs v. Ratliff (S.C. 1943) 202 S.C. 67, 24 S.E.2d 127.

This section [Code 1962 Section 19‑591] applies only to wills probated in this State, when the appointed executor is a foreign resident. Southern Ry. Co. v. Moore (S.C. 1930) 158 S.C. 446, 155 S.E. 740, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 283 U.S. 816, 75 L.Ed. 1432.

Court appointment has always been necessary to give the administrator authority to act, and the person appointed must take an oath and furnish bond before he has finally qualified for the office of executor or administrator. Simmons v. Atlantic Coast Line R. Co., 1964, 235 F.Supp. 325.

3. Under former Section 21‑13‑320

State statutes regulating the trust business are presumptively constitutional. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313.

Portions of state trust statutes which were unconstitutional were separable under state law and therefore the remaining portions are not invalid. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313.

The second paragraph of a trust company statute which bars a state trust company from serving as executor or administrator because it is controlled by a corporation domiciled in another state, violates the equal protection clause of the Fourteenth Amendment. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313.

Laws prescribing the financial resources of corporate fiduciaries, governing their conduct, and defining their responsibilities are appropriate means of controlling trust companies since the state has a legitimate interest in assuring that corporate fiduciaries serve the public faithfully. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313. Banks And Banking 310

Classification of domestic trust companies by the domicile or licensing of their corporate ownership bears no rational relation to the lawful discharge of the fiduciary duties or the states control over them. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313.

The statutory classification of domestic trust companies according to the domicil of their corporate owners is not inherently suspect, and the state need not justify the classification by proving a compelling state interest. American Trust Co., Inc. v. South Carolina State Bd. of Bank Control (D.C.S.C. 1974) 381 F.Supp. 313. Constitutional Law 2980

4. Under former Section 21‑15‑30

The question as to the survival of a cause of action is for the court of common pleas and not the probate court. Ex parte Conrad (S.C. 1906) 75 S.C. 1, 54 S.E. 799.

Right of tort feasor liable for causing death of intestate. In re Mayo’s Estate (S.C. 1901) 60 S.C. 401, 38 S.E. 634.

The fact of death is jurisdictional. Moore v. Smith (S.C. 1858) 11 Rich. 569, 73 Am.Dec. 122.

5. —— When section mandatory

This section [Code 1962 Section 19‑403] uses the mandatory word “shall,” but the judge of probate may deny administration to the person first entitled under this section [Code 1962 Section 19‑403] if, upon the showing made before him, he is satisfied that such person is not properly qualified for the position, and among other things the court calls attention to the fact that the granting of letters of administration is not automatic, because the law requires the issuance of a citation, to the end that the kindred or creditors of the intestate may show cause why the administration should not be granted to the person applying for it, notwithstanding such person may have the statutory priority. Ex parte Tolbert, 206 SC 300, 34 SE2d 49 (1945). Re Estate of McClam, 245 SC 315, 140 SE2d 478 (1965).

The granting of letters of administration is not automatic or mandatory, as the person having the statutory priority may not be granted the administration if just cause be given. In re McClam’s Estate (S.C. 1965) 245 S.C. 315, 140 S.E.2d 478. Executors And Administrators 17(1)

This section [Code 1962 Section 19‑403] is mandatory to the extent that letters of administration shall be granted in the order of priority listed, if the applicant is qualified and willing to serve. In re McClam’s Estate (S.C. 1965) 245 S.C. 315, 140 S.E.2d 478.

Section did not purport to be mandatory in the sense that it required either of the parties named to administer. Grant v. Poyas (S.C. 1902) 62 S.C. 426, 40 S.E. 891.

6. —— Coadministrators

Appointment of coadministrators must come from class or classes designated under statute unless disqualified. In re Youmans’ Estate (S.C. 1932) 165 S.C. 337, 163 S.E. 884. Executors And Administrators 23

Where deceased’s daughter seeking appointment was qualified and capable of serving as coadministrator with brother, and each child owned undivided interest, probate court abused discretion in appointing stranger to estate as coadministrator. In re Youmans’ Estate (S.C. 1932) 165 S.C. 337, 163 S.E. 884. Executors And Administrators 23

7. —— Effect of grant, liabilities of administrators

The grant of administration has relation to the time of the intestate’s death. M’Vaughters v Elder, 4 SC L 307 (1809). Hamer v Bethea, 11 SC 416 (1878). Cook v Cook, 24 SC 204 (1886).

When all indebtedness of the estate had been paid and there was no necessity to sell land in aid of assets, in such event the administrator had nothing to do with the real property. His only duty was to administer the personal property and he had no reason for not making distribution or investment. Ross v. Beacham, 1940, 33 F.Supp. 3. Executors And Administrators 39

The grant of administration vests in the administrator only the movable property within the state which grants it, and does not include choses in action in the state where the debtor resides. Dial v. Gary (S.C. 1881) 14 S.C. 573, 37 Am.Rep. 737. Executors And Administrators 171

The administrator is liable for property brought by him here from another state. Cureton v. Mills (S.C. 1880) 13 S.C. 409, 36 Am.Rep. 700.

8. —— Discretion in making grant, disqualifications

Disqualification in connection with granting letters of administration is not confined to the matter of character or intellectual competency, as one may be disqualified to act as administrator for some good reason arising out of his relation to the business and affairs of the intestate. Ex parte Tolbert, 206 SC 300, 34 SE2d 49 (1945). Re Estate of McClam, 245 SC 315, 140 SE2d 478 (1965).

Where it remains for decedent’s committee to make his final accounting and to turn over to the representative of the estate all assets in his possession, a conflict of interest would exist if he were appointed administrator of the estate. In re McClam’s Estate (S.C. 1965) 245 S.C. 315, 140 S.E.2d 478.

The probate court may deny letters of administration to one entitled to the same under this section [Code 1962 Section 19‑403], if such person is not fitted for the position. Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40. Executors And Administrators 18

In the absence of kindred and creditors it is not discretionary with the judge to whom administration shall be granted. Thompson v Hucket, 20 SC L 347 (1834). Ex parte Crafts (S.C. 1888) 28 S.C. 281, 5 S.E. 718.

The wishes of those having the greatest interest in the estate should have great, but not controlling, weight with the judge. McBeth v Hunt, 33 SC L 335 (1847). Ex parte Ostendorff (S.C. 1882) 17 S.C. 22.

9. —— Objections and errors

Under this section [Code 1962 Section 19‑403], where a daughter had knowledge of the application of her step‑brother for letters of administration, and made no appearance at the proper time, she cannot, by an application to the probate court, have the letters revoked on the ground that the administrator was not the legitimate son of the deceased. Ex parte White (S.C. 1892) 38 S.C. 41, 16 S.E. 286. Executors And Administrators 32(1)

Error in the grant of administration can be corrected by appeal only. State v. Mitchell (S.C. 1815).

10. —— Particular persons

Any persons enumerated in this section [Code 1962 Section 19‑403] are preferred to a stranger, and, at their instance, administration committed to stranger must be revoked. Thompson v Hucket, 20 SC L 347 (1834). Smith v Wingo, 24 SC L 287 (1839).

Letters should not be granted a nonresident. Burkhim v. Pinkhussohn (S.C. 1900) 58 S.C. 469, 36 S.E. 908.

The guardian for minor children was properly appointed administrator as against decedent’s brother, where the widow withdrew her application and asked that he be appointed. In re Brown’s Estate (S.C. 1913) 96 S.C. 34, 79 S.E. 791.

“Legal representative” is one who lawfully represents another in any manner whatever, or any person who by operation of law stands in the place of and represents the interest of another. In re Brown’s Estate (S.C. 1913) 96 S.C. 34, 79 S.E. 791.

11. Under former Section 21‑15‑110

A nonresident of the State cannot be appointed administrator. Burkhim v Pinkhussohn, 58 SC 469, 36 SE 908 (1900). Smith v Wingo, 24 SCL 287 (1839). State ex rel. Simmons v Watson, 29 SCL 97 (1843). Rose v Thornley, 33 SC 313, 12 SE 11 (1890).

This section [Code 1962 Section 19‑414] is not intended to bind the probate judge by the individual inclinations of persons applying as to the validity of the will, but “the greatest interest” means the interests appearing on the face of the will. Appeal of Wessinger (S.C. 1902) 63 S.C. 130, 41 S.E. 17.

As to who is such creditor as provided by section, see Burkhim v. Pinkhussohn (S.C. 1900) 58 S.C. 469, 36 S.E. 908.

This section [Code 1962 Section 19‑414] is undoubtedly imperative on the probate judge, who shall appoint the persons preferred, and in the order of preference. But the section itself takes cognizance of the fact that the preferred persons may not be willing to take upon themselves the duties and responsibilities of the appointment, and in that case the probate judge may appoint such other persons as may apply. Ex parte Crafts (S.C. 1888) 28 S.C. 281, 5 S.E. 718.

When such other person is appointed by the probate court, being a court of record, and having jurisdiction of the subject, it is a judicial act, a judgment, which must be assumed to have been rightly rendered, until the contrary appears. Ex parte Crafts (S.C. 1888) 28 S.C. 281, 5 S.E. 718.

Letters testamentary cannot be granted to one executor, not nominated by the will. Blakely & Copeland v. Frazier (S.C. 1883) 20 S.C. 144.

**SECTION 62‑3‑204.** Demand for notice of order or filing concerning decedent’s estate.

Any interested person desiring notice of any order or filing pertaining to a decedent’s estate may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant’s address or that of his attorney. The demand for notice shall expire one year from the date of filing with the court. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, the personal representative must give a copy of the demanded filing to the demandant or his attorney. If the demand is a demand for a hearing, then the personal representative must comply with Section 62‑1‑401. The validity of an order which is issued or filing which is accepted without compliance with this requirement is not affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and ceases upon the termination of his interest in the estate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 19; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Duty of personal representative, inventory and appraisement, see Section 62‑3‑706.

Notice of application for order granting powers of personal representative to conservator, see Section 62‑5‑425.

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

Notice of party’s intention to seek informal appointment, see Section 62‑3‑310.

Requirement in informal appointment proceedings that court determine whether this section has been complied with, see Section 62‑3‑308.

Requirement that court, prior to issuing written statement of informal probate, shall determine whether notice required by this section has been given, see Section 62‑3‑303.

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

Library References

Executors and Administrators 20(4).

Wills 269.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 53, 58.

C.J.S. Wills Sections 553 to 556.

RESEARCH REFERENCES

Encyclopedias

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

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

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

S.C. Jur. Wills Section 106, Demand for Notice, Generally.

Part 3

Informal Probate and Appointment Proceedings

**SECTION 62‑3‑301.** Applications for informal probate or appointment; contents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

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

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

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

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 20; 1990 Act No. 521, Section 35; 1993 Act No. 181, Section 1607; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Effect of Amendment

The 2013 amendment deleted former subsection (a)(1)(vii), relating to further information, and added subsection (c)(7), relating to probate of a will without appointing a personal representative.

CROSS REFERENCES

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

Contents of petitions for (a) formal probate of a will, or (b) adjudication of intestacy and appointment of administrator in intestacy, see Section 62‑3‑402.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Provision that, for purposes of Title 62, “application” means a written request for an order of informal probate or appointment pursuant to this part, see Section 62‑1‑201.

When petitions in formal proceedings concerning appointment of a personal representative must contain or adopt statements required by this section, see Section 62‑3‑414.

Library References

Executors and Administrators 20.

Wills 274.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 35, 53 to 69.

C.J.S. Wills Sections 559 to 560.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 67, General Application and Contents.

S.C. Jur. Wills Section 68, Specific Requirements for Applications of Successor Personal Representatives.

S.C. Jur. Wills Section 69, Effect of Verification of Application; Submission to Jurisdiction of Court.

S.C. Jur. Wills Section 84, Proceeding for Appointment.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Claims Against the Estate; Attorneys’ Fees and Administrators’ Commissions. 24 S.C. L. Rev. 684.

NOTES OF DECISIONS

Under former Section 21‑15‑1910 (“Letters to clerk of court for administration of derelict estates”) 2

Under former Section 21‑7‑620 1

1. Under former Section 21‑7‑620

Probate of will in common form by probate court is voidable only by requiring proof of the will in solemn or due form of law within the time required by statute, otherwise the probate in common form shall be conclusive of all matters relating to the validity of the will. Davis v Davis, 214 SC 247, 52 SE2d 192 (1949). Wooten v Wooten, 235 SC 228, 110 SE2d 922 (1959).

Probate Court, in admitting will to probate in common form, had jurisdiction to consider whether the will was revoked by virtue of the testator’s alleged marriage after execution of the will [1976 Code Section 21‑7‑220], and its admission of will to probate in common form became final after lapse of 6 months, and not subject to collateral attack under the guise of a declaratory action seeking construction of the terms of a will in the Court of Common Pleas. Jackson v. Cannon (S.C. 1976) 266 S.C. 198, 222 S.E.2d 494. Wills 260

Once the time for attacking the validity of the will has expired under 1962 Code Section 19‑255 [1976 Code Section 21‑7‑640], judgment of Probate Court becomes final on any question concerning the formalities of its execution, capacity of the testator, and validity of the will to the extent of the deceased died testate, and this judgment is not subject to collateral attack; however, Probate Court does not have jurisdiction to interpret the terms of the will or pass upon the validity of clauses of the will. Jackson v. Cannon (S.C. 1976) 266 S.C. 198, 222 S.E.2d 494. Wills 421; Wills 427

Construction questions not settled. The probate of a will in common form by the probate court settles all questions as to the formalities of its execution and the capacity of the testator, and validity of the will to the extent that the deceased died testate, but such probate does not affect the validity or invalidity of any particular clause or settle any question of construction. Davis v. Davis (S.C. 1949) 214 S.C. 247, 52 S.E.2d 192. Wills 427

The probate of a will in common form is an ex parte proceeding. Reed v. Lemacks (S.C. 1943) 204 S.C. 26, 28 S.E.2d 441. Wills 203

In an action for construction of a will, where both the complaint and answer admitted the will was duly probated under this section [Code 1962 Section 19‑253] and the time allowed in which to invalidate the said paper as a will had elapsed, there was no error in striking allegations that the will was not properly executed and the application would be made to probate court for probate in solemn form, because a proceeding to probate a will stands on the same footing as a judgment, and unless proceeding is brought within the time allowed by statute, the probate proceeding stands as an adjudication that the instrument probated is the last will and testament of the decedent, and is conclusive of all matters properly before the court for determination. Wilkinson v. Wilkinson (S.C. 1935) 178 S.C. 194, 182 S.E. 640.

The probate of a will in common form, being the judgment of a court of competent jurisdiction, is entitled to the respect accorded to the judgments of all courts of like character; namely, it is conclusive of all matters directly connected with the passing of the judgment, and that it is immune from attack in any collateral proceeding. Hembree v. Bolton (S.C. 1925) 132 S.C. 136, 128 S.E. 841.

The admission of a will to probate merely establishes the fact that it has been made as required by statute. Burkett v. Whittemore (S.C. 1892) 36 S.C. 428, 15 S.E. 616.

Testator’s signature need not be proved by each witness; it is sufficient if proved by others. Welch v. Welch (S.C. 1855) 9 Rich. 133.

2. Under former Section 21‑15‑1910 (“Letters to clerk of court for administration of derelict estates”)

Under this section [Code 1962 Section 19‑581] requiring forty days’ notice, the failure to publish the notice for the prescribed period is a jurisdictional defect, and the appointment of the administrator, and all proceedings thereafter to sell land to pay debts, are null and void. Hartley v Glover, 56 SC 69, 33 SE 796 (1899). Hendrix v Holden, 58 SC 495, 36 SE 1010 (1900).

Heirs and distributees cannot acquire title to personal assets so as to collect same without administration. Darwin v Moore, 58 SC 164, 36 SE 539 (1900). Bradford v Felder, 7 SC Eq 168 (1827). Pickens v Bryant, 45 SC 17, 22 SE 750 (1895). Richardson v Cooley, 20 SC 347 (1884). Elders v Vauters, 4 SC Eq 155 (1811). Haley v Thames, 30 SC 270, 9 SE 110 (1889).

For a case showing when sole distributee may collect assets without administration, see Grant v. Poyas (S.C. 1902) 62 S.C. 426, 40 S.E. 891.

**SECTION 62‑3‑302.** Informal probate; duty of court; effect of informal probate.

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 36; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

CROSS REFERENCES

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

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Wills 313, 417 to 433.

Westlaw Topic No. 409.

C.J.S. Wills Sections 639, 796 to 807, 813 to 818.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 75, Informal Probate, Generally; Effect.

**SECTION 62‑3‑303.** Informal probate; proof and findings required.

(a) In an informal proceeding for original probate of a will, the court shall determine whether:

(1) the application is complete;

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

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

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

(5) an original, duly executed and apparently unrevoked will is in the court’s possession;

(6) any notice required by Section 62‑3‑204 has been given and that the application is not within Section 62‑3‑304;

(7) it appears from the application that the time limit for original probate has not expired.

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

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

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

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

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

REPORTER’S COMMENT

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

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

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

Effect of Amendment

The 2013 amendment rewrote subsection (e).

CROSS REFERENCES

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Wills 287, 334.

Westlaw Topic No. 409.

C.J.S. Wills Sections 578 to 591, 727.

RESEARCH REFERENCES

Encyclopedias

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

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.

**SECTION 62‑3‑304.** Informal probate unavailable in certain cases.

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

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

REPORTER’S COMMENT

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

Library References

Wills 312.

Westlaw Topic No. 409.

C.J.S. Wills Section 639.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 79, Unavailability in Certain Cases.

**SECTION 62‑3‑305.** Informal probate; court not satisfied.

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

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

REPORTER’S COMMENT

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

Library References

Wills 312, 348.

Westlaw Topic No. 409.

C.J.S. Wills Sections 639, 737, 814 to 815.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 77, Where Court Not Satisfied; Effect of Declination of Application.

**SECTION 62‑3‑306.** Notice requirements.

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 37; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Library References

Executors and Administrators 20(4).

Wills 269.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 53, 58.

C.J.S. Wills Sections 553 to 556.

RESEARCH REFERENCES

Encyclopedias

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

LAW REVIEW AND JOURNAL COMMENTARIES

Administrator’s Fees. 25 S.C. L. Rev. 505.

NOTES OF DECISIONS

Under former Section 21‑15‑90 1

1. Under former Section 21‑15‑90

On refusing petitioner, judge may grant letters of administration to another without further citation. Ex parte Small, 69 SC 43, 48 SE 40 (1904). Phoenix Bridge Co. v Castleberry, 131 F 175 (1904).

The appointment of an administrator is in the nature of a judgment, and, unless it appears affirmatively from an inspection of the records that there was a failure to comply with the requirements of law, it will be presumed that the probate judge followed the requirements of law, and that the administrator was properly appointed. Hankinson v Charlotte, C. & A. R. Co., 41 SC 1, 19 SE 206 (1894). Petigru v Ferguson, 27 SC Eq 378 (1853). Hartley v Glover, 56 SC 69, 33 SE 796 (1899).

The reason for giving notice is to give all interested persons a chance to be heard, and this is accomplished by one citation, Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40.

In the absence of testimony the court will presume that publication was made. Hendrix v. Holden (S.C. 1900) 58 S.C. 495, 36 S.E. 1010.

**SECTION 62‑3‑307.** Informal appointment proceedings; delay in order; duty of court; effect of appointment.

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

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

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 38; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Successor personal representatives, see Section 62‑3‑613.

Library References

Executors and Administrators 20(9), 29.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 65, 82 to 87, 171.

**SECTION 62‑3‑308.** Informal appointment proceedings; proof and findings required.

(a) In informal appointment proceedings, the court must determine whether:

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

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

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

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

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

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

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

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

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

REPORTER’S COMMENTS

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

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

Subsection (b) sets out certain circumstances in which the application must be denied. The first such circumstance is where another personal representative has been appointed in this or another county of this State, except under the special situation of Section 62‑3‑612. The second such circumstance is in the case of a nondomiciliary decedent. Here, the section is designed to prevent informal appointment of a personal representative in this State when a personal representative has been previously appointed at the decedent’s domicile. Sections 62‑4‑201, 62‑4‑204, and 62‑4‑205 may make local appointment unnecessary.

Effect of Amendment

The 2013 amendment substituted “Section 62‑1‑201” for “Section 62‑1‑201(20)” in subsection (a)(3).

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Court order allowing conservator to act as personal representative upon death of protected person, see Section 62‑5‑425.

Library References

Executors and Administrators 20.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 35, 53 to 69.

RESEARCH REFERENCES

Encyclopedias

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

**SECTION 62‑3‑309.** Informal appointment proceedings; court not satisfied.

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

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

REPORTER’S COMMENT

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

CROSS REFERENCES

Informal appointment proceedings, notice requirements, see Section 62‑3‑310.

Library References

Executors and Administrators 20(9).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 65.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 72, Where Court Not Satisfied; Effect of Declination of Application.

**SECTION 62‑3‑310.** Informal appointment proceedings; notice requirements.

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

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

REPORTER’S COMMENT

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

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Priority among persons seeking appointment as personal representative, see Section 62‑3‑203.

Library References

Executors and Administrators 20(4).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 58.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 73, Notice Requirements.

**SECTION 62‑3‑311.** Informal appointment unavailable in certain cases.

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this State, and which is not filed for probate in this court, the court shall decline the application.

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

REPORTER’S COMMENT

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

Library References

Executors and Administrators 20(1).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53 to 54, 62.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 74, Unavailability in Certain Cases.

Part 4

Formal Testacy and Appointment Proceedings

**SECTION 62‑3‑401.** Formal testacy proceedings; nature; when commenced.

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

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

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

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 8, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

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

The representative’s power of distribution is automatically suspended upon the representative’s receipt of notice of the proceeding. If there is a contest over who should serve, the court has the discretion to restrict further the representative’s power.

The 2010 amendment deleted “may” and replaced it with “must” and added “and serving a summons” to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

CROSS REFERENCES

Events which do not terminate appointment of personal representative, although his powers may be reduced pursuant to this section, see Section 62‑3‑612.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Situation in which effect of filing petition for administration under Sections 62‑3‑501 et seq. is as provided by this section for formal testacy proceedings, see Section 62‑3‑503.

Uniform Declaratory Judgments Act, see Sections 15‑53‑10 et seq.

Library References

Wills 203 to 230.

Westlaw Topic No. 409.

C.J.S. Wills Sections 445 to 509, 742 to 752, 2026 to 2038, 2057 to 2062.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 93, Effect on Other Proceedings.

S.C. Jur. Wills Section 98, Formal Testacy Proceedings; Nature.

S.C. Jur. Wills Section 99, Formal Testacy Proceedings; Nature‑Effect on Previously Appointed Personal Representative.

Forms

South Carolina Legal and Business Forms Section 17:272 , Agreement Not to Contest Will‑Between Testator and Beneficiaries.

Treatises and Practice Aids

Will Contests Section 3:2, Standing to Bring Will Contest.

Will Contests Section 4:3, Will Contests Before Probate.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Claims Against the Estate; Attorneys’ Fees and Administrators’ Commissions. 24 S.C. L. Rev. 684.

NOTES OF DECISIONS

In general 1

Decree or order, under former Section 21‑7‑640 6

Jurisdiction and authority of court, under former Section 21‑7‑640 7

Limitations, under former Section 21‑7‑640 4

Parties, under former Section 21‑7‑640 5

Under former Section 21‑7‑610 2

Under former Section 21‑7‑640 3‑7

Decree or order 6

Jurisdiction and authority of court 7

Limitations 4

Parties 5

1. In general

Statute governing formal testacy proceedings governs procedure for proof of lost or destroyed wills, as well as wills in existence. Golini v. Bolton (S.C.App. 1997) 326 S.C. 333, 482 S.E.2d 784. Wills 231

2. Under former Section 21‑7‑610

The use of the words “when a paper is offered” in this section [Code 1962 Section 19‑252] would not limit the right of the judge to admit only existing wills to probate, and this section [Code 1962 Section 19‑252] should and does govern the procedure for the proof of lost or destroyed wills as well as wills in existence. Davis v. Davis (S.C. 1949) 214 S.C. 247, 52 S.E.2d 192.

3. Under former Section 21‑7‑640

If witnesses deny their attestation, other clear proof of execution is admissible. Pearson v Wightman, 8 SCL 336 (1817). Howell v House, 9 SCL 80 (1818).

Party objecting to probate of will on the grounds that the testator lacked testamentary capacity has burden of proof. Hellams v. Ross (S.C. 1977) 268 S.C. 284, 233 S.E.2d 98.

Question of validity of will cannot be raised except by a direct attack through proceedings in the probate court to prove the will in solemn or due form of law, in accordance with this section [Code 1962 Section 19‑255]. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387.

By the terms of this section [Code 1962 Section 19‑255], the procedure as to proof of a will in due form is not concerned with the question of domicile but only with the question of whether or not a will is a valid one. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123.

Proof in solemn form is the only positive procedure whereby a will may attain immunity from attack. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123.

4. —— Limitations

Probate of a will in common form by the probate court is voidable only by requiring proof of the will in solemn or due form of law within the time required by statute, otherwise the probate in common form shall be conclusive of all matters relating to the validity of the will. Wooten v Wooten, 235 SC 228, 110 SE2d 922 (1959). Davis v Davis, 214 SC 247, 52 SE2d 192 (1949). Henry v Cottingham, 253 SC 286, 170 SE2d 387 (1969).

Acquiescence in probate in the common‑law form barred the right to dispute validity of the provisions of the will. Kinard v Riddlehoover, 37 SCL 258 (1831). Ward v Glenn, 43 SCL 127 (1855).

In accordance with Section 21‑7‑640 and Section 15‑1‑20, November 2, 1977 was the last day to file notice to prove a will in due form where it was admitted to probate on May 2, 1977. Skelton v. Skelton (S.C. 1979) 272 S.C. 471, 252 S.E.2d 571.

Once the time for attacking the validity of the will has expired, judgment of the Probate Court becomes final on any question concerning the formalities of its execution, the capacity of the testator, and the validity of the will to the extent that the deceased died testate, and this judgment is not subject to collateral attack. Jackson v. Cannon (S.C. 1976) 266 S.C. 198, 222 S.E.2d 494. Wills 421; Wills 427

Immunity of will from attack upon its validity may result from inaction on the part of those who would contest the will, for, by the express language of this section [Code 1962 Section 19‑255], probate in common form becomes conclusive unless proceedings for proof in solemn form are commenced within six months. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123.

There can be no question but that the legislature has the power to set the time in which the validity of a will may be challenged and has exercised this power in this section [Code 1962 Section 19‑255] as amended. Wooten v. Wooten (S.C. 1959) 235 S.C. 228, 110 S.E.2d 922. Limitation Of Actions 4(1)

More than six months having lapsed between the date of probate in common form and the filing of a petition seeking to have a will proven in solemn form, order dismissing the petition must be affirmed. Wooten v. Wooten (S.C. 1959) 235 S.C. 228, 110 S.E.2d 922.

The provision authorizing one subject to the disability of infancy, but interested to invalidate the will, to require proof thereof in due form of law at any time within one year (since the 1956 amendment, six months) next after the removal of such disability, is also permissive and intended for the protection of the rights of the infant. It is permissive in that there is nothing to prevent an infant from requiring proof of the paper in due form during his minority. And certain it is that any person interested to invalidate a will may, by notice to the judge of probate, require all infants who would have been entitled to share in the distribution of a testator’s estate, if he had died intestate, to be brought into court in a proceeding for proof of the will in due form of law. Weinberg v. Weinberg (S.C. 1946) 208 S.C. 157, 37 S.E.2d 507. Wills 263

Infancy is the only disability made an exception to the four‑year (since the 1956 amendment, six months) period by this section [Code 1962 Section 19‑255], and the legislature meant by that enactment that other exceptions and legal disabilities should not be read into and included within the meaning of this section [Code 1962 Section 19‑255]. Wilkinson v. Wilkinson (S.C. 1935) 178 S.C. 194, 182 S.E. 640.

The lapse of four years (now six months) after probate did not bar the right to dispute validity of the provisions of the will. Craig v. Beatty (S.C. 1879) 11 S.C. 375.

5. —— Parties

The purpose of bringing before the court those who would be heirs if the deceased had died intestate is clearly to prevent successive contests by various heirs to set aside a will. The statute does not require the devisees under the will being attacked to be served. On the contrary, it recognizes that the one offering the will for probate (the executor) represents all persons taking under the will. This is made plain by placing the duty of serving the heirs upon him (the executor) who is offering the will for probate. The statute makes the proponents of the will, in effect, plaintiffs and they are represented by the executor. As devisees, these appellants are bound by the decision of the probate court. Since they could not take as heirs, regardless of the outcome, and since they properly made no claim as heirs, the statute affords them no reason to complain. Thompson v. Anderson (S.C. 1946) 208 S.C. 208, 37 S.E.2d 581.

Any person interested in invalidating a will is a proper party to the proof of the will in solemn form in the probate court. Mordecai v. Canty (S.C. 1910) 86 S.C. 470, 68 S.E. 1049.

This section [Code 1962 Section 19‑255] does not preclude making as parties to a probate proceeding beneficiaries under a prior will, though they are not heirs; and an executor is entitled to make them parties to avoid independent litigation with them. Mordecai v. Canty (S.C. 1910) 86 S.C. 470, 68 S.E. 1049.

And a will established thus, and confirmed on appeal, cannot be disturbed by a court of equity. Irby v. McCrae (S.C. 1814).

Parties interested required to prove will. If there is no executor or administrator, the parties interested in sustaining the will may be required to so prove the will. McDowall v. Peyton (S.C. 1805).

6. —— Decree or order

Probate Court, in admitting will to probate in common form, had jurisdiction to consider whether the will was revoked by virtue of the testator’s alleged marriage after execution of the will [1976 Code Section 21‑7‑220], and its admission of will to probate in common form became final after lapse of 6 months, and not subject to collateral attack under the guise of a declaratory action seeking construction of the terms of a will in the Court of Common Pleas. Jackson v. Cannon (S.C. 1976) 266 S.C. 198, 222 S.E.2d 494. Wills 260

As a proceeding to probate a will is a judicial one, a judgment or decree admitting a will to probate stands on the same footing as a judgment of any other court of competent jurisdiction; and while it is not conclusive in the sense that a person having a requisite interest may not attack it by a direct proceeding within the period of time allowed by statute, without a statute conferring the right to contest, the order admitting the will to probate would be final on all parties. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387.

Order of probate court admitting purported will to probate in common form is a judgment of a court of competent jurisdiction, and not subject to collateral attack. It must stand until upset in a direct proceeding for that purpose. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387. Wills 421

Decree of probate court admitting will to probate is final and conclusive if not reversed by the appellate court, or set aside and revoked by direct proceeding, and cannot be questioned collaterally. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387. Wills 423

The probate of a will settles all questions as to the formalities of its execution and the capacity of the testator, but does not affect the validity or invalidity of any particular clause or settle any question of construction. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387. Wills 423; Wills 427; Wills 428

7. —— Jurisdiction and authority of court

Where a will is admitted to probate in common form in the probate court, such court then has exclusive jurisdiction to require the proof of the will in solemn or due form of law. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387. Courts 475(2)

When a will has been admitted to probate in either common or solemn form, no issue as to the validity of the will itself is left for determination under the Declaratory Judgments Act, but such probate does not preclude inquiry into the validity or effect of any or all of the provisions of the will because these are matters for construction. Henry v. Cottingham (S.C. 1969) 253 S.C. 286, 170 S.E.2d 387. Declaratory Judgment 241; Wills 427; Wills 428

This section [Code 1962 Section 19‑255] practically confers jurisdiction of the issue of “will or no will” upon the court of common pleas. Muldrow v. Jeffords (S.C. 1928) 144 S.C. 509, 142 S.E. 602.

The probate court cannot construe the will on application; it only determines the execution and capacity. Prater v. Whittle (S.C. 1881) 16 S.C. 40.

**SECTION 62‑3‑402.** Formal testacy or appointment proceedings; petition; contents.

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(1) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(2) contains the statements required for informal applications as stated in the six subitems under Section 62‑3‑301(a)(1), and the statements required by subitems (ii) and (iii) of Section 62‑3‑301(a)(2);

(3) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of Section 62‑3‑301(a) and indicate whether administration under Part 5 [Sections 62‑3‑501 et seq.] is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subitem (ii) of Section 62‑3‑301(a)(4) above may be omitted.

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

REPORTER’S COMMENT

An interested person who petitions the court for a formal testacy proceeding must comply with the requirements of this section concerning the contents of the petition. Regardless of whether the formal testacy proceeding concerns a testate or intestate decedent, the petitioner must request an order determining the decedent’s heirs. Requiring the determination of heirship precludes later questions that might arise at the time of distribution. If formal probate of a will is requested, the petition must provide the court with information concerning the location of the original will. If the original is “lost, destroyed, or otherwise unavailable”, the petition must contain the terms of the missing will. The petition should indicate whether administration under Part 5 of this article is desired. Once a formal testacy proceeding has been initiated, notice must be given as specified in Section 62‑3‑403.

If a formal order of appointment is sought because of a dispute over who should serve, Section 62‑3‑414 describes the appropriate procedure.

Effect of Amendment

The 2013 amendment substituted “in the six subitems” for “in the seven subitems”, and inserted “and” before “the statements” in subsection (a)(2).

CROSS REFERENCES

Circumstances when formal proceedings concerning appointment of a personal representative are subject to this section, see Section 62‑3‑414.

General nature of formal testacy proceedings, see Section 62‑3‑401.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Executors and Administrators 20(5).

Wills 272 to 286.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 53, 59.

C.J.S. Wills Sections 558 to 577, 747 to 748.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 84, Proceeding for Appointment.

S.C. Jur. Wills Section 98, Formal Testacy Proceedings; Nature.

S.C. Jur. Wills Section 107, Petition for Formal Probate; Contents.

NOTES OF DECISIONS

Under former Section 21‑15‑1910 (‘Letters to clerk of court for administration of derelict estates’) 1

1. Under former Section 21‑15‑1910 (‘Letters to clerk of court for administration of derelict estates’)

Under this section [Code 1962 Section 19‑581] requiring forty days’ notice, the failure to publish the notice for the prescribed period is a jurisdictional defect, and the appointment of the administrator, and all proceedings thereafter to sell land to pay debts, are null and void. Hartley v Glover, 56 SC 69, 33 SE 796 (1899). Hendrix v Holden, 58 SC 495, 36 SE 1010 (1900).

Heirs and distributees cannot acquire title to personal assets so as to collect same without administration. Darwin v Moore, 58 SC 164, 36 SE 539 (1900). Bradford v Felder, 7 SC Eq 168 (1827). Pickens v Bryant, 45 SC 17, 22 SE 750 (1895). Richardson v Cooley, 20 SC 347 (1884). Elders v Vauters, 4 SC Eq 155 (1811). Haley v Thames, 30 SC 270, 9 SE 110 (1889).

Suit cannot be brought by creditors until administration by some one. Screven v. Bostick (S.C. 1827) 16 Am.Dec. 664.

For a case showing when sole distributee may collect assets without administration, see Grant v. Poyas (S.C. 1902) 62 S.C. 426, 40 S.E. 891.

**SECTION 62‑3‑403.** Notice of hearing on petition.

(a) Upon commencement of a formal testacy proceeding or at any time after that, the court shall fix a time and place of hearing. Notice must be given in the manner prescribed by Section 62‑1‑401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under Section 62‑3‑204. The following persons must be properly served with summons and petition: the surviving spouse, children, and other heirs of the decedent (regardless of whether the decedent died intestate and determined as if the decedent died intestate), the devisees, and personal representatives named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

(b) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the summons, petition, and notice of the hearing on the petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(3) by engaging the services of an investigator.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 39; 2010 Act No. 244, Section 9, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑403(a) specifies those persons to whom notice of a formal testacy proceeding must be given. If another will has been or is being offered for probate within the county, those persons named in that will must be notified. The petitioner is not required to determine whether another will has been probated or offered for probate in other counties, but if the petitioner has actual knowledge of such a will, the devisees and executors named therein must be notified.

If the notice which is given does not fully comply with the requirements of this section, that defect is not necessarily fatal to the validity of an order. Section 62‑3‑106 provides that an order is valid as to those given notice though less than all interested persons were given notice. Section 62‑3‑1001(b) allows the court to confirm or amend as it affects those persons who were not notified of the formal testacy proceeding.

Section 62‑3‑403(b) sets out the additional steps which must be taken if the fact of the decedent’s death is in doubt. In addition to giving notice to the alleged decedent, the petitioner must make a “reasonably diligent search” for that individual. The court is to determine whether the search has been sufficiently diligent in light of the circumstances. In the event the alleged decedent is in fact alive or if the court is not convinced of the death of the alleged decedent, the petitioner is responsible for the costs of the search. In the event the court finds the alleged decedent is dead, the estate of that decedent will bear the cost of the search.

The 2010 amendment revised subsection (a) to add “or at any time after that,” to delete Notice at the beginning of the third sentence and replacing it with “The following persons” and also including the requirement for a summons and petition. The 2010 amendment also revised subsection (b) to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

CROSS REFERENCES

Provision that conclusiveness of finding of fact of death in formal testacy proceeding depends on whether a search was made under this section, see Section 62‑3‑412.

Library References

Wills 269.

Westlaw Topic No. 409.

C.J.S. Wills Sections 553 to 556.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 105, Notice of Hearing on Petition‑Notice Where Death of Alleged Decedent in Doubt.

LAW REVIEW AND JOURNAL COMMENTARIES

Administrator’s Fees. 25 S.C. L. Rev. 505.

NOTES OF DECISIONS

Under former Section 21‑15‑90 2

Under former Section 21‑7‑650 1

1. Under former Section 21‑7‑650

The nonresident next of kin who are ignorant of the will are permitted to litigate it for fraud, after probate. McDowall v. Peyton (S.C. 1805).

2. Under former Section 21‑15‑90

On refusing petitioner, judge may grant letters of administration to another without further citation. Ex parte Small, 69 SC 43, 48 SE 40 (1904). Phoenix Bridge Co. v Castleberry, 131 F 175 (1904).

The appointment of an administrator is in the nature of a judgment, and, unless it appears affirmatively from an inspection of the records that there was a failure to comply with the requirements of law, it will be presumed that the probate judge followed the requirements of law, and that the administrator was properly appointed. Hankinson v Charlotte, C. & A. R. Co., 41 SC 1, 19 SE 206 (1894). Petigru v Ferguson, 27 SC Eq 378 (1853). Hartley v Glover, 56 SC 69, 33 SE 796 (1899).

The reason for giving notice is to give all interested persons a chance to be heard, and this is accomplished by one citation. Ex parte Small (S.C. 1904) 69 S.C. 43, 48 S.E. 40.

In the absence of testimony the court will presume that publication was made. Hendrix v. Holden (S.C. 1900) 58 S.C. 495, 36 S.E. 1010.

**SECTION 62‑3‑404.** Written objections to probate.

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

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

REPORTER’S COMMENT

In order to object to the formal probate of a will, the objections must be stated in a pleading. The filing of such a response makes the proceeding a contested matter, and a hearing must be held in accordance with Section 62‑3‑406.

Library References

Wills 277.

Westlaw Topic No. 409.

C.J.S. Wills Sections 567 to 568.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 108, Objections to Probate.

**SECTION 62‑3‑405.** Uncontested cases; hearings and proof.

If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of Section 62‑3‑409 have been met or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit (including an affidavit of self‑proof executed in compliance with Section 62‑2‑503) or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 21; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

If proper notice has been given and no objection has been stated in a pleading, the proceeding is an uncontested one. The court may enter relief on the pleadings alone and without a hearing if the court finds that the alleged decedent is dead, venue is proper, and the proceeding is a timely one. Even in the absence of an objection, the court may require a hearing and evidence concerning the execution of the will. In the latter case, the section provides that the affidavit or testimony of one or more witnesses is sufficient proof of such execution.

Section 14‑23‑330 establishes a mechanism for the judge to receive the deposition of an attesting witness who lives at a distance from the court. Under Section 62‑3‑405, the court is given more flexibility in considering evidence of proof of execution of the will in an uncontested proceeding.

CROSS REFERENCES

Probate courts, generally, see Sections 14‑23‑30 et seq.

Self‑proved wills, which obviate the need for testimony of witnesses as to due execution, see Section 62‑2‑503.

Use of depositions before probate courts, see Section 14‑23‑330.

Library References

Wills 303(1), 313.

Westlaw Topic No. 409.

C.J.S. Wills Sections 613 to 614, 618 to 621, 625, 639.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 111, Uncontested Case; Determination on the Pleadings or Hearing.

LAW REVIEW AND JOURNAL COMMENTARIES

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

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.

**SECTION 62‑3‑406.** Testimony of attesting witnesses.

In a contested case in which the proper execution of a will is at issue:

(1) if the will is self‑proved pursuant to Section 62‑2‑503, the will satisfies the requirements for execution, subject to rebuttal, without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it;

(2) if the will is notarized pursuant to Section 62‑2‑503(c), but not self‑proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will;

(3) if the will is witnessed pursuant to Section 62‑2‑502, but not notarized or self‑proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 22; 1988 Act No. 659, Section 16; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

In the event an objection to a formal testacy proceeding has been received, the evidence necessary to prove the will depends upon whether the will is self‑proved or notarized. If the will is not self‑proved or notarized, testimony of at least one attesting witness is required. Compliance with the self‑proving procedure of Section 62‑2‑503 gives rise to a rebuttable presumption that the will was properly executed, and the testimony of attesting witnesses is not required. The presumption does not extend to other grounds of attack, such as undue influence, lack of testamentary intent or capacity, fraud, duress, mistake, or revocation.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Competency of subscribing witness to attest or prove will, notwithstanding his interest in the estate, see Section 62‑2‑504.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Self‑proved wills, which obviate the need for testimony of witnesses as to due execution, see Section 62‑2‑503.

Use of depositions before probate courts, see Section 14‑23‑330.

Library References

Wills 289, 294, 303, 312.

Westlaw Topic No. 409.

C.J.S. Wills Sections 52, 582 to 588, 590 to 591, 595 to 597, 601, 604, 613 to 614, 618 to 621, 625 to 626, 639.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 110, Contested Cases; Testimony of Attesting Witnesses.

Treatises and Practice Aids

Will Contests Section 4:3, Will Contests Before Probate.

LAW REVIEW AND JOURNAL COMMENTARIES

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

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.

**SECTION 62‑3‑407.** Burdens in contested cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it must be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it must be determined first whether the will is entitled to probate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 23; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

In all contested formal testacy proceedings, the petitioner bears the burden of proving death and venue. If the petitioner is attempting to establish that the decedent died intestate, he must also prove heirship. Any person asserting that a will is valid bears the burden of proving due execution.

This section also specifies the order of proof when two wills are offered and the later will purports to revoke the earlier. Proof of the later will is considered first, and an earlier will cannot be probated unless the later will is found to be invalid.

Library References

Wills 289.

Westlaw Topic No. 409.

C.J.S. Wills Sections 582 to 588, 590 to 591.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 112, Burdens of Proof.

Treatises and Practice Aids

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

Restatement (3d) Property (Wills & Don. Trans.) Section 8.3, Undue Influence, Duress, or Fraud.

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

Restatement (3d) Property (Wills & Don. Trans.) Section 8.3 TD 3, Undue Influence, Duress, or Fraud.

LAW REVIEW AND JOURNAL COMMENTARIES

Howard v. Nasser: The Relative Burdens for Wills Contested on the Basis of Confidential Relationships and Undue Influence, 57 S.C. L. Rev. 531 (Spring 2006).

NOTES OF DECISIONS

In general 1

Lost or missing wills 3

Under former Section 21‑7‑720 4

Undue influence 2

1. In general

The contestant to a will did not raise an issue of testator capacity by showing that the testator had been hospitalized for head surgery and that the will was a complex document, where she failed to either assert that he was mentally incapacitated, or to call witnesses to testify concerning his condition at the time of execution. Hembree v. Estate of Hembree (S.C.App. 1993) 311 S.C. 192, 428 S.E.2d 3, rehearing denied.

2. Undue influence

Nephews of decedent, who challenged decedent’s will on the basis of undue influence by decedent’s second wife, bore the ultimate burden of proof at trial; if nephews established undue influence then wife was required to present evidence in rebuttal, and the issue was presented to a jury. Howard v. Nasser (S.C.App. 2005) 364 S.C. 279, 613 S.E.2d 64. Wills 163(1)

For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator, and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. Russell v. Wachovia Bank, N.A. (S.C. 2003) 353 S.C. 208, 578 S.E.2d 329, rehearing denied. Wills 155.1

Where a testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed. Russell v. Wachovia Bank, N.A. (S.C. 2003) 353 S.C. 208, 578 S.E.2d 329, rehearing denied. Wills 160(1)

Testator’s grandchildren and their father did not exercise undue influence over will; children and father were not present when contents of will were discussed or when it was executed, and testator drove his own car, worked, and met alone with his attorney while executing will. Russell v. Wachovia Bank, N.A. (S.C. 2003) 353 S.C. 208, 578 S.E.2d 329, rehearing denied. Wills 158

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

The contestant to a will did not raise an issue of undue influence by showing that the residuaries of the estate (the testator’s daughters) had assisted the testator in having an attorney prepare his will where there was no evidence of coercion, they were not in the room when the will was executed nor when the testator first met with the attorney, and the testator had almost one year, unhampered by the presence of the residuaries, to change or revoke the will. Hembree v. Estate of Hembree (S.C.App. 1993) 311 S.C. 192, 428 S.E.2d 3, rehearing denied.

A will contestant failed to prove undue influence in the revocation of a codicil in her favor by a bank which was named as trustee in the will where the testatrix exhibited a pattern of changing her will over a period of years, when these changes were desired she went through a consistent procedure of talking with her lawyer and of talking with representatives of the bank, at times there were suggestions by the bank but the testatrix often did not follow the bank’s suggestions and, therefore, it appeared that the testatrix was the ultimate decision‑maker. First Citizens Bank & Trust Co. of South Carolina v. Inman (S.C.App. 1988) 296 S.C. 8, 370 S.E.2d 99.

3. Lost or missing wills

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

4. Under former Section 21‑7‑720

Error cannot be predicated on a refusal to allow the contestant to close the argument, whether he offered evidence or not. Re Brock, 37 SC 348, 16 SE 38 (1892). See Gable v Rauch, 50 SC 95, 27 SE 555 (1897).

On an appeal from the probate court, in proceedings to prove a will in solemn form, where the issue was raised that the will was fraudulent and void, it is proper for the circuit court to try the issue de novo on issues framed by the circuit court on notice. Ex parte Jackson, 67 SC 55, 45 SE 132 (1903). Peeples v Smith, 42 SCL 90 (1854). 8 Prater v Whittle, 16 SC 40 (1881).

On appeal to circuit court on question of will or no will, fact issues are tried de novo. Johnson v. Johnson (S.C. 1931) 160 S.C. 158, 158 S.E. 264. Wills 374

On appeal from an order of the probate judge declaring a will a nullity, the refusal to submit the issue as to the place of testator’s residence at the time of his death, on the trial of the issue of “will or no will,” was held not error. Henson v. Wolfe (S.C. 1924) 130 S.C. 273, 125 S.E. 293. Wills 317

A proceeding to prove a paper purporting to be a will is not a case of equitable nature, but is rather a special proceeding under this section [Code 1962 Section 19‑263], in which case either party so desiring has the right, on an appeal from a decree of the probate court, to a trial de novo by a jury in the circuit court on any issue of fact raised on such appeal when the question is will or no will. Meier v. Kornahrens (S.C. 1920) 113 S.C. 270, 102 S.E. 285. Jury 17(3)

**SECTION 62‑3‑408.** Effect of final order in another jurisdiction.

A final order of a court of another state determining testacy, or the validity or construction of a will made in a proceeding involving notice to and an opportunity for contest by all interested persons, must be accepted as determinative by the courts of this State if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

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

REPORTER’S COMMENT

This section makes it incumbent upon the local court to give full faith and credit to final orders of courts in another jurisdiction in the United States determining testacy or the validity or construction of a will regardless of whether the parties before the local court were personally before the foreign court. However, the foreign proceeding must have provided the requisite notice and opportunity for contest or construction for the resulting order to be binding locally.

This section does not apply unless the foreign proceeding has been previously concluded. If a local proceeding is concluded before completion of the foreign formal proceedings, local law will control.

If there is a contest concerning the decedent’s domicile in formal proceedings commenced in different jurisdictions, Section 62‑3‑202 applies.

Local courts are bound by the foreign court’s determination of the validity or construction of the will so long as this determination is part of a final order.

Library References

Wills 426.

Westlaw Topic No. 409.

C.J.S. Wills Sections 800 to 806.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 125, Effect of Final Order in Another Jurisdiction.

Treatises and Practice Aids

Will Contests Section 4:3, Will Contests Before Probate.

NOTES OF DECISIONS

Under former Section 21‑7‑960 1

1. Under former Section 21‑7‑960

The probate of a will in another state establishes that the will was executed according to the law of that state, but does not establish that the will was executed according to the law of South Carolina. Blount v. Walker (U.S.S.C. 1890) 10 S.Ct. 606, 134 U.S. 607, 33 L.Ed. 1036.

By the use of the words “solemn form” in the proviso to this section the legislature intended reference to the point at which by the laws of the foreign state the will should attain immunity from attack, rather than to the means by which such point of finality should be reached. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123. Wills 434

Proof in solemn form is the only positive procedure whereby a will may attain immunity from attack upon it validity. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123. Wills 425

Immunity of will from attack upon its validity may result from inaction on the part of those who would contest the will, for, by the express language of Code 1962 Section 19‑255, probate in common form becomes conclusive unless proceedings for proof in solemn form are commenced within six months. Tripp v. Tripp (S.C. 1962) 240 S.C. 334, 126 S.E.2d 9, 93 Ohio Law Abs. 565, certiorari denied 83 S.Ct. 187, 371 U.S. 888, 9 L.Ed.2d 123.

This section [Code 1962 Section 19‑286] authorizes any interested party, under proper circumstances, to contest the validity of a foreign will admitted to probate in common form in this State, even though the property situated in this State consists only of personalty, but it was not intended to give jurisdiction to the courts of this State to determine the validity of a foreign will in so far as it relates to personal property located in the state of the testator’s domicile. Collins v. Collins (S.C. 1951) 219 S.C. 1, 63 S.E.2d 811. Wills 245

Probate in solemn form in court of decedent’s domicile is conclusive. This section [Code 1962 Section 19‑286] clearly contemplates, certainly as to personal property situated in this State, that if a foreign will has been proved in solemn form in the courts of decedent’s domicile, such an adjudication would be conclusive here. Collins v. Collins (S.C. 1951) 219 S.C. 1, 63 S.E.2d 811.

And foreign judgment adjudicating validity of will should be recognized. Whether or not an adjudication by the courts of the testator’s domicile as to the validity of his will is, under the full faith and credit clause of the Federal Constitution, conclusive upon the courts of other states in so far as personal property is concerned, ordinarily recognition should be given to such judgment upon principles of comity. Collins v. Collins (S.C. 1951) 219 S.C. 1, 63 S.E.2d 811.

Ordinarily where there is a contest as to the validity of a will transmitting personal property located in two or more states, the courts in the ancillary jurisdiction should stay any proceedings instituted there affecting the validity of the instrument until the courts of the domiciliary jurisdiction have had a reasonable opportunity to determine the question, particularly where a similar rule is followed by the courts of the testator’s domicile. Collins v. Collins (S.C. 1951) 219 S.C. 1, 63 S.E.2d 811. Action 69(5)

This section [Code 1962 Section 19‑286] does not dispense with the necessity of the qualification of the executor under the laws of this State. Southern Ry. Co. v. Moore (S.C. 1930) 158 S.C. 446, 155 S.E. 740, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 283 U.S. 816, 75 L.Ed. 1432.

Where there are in this State assets of a testator, a citizen of another state whose will is there probated, the executor of the home state may file an exemplified copy of the will in this State, qualify as executor under our laws, and proceed to administer the assets found here. Southern Ry. Co. v. Moore (S.C. 1930) 158 S.C. 446, 155 S.E. 740, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 283 U.S. 816, 75 L.Ed. 1432.

**SECTION 62‑3‑409.** Order; foreign will.

Upon proof of service of the summons and petition, and after any hearing and notice that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed by Section 62‑3‑108, it shall determine the decedent’s domicile at death, his heirs (regardless of whether the decedent died intestate and determined as if the decedent died intestate), and his state of testacy. Any will found to be valid and unrevoked must be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 62‑3‑612. The petition must be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this State by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will is not ineligible for probate under the law of the other place.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 40; 2010 Act No. 244, Section 10, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section governs the scope and content of the formal testacy order. Every order must contain the court’s findings regarding whether the alleged decedent is dead, the decedent’s domicile at death, whether venue is proper, and whether the proceeding is a timely one. Regardless of whether the decedent is alleged to have died intestate, the order must contain a determination of heirs and testacy. If the court is not convinced of the alleged decedent’s death, the court may dismiss the proceeding or it may permit amendment of the proceeding so as to make it a proceeding to protect the estate of a missing and therefore “disabled” person under Article 5. Provision is made for proof of a will from a foreign jurisdiction which does not provide for probate of wills.

The 2010 amendment revised this section to delete “After the time required for any notice has expired, upon” at the beginning and replace it with “Upon” proof of “service of the summons and petition” and also included the notice requirement for any hearing. The foregoing amendment was intended to clarify that a summons and petition are required to commence a formal proceeding, including a formal testacy proceeding. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

Library References

Wills 238 to 246.

Westlaw Topic No. 409.

C.J.S. Wills Sections 515 to 523.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 52, Necessity of Order of Probate for Will.

S.C. Jur. Wills Section 115, Proof of Foreign Will.

S.C. Jur. Wills Section 116, Scope and Content of Formal Testacy Order.

S.C. Jur. Wills Section 117, Final Effect of Formal Testacy Order.

**SECTION 62‑3‑410.** Probate of more than one instrument.

(A) If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument.

(B) After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 62‑3‑412.

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

REPORTER’S COMMENT

An order in a formal testacy proceeding ends the time within which it is possible to probate after‑discovered wills, though subject to the provisions for vacation or modification of that order under Sections 62‑3‑412 and 62‑3‑413. While a determination of heirs is not barred by the ten year limitation under Section 62‑3‑108, a judicial determination of heirs in a final order is conclusive unless the order is vacated or modified.

Under this section the court may admit more than one will to probate if the court in the exercise of its sound discretion determines that the instruments can be construed together.

Effect of Amendment

The 2013 amendment inserted the subsection designators.

CROSS REFERENCES

Finality of formal testacy order, see Section 62‑3‑412.

Uniform Declaratory Judgments Act, see Sections 15‑53‑10 et seq.

Library References

Wills 207.

Westlaw Topic No. 409.

C.J.S. Wills Sections 461 to 466.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 123, Probate of More Than One Instrument; Contents of Order.

**SECTION 62‑3‑411.** Partial intestacy.

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent’s estate is or may be partially intestate, the court shall enter an order to that effect.

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

Library References

Wills 216.

Westlaw Topic No. 409.

C.J.S. Wills Section 474.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 117, Final Effect of Formal Testacy Order.

S.C. Jur. Wills Section 124, Partial Intestacy.

**SECTION 62‑3‑412.** Effect of order; vacation.

Subject to appeal and subject to vacation as provided herein and in Section 62‑3‑413, a formal testacy order under Sections 62‑3‑409 through 62‑3‑411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent’s estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later‑offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under either (1) or (2) above must be filed prior to the earlier of the following time limits:

(i) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate.

(ii) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 62‑3‑108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(iii) Twelve months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances by the order of probate of the later‑offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Section 62‑3‑403(b) was made. If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 41; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section establishes the exceptions to the res judicata effect of a formal testacy order. If a decedent’s will has been probated and a final order issued, the court may modify or vacate the order only if: (1) the proponents of a later‑offered will had no knowledge of the existence of the will at the time of the proceeding; or (2) the proponents of the later will did not have actual knowledge of the earlier proceeding and were given no notice of it other than by publication. If the final order determined that all or a part of the estate was intestate, that order may be vacated or modified only if the petitioner can establish: (1) that one or more heirs were omitted and (2) that the omitted heir or heirs had no knowledge of their status as an heir, that they were unaware the decedent had died, or that they were given no notice of the proceeding other than by publication.

Section 62‑3‑412(3) prescribes the time limits for filing a petition for vacation under this section. The petition must be filed prior to the earlier of the following: (1) in an estate where a personal representative has been appointed, the entry of an order approving final distribution; (2) the ten‑year ultimate time limit under Section 62‑3‑108; or (3) twelve months from the entry of the formal testacy order. The individual submitting a petition for vacation bears the burden of proving that modification or vacation of the order is “appropriate under the circumstances.”

This section also specifies the procedure to be followed when an alleged decedent is discovered to be alive subsequent to a final order finding the fact of death. In such a situation, the alleged decedent may recover assets retained by the personal representative. The heirs and distributees may be required to restore the “estate or its proceeds” if it is “equitable in view of all the circumstances.”

Library References

Wills 355, 417 to 434.

Westlaw Topic No. 409.

C.J.S. Wills Sections 742 to 752, 796 to 818.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 117, Final Effect of Formal Testacy Order.

S.C. Jur. Wills Section 118, Final Effect of Formal Testacy Order‑Modification or Vacation.

S.C. Jur. Wills Section 120, Conclusiveness of Finding of Fact of Death.

S.C. Jur. Wills Section 121, Conclusiveness of Finding of Fact of Death‑Where Alleged Decedent is Not Dead; Remedies.

S.C. Jur. Wills Section 123, Probate of More Than One Instrument; Contents of Order.

**SECTION 62‑3‑413.** Vacation of order for other cause.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

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

REPORTER’S COMMENT

This section deals with the modification or vacation of an order during the pendency of an appeal or within the time allowed for appeal. Broadly speaking, the power to vacate or modify an order under Section 62‑3‑412 provides the court with a means of dealing with facts not before the court during the proceeding. Section 62‑3‑413 gives the court the option of reconsidering its decision although it has no new evidence before it.

Library References

Wills 355.

Westlaw Topic No. 409.

C.J.S. Wills Sections 742 to 752, 817.

RESEARCH REFERENCES

Encyclopedias

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

**SECTION 62‑3‑414.** Formal proceedings concerning appointment of personal representative.

(a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as a personal representative, or of one who previously has been appointed a personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 62‑3‑402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by Section 62‑3‑301(a)(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(b) After service of the summons and petition to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as a personal representative, the court shall determine who is entitled to appointment under Section 62‑3‑203, make a proper appointment, and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 62‑3‑611.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 11, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

If there is a question concerning the priority or qualifications of a personal representative, the issue may be combined with a request for the determination of testacy in a petition for a formal testacy proceeding. However, the formal appointment of a personal representative can be considered alone. If the proceeding under this section is combined with a formal testacy proceeding, the petition must not only comply with the requirements of a petition for formal testacy, but must also describe the issue regarding appointment. Once a proceeding has been initiated under this section alone, the court must receive a petition which complies with the requirements of Section 62‑3‑402 and describes the issue regarding appointment. Once initiated, a proceeding under this section stays any pending informal appointment proceedings. If a representative had been appointed prior to this proceeding, the filing of a petition under this section automatically restraints all of the representative’s powers which are not necessary to preserve the estate. Under this section, service of the summons and petition must be given to all interested persons as defined in subparagraph (b).

Formal proceedings concerning appointment should be distinguished from administration under Part 5. The former includes any proceeding after notice involving a request for an appointment. Administration under Part 5 begins with a formal proceeding and may be requested in addition to a ruling concerning testacy or appointment, but it is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. A personal representative appointed in a formal proceeding may or may not be subject to administration under Part 5. Procedures for securing the appointment of a new personal representative after a previous assumption as to testacy under Section 62‑3‑612 may be informal or related to pending formal proceedings concerning testacy.

When an order authorizing appointment is issued, the personal representative must then comply with Section 62‑3‑601 et seq., concerning bond requirements.

The 2010 amendment revised subsection (b) to delete “notice” and replace it with “service of the summons and petition” to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding concerning appointment of a personal representative as referred to in this section. See 2010 amendments to certain definitions in S. C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

CROSS REFERENCES

Successor personal representatives, see Section 62‑3‑613.

Library References

Executors and Administrators 20.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 35, 53 to 69.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 84, Proceeding for Appointment.

Part 5

Administration Under Part 5

**SECTION 62‑3‑501.** Nature of proceeding.

Administration under Part 5 [Sections 62‑3‑501 et seq.] is a single in rem proceeding to secure complete administration and settlement of a decedent’s estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A personal representative under Part 5 [Sections 62‑3‑501 et seq.] is responsible to the court, as well as to the interested persons, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a personal representative under Part 5 [Sections 62‑3‑501 et seq.] has the same duties and powers as a personal representative who is not subject to administration under Part 5 [Sections 62‑3‑501 et seq.].

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

REPORTER’S COMMENT

This section and the following sections of this part describe an optional procedure for settling an estate in one continuous proceeding in the court. The proceeding is a single “in rem” action designed to secure complete administration and settlement of a decedent’s estate when it is desired to make sure that every step in probate is adjudicated with notice and hearing. If administration under Part 5 is not requested or ordered, there may be no compelling reason to employ all the available formal proceedings in the administration of an estate.

Effect of Amendment

The 2013 amendment substituted “interested persons” for “interested parties” in the second sentence.

CROSS REFERENCES

Provision that, unless administration under this part is involved, each proceeding before the court is independent of any other proceeding involving the same estate, see Section 62‑3‑107.

Library References

Executors and Administrators 1, 74 to 82.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 2 to 3, 5, 163 to 164, 166 to 168, 171 to 172.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 89, Petition.

S.C. Jur. Wills Section 90, Petition‑Adjudication of Testacy of Decedent, Priority and Qualifications of Personal Representative.

S.C. Jur. Wills Section 91, Petition‑Order.

S.C. Jur. Wills Section 93, Effect on Other Proceedings.

**SECTION 62‑3‑502.** Petition; order.

A petition for administration under Part 5 [Sections 62‑3‑501 et seq.] may be filed by any interested person or by a personal representative at any time, a prayer for administration under Part 5 [Sections 62‑3‑501 et seq.] may be joined with a petition in a testacy or appointment proceeding, or the court may order administration under Part 5 [Sections 62‑3‑501 et seq.] on its own motion. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for administration under Part 5 [Sections 62‑3‑501 et seq.] shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for administration under Part 5 [Sections 62‑3‑501 et seq.], even though the request for administration under Part 5 [Sections 62‑3‑501 et seq.] may be denied. After service of the summons and petition and upon notice to interested persons, the court shall order administration under Part 5 [Sections 62‑3‑501 et seq.] of a decedent’s estate: (1) if the decedent’s will directs administration under Part 5 [Sections 62‑3‑501 et seq.], it shall be ordered unless the court finds that circumstances bearing on the need for administration under Part 5 [Sections 62‑3‑501 et seq.] have changed since the execution of the will and that there is no necessity for administration under Part 5 [Sections 62‑3‑501 et seq.]; (2) if the decedent’s will directs no administration under Part 5 [Sections 62‑3‑501 et seq.], then administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or (3) in other cases if the court finds that administration under Part 5 [Sections 62‑3‑501 et seq.] is necessary under the circumstances.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 12, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Under this section any “interested person” or the personal representative may request administration under Part 5, or the probate court may order it on its own motion. If the decedent’s will directs such administration it must be ordered unless the court finds circumstances have changed since execution of the will. Likewise, where the will directs no such administration, it will be ordered only if the court finds it is necessary for protection of interested persons.

Even though it is possible that a request for administration under Part 5 may be made after a determination of testacy has been made, this section requires the petition for such administration to include matters necessary to put the issue of testacy before the court. The result is that the question of testacy will be adjudicated.

While administration under Part 5 compels a judicial settlement of an estate there are other sections which grant a judicial review and settlement. This fact leads to the conclusion that administration under Part 5 will be valuable primarily when there is some advantage in a single judicial proceeding which will adjudicate all major points involved in an estate settlement.

The 2010 amendment revised this section to add “service of the summons and petition and upon” in the fourth sentence to clarify that a summons and petition and notice of any hearing are required for a formal proceeding for administration under Part 5. See 2010 amendments to certain definitions in S. C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

CROSS REFERENCES

Contested cases, testimony of attesting witnesses, see Section 62‑3‑406.

Library References

Executors and Administrators 20(3), 20(5).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 55, 59.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 89, Petition.

S.C. Jur. Wills Section 90, Petition‑Adjudication of Testacy of Decedent, Priority and Qualifications of Personal Representative.

S.C. Jur. Wills Section 91, Petition‑Order.

**SECTION 62‑3‑503.** Effect on other proceedings.

(a) The pendency of a proceeding for administration under Part 5 [Sections 62‑3‑501 et seq.] of a decedent’s estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for administration under Part 5 [Sections 62‑3‑501 et seq.] is as provided for formal testacy proceedings by Section 62‑3‑401.

(c) After service of the summons and petition upon the personal representative and notice of the filing of a petition for administration under Part 5 [Sections 62‑3‑501 et seq.], a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 13, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section deals with the effect of administration under Part 5 on other proceedings. Primarily pendency of such administration does two things: (1) it stays action on any informal proceedings and (2) it prohibits the personal representative from exercising his power to distribute the estate. However, the filing of the petition does not otherwise affect the powers and duties of the personal representative unless the court restricts the exercise of such power.

In regard to the effect of such action on the personal representative’s ability to create good title in a purchaser of estate assets, it should be noted that such a power is not hampered by the fact that the personal representative may breach a duty created by statute or otherwise. However, the personal representative may be held for contempt of court. In any event, the pendency of the proceeding could be recorded as is usual under a lis pendens.

The 2010 amendment deleted “he has received” and added “service of the summons and petition upon the personal representative and” to the first sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding under Part 5. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

CROSS REFERENCES

Contested cases, testimony of attesting witnesses, see Section 62‑3‑406.

Library References

Executors and Administrators 20(9).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 53, 65.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 93, Effect on Other Proceedings.

**SECTION 62‑3‑504.** Powers of personal representative.

Unless restricted by the court, a personal representative under Part 5 [Sections 62‑3‑501 et seq.] has, without interim orders approving exercise of a power, all powers of personal representatives under this Code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and any court certification thereof, and unless so endorsed is ineffective as to persons dealing in good faith with the personal representative.

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

REPORTER’S COMMENT

This section acknowledges that the powers of a personal representative in an administration under Part 5 are the same as in any other administration unless restricted by the court and endorsed on the letters of appointment. If not so endorsed, the restrictions are ineffective as to persons dealing with the estate in good faith. The practical effect of this provision is to require persons dealing with the personal representative to examine the representative’s letters.

CROSS REFERENCES

Effect of will provisions or court orders purporting to limit power of personal representative, except for limitations under this part which are endorsed on letters pursuant to this section, see Section 62‑3‑714.

Library References

Executors and Administrators 74 to 82, 288.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 163 to 164, 166 to 168, 171 to 172, 533.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 92, Powers of Personal Representative.

**SECTION 62‑3‑505.** Interim orders; distribution and closing orders.

Unless otherwise ordered by the court, administration under Part 5 [Sections 62‑3‑501 et seq.] is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under Section 62‑3‑1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of an administration under Part 5 [Sections 62‑3‑501 et seq.] on the application of the personal representative or any interested person.

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

REPORTER’S COMMENT

This section requires additional notice for a closing order. The requirement for notice of interim orders is left to the discretion of the court except to the extent such notice is required by other sections, see e.g. Section 62‑3‑204, which entitles any interested person to notice of any interim order.

Library References

Executors and Administrators 315.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 570.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 94, Interim Orders.

S.C. Jur. Wills Section 95, Closing Orders.

Part 6

Personal Representative; Appointment, Control, and Termination of Authority

**SECTION 62‑3‑601.** Qualification.

Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

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

REPORTER’S COMMENT

This and related sections of this part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is subject to administration under Part 5. Section 62‑1‑305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 62‑3‑504 which directs endorsement on letters and any court certification of any restrictions of powers of an administrator under Part 5.

No formal oath is required of a personal representative.

CROSS REFERENCES

Priority among persons seeking appointment as personal representative, see Section 62‑3‑203.

Library References

Executors and Administrators 25, 26.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 70 to 77.

NOTES OF DECISIONS

Under former Section 21 15‑50 1

1. Under former Section 21 15‑50

Person named as executor in a will has no standing to appeal a case commenced by the decedent until the will is filed for probate and the person is formally appointed executor. Asbury v. South Carolina Nat. Bank (S.C. 1977) 268 S.C. 40, 231 S.E.2d 306.

The testamentary disposition of property is controlled by statute, and a will is wholly ineffectual until it is admitted to probate by a competent tribunal, executed, and proven in strict compliance with the statutory requirements. Asbury v. South Carolina Nat. Bank (S.C. 1977) 268 S.C. 40, 231 S.E.2d 306.

**SECTION 62‑3‑602.** Acceptance of appointment; consent to jurisdiction.

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

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

REPORTER’S COMMENT

Except for personal representatives appointed pursuant to Section 62‑3‑502, appointees are not deemed to be officers of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 62‑3‑107.

In order to prevent a personal representative who might make himself unavailable to service within the State from affecting the power of the appointing court to enter valid orders affecting him, each appointee is required to consent in advance to the personal jurisdiction of the court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

CROSS REFERENCES

Actions against executors or administrators when one or more is out of the State, see Section 15‑5‑120.

Library References

Executors and Administrators 25, 441.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 70, 782 to 784.

NOTES OF DECISIONS

Under former Section 21‑13‑10 (“Oath of administrator”) 1

Under former Section 21‑13‑20 (“Oath of executor or administrator with the will annexed”) 2

1. Under former Section 21‑13‑10 (“Oath of administrator”)

The maxim, “omnia praesumuntur rite esse acta,” is applicable in these cases. So the fact that the record does not contain evidence that all the requirements of law were complied with before granting the letters of administration, is not alone sufficient to negative this presumption. Tederall v Bouknight, 25 SC 275 (1886). Hartley v Glover, 56 SC 69, 33 SE 796 (1899).

Court appointment has always been necessary to give the administrator authority to act, and the person appointed must take an oath and furnish bond before he has finally qualified for the office of executor or administrator. Simmons v. Atlantic Coast Line R. Co., 1964, 235 F.Supp. 325.

A record of the probate court showing that administration was granted “on hearing the petition” is not proof that the administrator took the oath prescribed by this section [Code 1962 Section 19‑431], and the appointment therefore is defective. Hendrix v. Holden (S.C. 1900) 58 S.C. 495, 36 S.E. 1010.

Where the records of the probate court showed on their face that no oath was taken by the administrator before the probate judge until after actions were instituted and subsequently removed to a Federal court and answer filed by defendant, they reflected on the surface that the appointment was invalid and without force and effect. Simmons v. Atlantic Coast Line R. Co., 1964, 235 F.Supp. 325.

2. Under former Section 21‑13‑20 (“Oath of executor or administrator with the will annexed”)

Qualified executor required to execute will in accordance with law. Grant v. Osgood (S.C. 1962) 241 S.C. 104, 127 S.E.2d 202.

Filing a caveat or otherwise opposing probate of a will by a named executor is equivalent to a renunciation of the executorship. Grant v. Osgood (S.C. 1962) 241 S.C. 104, 127 S.E.2d 202.

**SECTION 62‑3‑603.** Bond not required without court order; exceptions; waiver of bond requirement.

(A) Except as may be required pursuant to Section 62‑3‑605 or upon the appointment of a special administrator, a personal representative is not required to file a bond if:

(1) all heirs and devisees agree to waive the bond requirement;

(2) the personal representative is the sole heir or devisee;

(3) the personal representative is a state agency, bank, or trust company, unless the will expressly requires a bond; or

(4) the personal representative is named in the will, unless the will expressly requires a bond.

If, pursuant to Section 62‑3‑203(a), the court appoints as personal representative a nominee of a personal representative named in a will, the court may in its discretion decide not to require bond.

(B) Where a bond is required of the personal representative or administrator of an estate by law or by the will, it may be waived under the following conditions:

(1) the personal representative or administrator by affidavit at the time of applying for appointment as such certifies to the court that the gross value of the estate will be less than twenty thousand dollars, that the assets of the probate estate are sufficient to pay all claims against the estate, and that the personal representative or administrator agrees to be personally liable to any beneficiary or other person having an interest in the estate for any negligence or intentional misconduct in the performance of his duties as personal representative or administrator; and

(2) all known beneficiaries and other persons having an interest in the estate execute a written statement on a form prescribed by the court that they agree to the bond being waived. This form must be filed with the court simultaneously with the affidavit required by item (1) above. A creditor for purposes of this item (2) is not considered a person having an interest in the estate.

The provisions of this subsection (B) are supplemental and in addition to any other provisions of law permitting the waiving or reducing of a bond. Any bond required by Section 62‑3‑605 may not be waived under the provisions of this section.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 24; 1988 Act No. 659, Section 17; 1989 Act No. 53, Section 1; 1990 Act No. 521, Section 42; 1994 Act No. 470, Section 1; 1997 Act No. 152, Section 13; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

A bond is required of any personal representative who is not named in a will, including an administrator in intestacy and a special administrator, whether in probate or in intestacy, whether resident or nonresident, but excluding corporate fiduciaries not required to be bonded. However, bond is not required for a personal representative who is the sole heir or devisee. Moreover, all heirs and devisees can agree to waive any bond requirement. A bond is not required of any personal representative who is named in a will, unless appointed as a special administrator or unless the will or some interested person under Section 62‑3‑605, requires a bond.

CROSS REFERENCES

Bond required of personal representative handling proceeds of sale of real estate, see Section 62‑3‑1310.

Costs against certain fiduciaries, see Section 15‑37‑180.

Manner of service on nonresident fiduciaries, see Section 15‑9‑450.

Library References

Executors and Administrators 26.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 71 to 77.

RESEARCH REFERENCES

Forms

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

South Carolina Legal and Business Forms Section 17:147 , Executors‑Appointment‑General Clause.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 151, Oath, Bond, and Letters of Trusteeship.

**SECTION 62‑3‑604.** Bond amount; security; procedure; reduction.

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the court indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal estate during the next year, and he shall execute and file a bond with the court, or give other suitable security, in an amount not less than the estimate. The court shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 62‑6‑101) in a manner that prevents their unauthorized disposition. Upon application by the personal representative or another interested person or upon the court’s own motion, the court may increase or reduce the amount of the bond, release sureties, dispense with security or securities, permit the substitution of another bond with the same or different sureties or dispense with the bond.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 14, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section permits estimates of value needed to fix the amount of any required bond. A consequence of this procedure is that estimates of value of estates are not required to appear in the petition and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved.

Release of sureties was formerly interpreted to mean that the probate court might release a surety if he petitioned for relief and established that he reasonably believes himself to be in danger of suffering a loss on account of his suretyship. See Bellinger v. United States Fidelity Co., 115 S.C. 469, 106 S.E. 470 (1921); and McKay v. Donald, 8 Rich. 311 (42 S.C.L. 331) (1855). Section 62‑3‑604 is more flexible and should not be construed so narrowly as to permit release of sureties only on the limited basis available at prior law.

The 2010 amendment deleted “On petition of” at the beginning of the last sentence and added “Upon application by” to allow the personal representative or another interested person to make application to the probate court regarding bond matters as outlined in this section. Unlike a petition, an application does not require a summons or petition. See Section 62‑1‑201(1). The 2010 amendment also added “upon the court’s own motion” in the last sentence.

Effect of Amendment

The 2013 amendment inserted “or dispense with the bond” at the end.

CROSS REFERENCES

Bond for handling of proceeds of a real estate sale by the personal representative of an estate, see Section 62‑3‑1310.

Costs against certain fiduciaries, see Section 15‑37‑180.

Library References

Executors and Administrators 26.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 71 to 77.

RESEARCH REFERENCES

Forms

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

South Carolina Legal and Business Forms Section 17:147 , Executors‑Appointment‑General Clause.

NOTES OF DECISIONS

Under former Section 21‑13‑50 1

Under former Section 21‑13‑70 2

1. Under former Section 21‑13‑50

Actions on bond may be brought in name of probate judge. Johnson v Dawkins, 20 SC 528 (1884). Burnside v Robertson, 28 SC 583, 6 SE 843 (1888).

The judge acts ministerially and not judicially in accepting bond. McRae v. David (S.C. 1853).

2. Under former Section 21‑13‑70

By the provisions of Code 1962 Section 31‑4, this section [Code 1962 Section 19‑437] also applies to discharge of sureties on guardians’ bonds. In a case involving the discharge of such a surety, it was held that when the court grants an order discharging such surety, and a new bond is executed, but no new letters of guardianship are issued, the surety is liable for all the property of the ward in the hands of the guardian at the time of discharge, but not for the property of the ward that may subsequently come into the hands of the guardian. Hall v Hall, 45 SC 166, 22 SE 818 (1895). Bellinger v United States Fidelity, & Guaranty Co., 115 SC 469, 106 SE 470 (1921).

It is sufficient under this section [Code 1962 Section 19‑437] that the surety believes he is in danger on account of his suretyship; proof of actual danger is unnecessary. Bellinger v United States Fidelity, & Guaranty Co., 115 SC 469, 106 SE 470 (1921). McKay v Donald, 42 SC L 331 (1855).

The court may require a new bond with additional sureties or revoke the administration. Owens v Walker, 21 SC Eq 289 (1848). Waterman v Bigham, 20 SC L 512 (1834). Norton v Wallace, 30 SC L 507 (1844). Gilliam v McJunkin, 2 SC 442 (1871).

If discharge is granted by requiring new bond, the second bond is primary security as to the amount fixed by accounting. Bobo v Vaiden, 20 SC 271 (1883). Trimmier v Trail, 18 SC L 480 (1831). Waterman v Bigham, 20 SC L 512 (1834).

If the same administrator is appointed administrator de bonis non, and his accounts are fixed, that discharges the sureties. Trimmier v Trail, 18 SC L 480 (1831). Enicks v Powell, 21 SC Eq 196 (1848).

Recourse to court of equity cannot be demanded where there is an adequate legal remedy supplied by statute. American Surety Co. of New York v. Muckenfuss (S.C. 1934) 172 S.C. 169, 173 S.E. 290. Equity 43

Court of common pleas could not assume jurisdiction of action for release of surety from administrator’s bond where statute regarding proceedings in probate court for surety’s release from bond provided the remedy desired. American Surety Co. of New York v. Muckenfuss (S.C. 1934) 172 S.C. 169, 173 S.E. 290. Courts 475(2)

As this statute is one of exceptional privilege, the petitioner must bring himself within its terms. There is no statute which accords to the sureties upon any other class of bonds than administration and guardianship bonds the privilege of this section [Code 1962 Section 19‑437]. Bellinger v. U.S. Fidelity & Guaranty Co. (S.C. 1921) 115 S.C. 469, 106 S.E. 470.

This section [Code 1962 Section 19‑437] relieves the surety from a substantial portion of the obligation which he assumed when he signed the bond, which was intended to secure the continuing obligation of the principal until his final and legal release. Bellinger v. U.S. Fidelity & Guaranty Co. (S.C. 1921) 115 S.C. 469, 106 S.E. 470.

In a proceeding under this section [Code 1962 Section 19‑437] and Code 1962 Section 31‑4, providing for the release of a surety on a guardian’s bond, it was not necessary that an accounting be had, and the letters of guardianship revoked, before the surety could be discharged from further liability. Hall v. Hall (S.C. 1895) 45 S.C. 166, 22 S.E. 818. Guardian And Ward 177

If relief is granted by revoking administration, the sureties are still liable for default before that time. Shelton ads. Cureton (S.C. 1826).

No money decree can be given against the administrator. Gilliam v. McJunkin (S.C. 1871) 2 S.C. 442.

**SECTION 62‑3‑605.** Demand for bond by interested person.

Any person apparently having an interest in the estate worth in excess of five thousand dollars, or any creditor having a claim in excess of five thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required in an amount determined by the court as sufficient to protect the interest of the person or creditor demanding bond, but the requirement ceases if the person or creditor demanding bond ceases to have an interest in the estate worth in excess of five thousand dollars or a claim in excess of five thousand dollars. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate or to pay the person or creditor demanding bond. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative unless good cause is shown for the delay.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 25; 1990 Act No. 521, Section 43; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 62‑3‑705 to give each beneficiary includes a statement concerning whether bond has been required. Section 62‑3‑605 is consistent with the general policy of this Code to minimize the formalities of estate administration unless interested parties ask for specific protection.

Effect of Amendment

The 2013 amendment substituted “five thousand dollars” for “one thousand dollars” throughout, and inserted “unless good cause is shown for the delay” at the end.

CROSS REFERENCES

Bond required of personal representative handling proceeds of sale of real estate, see Section 62‑3‑1310.

Costs against certain fiduciaries, see Section 15‑37‑180.

Library References

Executors and Administrators 26.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 71 to 77.

RESEARCH REFERENCES

Forms

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

South Carolina Legal and Business Forms Section 17:147 , Executors‑Appointment‑General Clause.

**SECTION 62‑3‑606.** Terms and conditions of bonds.

(a) The following requirements and provisions apply to any bond required by this part:

(1) Bonds shall name the judge of the court as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

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

REPORTER’S COMMENT

This section provides for the terms and conditions of bonds to be furnished by personal representatives. It provides that the judge of the court is the obligee of the bond and that the sureties are jointly and severally liable if they consent to the jurisdiction of the court by executing the bond.

CROSS REFERENCES

Actions against executors or administrators when one or more is out of the State, see Section 15‑5‑120.

Costs against certain fiduciaries, see Section 15‑37‑180.

Probate courts, generally, see Sections 14‑23‑30 et seq.

Library References

Executors and Administrators 26.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 71 to 77.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

Forms

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

South Carolina Legal and Business Forms Section 17:147 , Executors‑Appointment‑General Clause.

NOTES OF DECISIONS

Actions on bonds; suits against sureties, under former Section 21‑13‑30 2

Breach of bond, under former Section 21‑13‑30 3

Judgment against administrator may be shown to be incorrect but not fraudulent, under former Section 21‑13‑30 5

Period of liability, under former Section 21‑13‑30 4

Under former Section 21‑13‑100 6

Under former Section 21‑13‑110 7

Under former Section 21‑13‑30 1‑5

Actions on bonds; suits against sureties 2

Breach of bond 3

Judgment against administrator may be shown to be incorrect but not fraudulent 5

Period of liability 4

1. Under former Section 21‑13‑30

Statutes relating to the administrator’s bond and to civil actions for wrongful death must be considered together. Boyd v. Richie (S.C. 1930) 159 S.C. 55, 155 S.E. 844. Death 9; Executors And Administrators 26(2)

The form prescribed in this section [Code 1962 Section 19‑433] must be followed. Ordinary of Kershaw Dist. v. Blanchard (S.C. 1813).

Residence is no part of the qualification of a surety. State v. Watson (S.C. 1843).

2. —— Actions on bonds; suits against sureties, under former Section 21‑13‑30

The creditors can sue the sureties as soon as they have established the debt against the administrator. Ordinary of Charleston v Hunt, 26 SCL 380 (1841). Kaminer v Hope, 18 SC 561 (1883). Wilbur & Son v Hutto, 25 SC 246 (1886). Burnside v Robertson, 28 SC 583, 6 SE 843 (1888). Wiley v Johnsey, 40 SCL 355 (1853).

Sureties may be joined in equity with principal or his representatives. Aiken v Miller, 5 SC Eq 69 (1824). McBee v Crocker, 16 SC Eq 485 (1831). Gayden v Gayden, 16 SC Eq 435 (1838). O’Neall v Herbert, 16 SC Eq 495 (1837). Swindersine v Miscally, 8 SC Eq 304 (1831). Taylor v Taylor, 2 19 SC Eq 123 (1843). Wright v Eaves, 31 SC Eq 582 (1858).

Sureties of one administrator are not liable for another. Hoell v Blanchard, 4 SC Eq (1809). Knox v Picket, 4 SC Eq 92 (1810).

A judgment establishing a breach of the administrator’s bond as prescribed by this section [Code 1962 Section 19‑433] is not a prerequisite to an action upon the bond. Beatty v. National Surety Co. (S.C. 1925) 132 S.C. 45, 128 S.E. 40.

3. —— Breach of bond, under former Section 21‑13‑30

The surety on the bond of an administratrix is liable for the amount collected for the benefit of a minor as damages for the wrongful death of administratrix’s husband. For although the money collected by the administratrix for the benefit of the minor son does not become part of the estate of her deceased husband, nevertheless the administratrix brings the action as such, and collects the money by virtue of her office, with the resulting duty to disburse it, not personally, but officially. Boyd v. Richie (S.C. 1930) 159 S.C. 55, 155 S.E. 844.

4. —— Period of liability, under former Section 21‑13‑30

The obligation of the principal, for which the surety stands bound, begins before he receives a dollar of the estate, for it is his duty to collect the assets; it continues through the administration of his office, and ends only after he shall have made a full and honest accounting and distributed the net assets to those entitled to them. It is to the interest of the beneficiaries of the estate that these obligations of the principal and of the surety be fulfilled. Any action therefore which touches these obligations necessarily “impairs,” certainly “affects,” that interest. Bellinger v. U.S. Fidelity & Guaranty Co. (S.C. 1921) 115 S.C. 469, 106 S.E. 470.

5. —— Judgment against administrator may be shown to be incorrect but not fraudulent, under former Section 21‑13‑30

A decree against an administrator for breach of his official duty is only prima facie evidence and may be shown to be incorrect. Simkins v Cobb, 18 SCL 60 (1830). Trimmier v Trail, 18 SCL 480 (1831). Schnell v Schroder, 8 SC Eq 334 (1831). Ordinary of Charleston Dist. v Condy, 20 SCL 313 (1834). Ordinary v Carlile, 26 SCL 100 (1841). Buckner v Archer, 26 SCL 85 (1841). Norton v Wallace, 30 SCL 507 (1844). Lesly v Osborn, 31 SCL 90 (1845). Thompson v Bailey, 39 SCL 68 (1851). Stewart v McCully, 39 SCL 80 (1851).

But it cannot be shown to be fraudulent. Norton v Wallace, 31 SCL 460 (1845). Boyd v Caldwell, 38 SCL 117 (1850).

6. Under former Section 21‑13‑100

Judge and distributees may unite in action on bond. McCorkle v. Williams (S.C. 1895) 43 S.C. 66, 20 S.E. 744.

7. Under former Section 21‑13‑110

One whose appointment as administrator has been declared invalid cannot charge estate with premium on his bond. In re Youmans’ Estate (S.C. 1932) 165 S.C. 337, 163 S.E. 884. Executors And Administrators 219

**SECTION 62‑3‑607.** Order restraining personal representative.

(a) Upon application of any interested person, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten days or at such other times as the parties may agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the application.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 15, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides that a person who appears to have an interest in an estate may petition the court for an order to restrain a personal representative from performing acts of administration if it appears to the court that the personal representative may take some action which would jeopardize the interest of the applicant or some other interested person. The matter must be set for hearing on the restraining order within ten days or at such other time as the parties may agree. There is also a provision for notice which must be given to the personal representative, his attorney, and to any other parties named defendant in the petition.

The 2010 amendment deleted “On petition” at the beginning of this section and replaced it with “Upon application” so that any person who appears to have an interest in the estate can make application to the probate court to restrain a personal representative. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in Section 62‑1‑201(1).

Effect of Amendment

The 2013 amendment, in subsection (a), substituted “any interested person” for “any person who appears to have an interest in the estate”; and in subsection (b), substituted “application” for “petition” at the end.

CROSS REFERENCES

Restriction upon actions of personal representative after receipt of notice of removal proceedings, except as otherwise ordered under this section, see Section 62‑3‑611.

Library References

Executors and Administrators 74 to 82.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 163 to 164, 166 to 168, 171 to 172.

**SECTION 62‑3‑608.** Termination of appointment.

Termination of appointment of a personal representative occurs as indicated in Sections 62‑3‑609 to 62‑3‑612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this Code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor, and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

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

REPORTER’S COMMENT

“Termination,” as defined by this Section and Sections 62‑3‑609 through 62‑3‑612 provide definiteness respecting when the rights and powers of a personal representative (who may or may not be discharged of duty and liability by court order) terminate. An order of the court entered under Sections 62‑3‑1001 may terminate the appointment of and discharge a personal representative.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

Library References

Executors and Administrators 31 to 36.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 23 to 26, 45 to 47, 88 to 120, 972 to 973.

**SECTION 62‑3‑609.** Death or disability terminates appointment.

The death of a personal representative or the appointment of a conservator or guardian for the person of a personal representative terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

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

REPORTER’S COMMENT

This section deals with the termination of a representative by death or disability. The personal representative of the disabled or deceased representative will sometimes succeed to the duties and powers of the office.

Effect of Amendment

The 2013 amendment substituted “or guardian for the person” for “for the estate”.

Library References

Executors and Administrators 31, 36.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 88, 92, 94, 972 to 973.

NOTES OF DECISIONS

Under former Section 21‑15‑130 1

1. Under former Section 21‑15‑130

The duty expressly imposed upon the probate court under this section [Code 1962 Section 19‑416], in case of the death of an executor or administrator, does not deprive that court of its jurisdiction to appoint an administrator de bonis non, if otherwise proper, whenever a vacancy occurs in the official representation of a decedent’s estate. McNair v. Howle (S.C. 1923) 123 S.C. 252, 116 S.E. 279. Executors And Administrators 37(4)

**SECTION 62‑3‑610.** Order closing estate terminates appointment.

(a) Unless otherwise provided, an order closing an estate as provided in Section 62‑3‑1001 terminates an appointment of a personal representative and relieves the personal representative’s attorney of record of any further duties to the court.

(b) A personal representative may resign his position by filing a written statement of resignation with the court and providing twenty days’ written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him. When the resignation is effective, the personal representative’s attorney of record shall be relieved of any further duties to the court.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 44; 1997 Act No. 152, Section 14; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Under subparagraph (a) a formal closing immediately terminates the authority of a personal representative. Subparagraph (b) allows resignation of a personal representative.

The more informal process for resignation coupled with the comparative ease of securing appointment of a successor, see Sections 62‑3‑613 through 62‑3‑618, infra, facilitates the substitution of personal representatives.

Effect of Amendment

The 2013 amendment, in subsection (a), inserted at the end “and relieves the personal representative’s attorney of record of any further duties to the court”; and in subsection (b) added the last sentence, relating to when the resignation is effective.

CROSS REFERENCES

Contents of application for appointment of personal representative to succeed personal representative who has tendered a resignation, see Section 62‑3‑301.

Provision that appointment, and office of personal representative created thereby, is subject to termination as provided in Sections 62‑3‑608 through 62‑3‑612, but is not subject to retroactive vacation, see Section 62‑3‑307.

Requirement that application for informal appointment be denied if it indicates that a personal representative who has not resigned has previously been appointed, see Section 62‑3‑308.

Library References

Executors and Administrators 33.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 89, 93.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 68, Specific Requirements for Applications of Successor Personal Representatives.

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

**SECTION 62‑3‑611.** Petition for removal; cause; procedure.

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 62‑3‑607, after service of the summons and petition upon the personal representative and receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent’s will directs otherwise, a personal representative appointed at the decedent’s domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

(c) The termination of appointment under this section shall relieve the personal representative’s attorney of record of any further duties to the court.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 16, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section deals with the termination of a personal representative by removal for cause. Any interested person may petition the court for the removal of a representative although notice and hearing are required.

The 2010 amendment added “service of the summons and petition upon the personal representative and” in the fourth sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding to remove a personal representative. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

Effect of Amendment

The 2013 amendment added subsection (c), relating to termination of appointment.

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Provision that appointment, and office of personal representative created thereby, is subject to termination as provided in Sections 62‑3‑608 through 62‑3‑612, but is not subject to retroactive vacation, see Section 62‑3‑307.

Termination of improper appointment of personal representative, pursuant to this section, in formal proceedings concerning appointment, see Section 62‑3‑414.

Library References

Executors and Administrators 35.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 104 to 120.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 84, Proceeding for Appointment.

Forms

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

NOTES OF DECISIONS

In general 1

Removal 2

Under former Section 21‑13‑370 3

Under former Section 21‑13‑390 4

1. In general

Power to remove a personal representative should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration, or fraud. Blackmon v. Weaver (S.C.App. 2005) 366 S.C. 245, 621 S.E.2d 42. Executors And Administrators 35(1)

For purposes of proceeding to remove personal representative, there is a strong deference shown to the personal representative chosen by the testator. Blackmon v. Weaver (S.C.App. 2005) 366 S.C. 245, 621 S.E.2d 42. Executors And Administrators 35(1)

Removal of personal representative was not warranted, although personal representative had ceased talking to one of beneficiaries because of conflict between the two; personal representative had disclosed existence of debt on estate inventory and was in process of obtaining default judgment against debtor, personal representative had not obtained default judgment earlier because it had been difficult to find any attorney to represent estate in that action, and personal representative had allowed beneficiaries on one occasion to walk through testator’s house and take some items. Blackmon v. Weaver (S.C.App. 2005) 366 S.C. 245, 621 S.E.2d 42. Executors And Administrators 35(2); Executors And Administrators 35(8.5)

2. Removal

Trial court had cause to remove testator’s initial personal representatives, who were also trustees for testator’s irrevocable trust, in estate controversy; representatives had sought $5 million in fees for services for a relatively short interval of time and had sold assets from testator’s estate in order to raise funds, a large portion of which went first to pay representatives’ own attorneys’ fees, and there was extreme discord between representatives and other parties involved in controversy. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Executors and Administrators 35(1)

Mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the personal representative; without a showing of fault, the court will not remove a personal representative simply because the parties do not get along. Blackmon v. Weaver (S.C.App. 2005) 366 S.C. 245, 621 S.E.2d 42. Executors And Administrators 35(2)

3. Under former Section 21‑13‑370

Under the provisions of this section [Code 1962 Section 19‑597] and Code 1962 Section 19‑599, a nonresident may be appointed administrator in this State of the estate of a resident of this State. Stubbs v. Ratliff (S.C. 1943) 202 S.C. 67, 24 S.E.2d 127.

The vacancy caused by the discharge of a general administrator authorizes the appointment of an administrator de bonis non. McNair v. Howle (S.C. 1923) 123 S.C. 252, 116 S.E. 279.

A nonresident may be appointed administrator. In re Peele’s Estate (S.C. 1910) 85 S.C. 140, 67 S.E. 135.

4. Under former Section 21‑13‑390

Appointment of nonresident as administrator. Ex parte Peele’s Estate, 85 SC 140, 67 SE 135 (1910). Burkhim v Pinkhussohn, 58 SC 469, 36 SE 908 (1900).

Under the provisions of this section [Code 1962 Section 19‑599] and Code 1962 Section 19‑597, a nonresident may be appointed administrator in this State of the estate of a resident of this State. Stubbs v. Ratliff (S.C. 1943) 202 S.C. 67, 24 S.E.2d 127.

**SECTION 62‑3‑612.** Change of testacy status.

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in Section 62‑3‑401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

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

REPORTER’S COMMENT

This section and Section 62‑3‑401 describe the relationship between formal or informal proceedings. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues in spite of formal or informal probate that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent’s will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent’s will. It is not necessary for the continuing representative to seek a reappointment under the new assumption for Section 62‑3‑703 is broad enough to require him to administer the estate as intestate, or under the later probated will, if either status is established after he was appointed. Under Section 62‑3‑403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

CROSS REFERENCES

Provision that appointment, and office of personal representative created thereby, is subject to termination as provided in Sections 62‑3‑608 through 62‑3‑612, but is not subject to retroactive vacation, see Section 62‑3‑307.

Provision that, in formal testacy proceedings, termination of any previous informal appointment is governed by this section, see Section 62‑3‑409.

Requirement that application for informal appointment be denied if it indicates that a personal representative who has not resigned has previously been appointed, see Section 62‑3‑308.

Library References

Executors and Administrators 31.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 88, 94.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 84, Proceeding for Appointment.

S.C. Jur. Wills Section 116, Scope and Content of Formal Testacy Order.

**SECTION 62‑3‑613.** Successor personal representative.

Parts 3 and 4 of this article [Sections 62‑3‑301 et seq. and Sections 62‑3‑401 et seq.] govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

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

REPORTER’S COMMENT

This section provides that all powers and authority of the initial representative pass to the successor personal representative unless the court provides otherwise.

Library References

Executors and Administrators 23, 37.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 52, 935, 946.

**SECTION 62‑3‑614.** Special administrator; appointment.

A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in Section 62‑3‑609;

(b) for a creditor of the decedent’s estate to institute any proceeding under Section 62‑3‑803; or

(c) to take appropriate actions involving estate assets;

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 15; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 62‑3‑715(19).

Effect of Amendment

The 2013 amendment added subsection (1)(c), relating to appropriate actions involving estate assets.

CROSS REFERENCES

Duty of court upon receipt of application for informal appointment of personal representative other than a special administrator as provided in this section, see Section 62‑3‑307.

Evidence of appointment of executors and administrators, see Section 19‑5‑50.

Provision that, for purposes of Title 62, “special administrator” means a personal representative as described by Sections 62‑3‑614 through 62‑3‑618, see Section 62‑1‑201.

Library References

Executors and Administrators 22.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 951 to 956.

Attorney General’s Opinions

The provisions of Section 19‑402, South Carolina Code of Laws of 1962 (as amended) [Code 1976 Section 21‑15‑20] are mandatory upon a judge of probate and a temporary administrator appointed pursuant to Section 19‑402 [Code 1976 Section 21‑15‑20] does not have the authority to pay the debts or distribute the assets of the intestate’s estate. 1974‑75 Op. Atty Gen, No 4131, p 199.

NOTES OF DECISIONS

Under former Section 21‑15‑20 1

1. Under former Section 21‑15‑20

This statute contains no limitation as to the time in which permanent letters should be granted, and in the meantime gives full authority to the appointee. Norwood v. Atlantic Coast Line R. Co. (S.C. 1943) 203 S.C. 456, 27 S.E.2d 803.

Citation need not be published in order to qualify a person as a holder of temporary letters, since the section specifically provides for appointment without notice. Norwood v. Atlantic Coast Line R. Co. (S.C. 1943) 203 S.C. 456, 27 S.E.2d 803.

**SECTION 62‑3‑615.** Special administrator; who may be appointed.

(a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available and qualified.

(b) In other cases, any proper person may be appointed special administrator.

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

REPORTER’S COMMENT

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

CROSS REFERENCES

Provision that, for purposes of Title 62, “special administrator” means a personal representative as described by Sections 62‑3‑614 through 62‑3‑618, see Section 62‑1‑201.

Library References

Executors and Administrators 22.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 951 to 956.

**SECTION 62‑3‑616.** Special administrator; appointed informally; powers and duties.

A special administrator appointed by the court in informal proceedings pursuant to Section 62‑3‑614(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under this Code necessary to perform his duties.

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

REPORTER’S COMMENT

Duties of the special administrator are provided throughout this particular section, although the power to distribute assets is specifically omitted.

CROSS REFERENCES

Provision that, for purposes of Title 62, “special administrator” means a personal representative as described by Sections 62‑3‑614 through 62‑3‑618, see Section 62‑1‑201.

Library References

Executors and Administrators 22.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 951 to 956.

**SECTION 62‑3‑617.** Special administrator; formal proceedings; powers and duties.

A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts, or on other terms as the court may direct.

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

REPORTER’S COMMENT

In formal proceedings in which a special administrator is appointed, the powers of a special administrator are the same as those of a personal representative except in the instance where the powers are limited by the court.

CROSS REFERENCES

Provision that, for purposes of Title 62, “special administrator” means a personal representative as described by Sections 62‑3‑614 through 62‑3‑618, see Section 62‑1‑201.

Library References

Executors and Administrators 22.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 951 to 956.

**SECTION 62‑3‑618.** Termination of appointment; special administrator.

The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in Sections 62‑3‑608 through 62‑3‑611.

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

REPORTER’S COMMENT

Appointment of a special administrator would terminate according to the provisions of the order of appointment.

CROSS REFERENCES

Provision that, for purposes of Title 62, “special administrator” means a personal representative as described by Sections 62‑3‑614 through 62‑3‑618, see Section 62‑1‑201.

Library References

Executors and Administrators 22.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 951 to 956.

**SECTION 62‑3‑619.** “Executor de son tort” defined.

Any person who obtains, receives, or possesses property of whatever kind, belonging to the decedent, by means of fraud or without paying valuable consideration equivalent to the value of the property, shall be charged and chargeable as executor of his own wrong (executor de son tort) with respect to the goods and debts. The value of the property is charged to the executor de son tort. Likewise, the value of the property shall be deducted from any distribution or payment of any claim or commission to which the executor de son tort is entitled from the estate.

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

REPORTER’S COMMENT

This section defines as an executor de son tort any person who by fraud or without valuable consideration obtains assets of a decedent without appointment as his personal representative, charging him with liability therefor.

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Executors and Administrators 538 to 544.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 989 to 992.

NOTES OF DECISIONS

Under former Section 21‑13‑510 1

1. Under former Section 21‑13‑510

Executor de son tort is chargeable only with assets in hand, not with those not reduced to possession. Administrator of Kinard v Young, 19 SC Eq 247 (1845). Cook v Sanders, 49 SCL 63 (1867).

Executorde son tort may plead plene administravit. Leach v House, 17 SCL 42 (1828). Cook v Sanders, 49 SCL 63 (1867).

One occupying a position of executor de son tort may pay, under this section [Code 1962 Section 19‑611], just debts of an estate and is entitled to deduct the same from a verdict against himself and in favor of the executor. McElveen v Adams, 108 SC 437, 94 SE 733 (1917). Davega v Henry, 31 SC 413, 10 SE 72 (1889).

A mortgagee will be held by virtue of this section [Code 1962 Section 19‑611] as an executor de son tort, who after the death of the mortgagor, seizes the mortgaged property, sells it, and converts the proceeds in excess of the amount of the mortgage. Davega v. Henry (S.C. 1889) 31 S.C. 413, 10 S.E. 72.

A judgment against an executor de son tort cannot be levied on the lands of the testator. Warren v. Raymond (S.C. 1882) 17 S.C. 163. Executors And Administrators 544

A judgment against an executor de son tort does not arrest the statute of limitations. Bolt v. Dawkins (S.C. 1881) 16 S.C. 198.

**SECTION 62‑3‑620.** Order for executor de son tort to account for deceased’s property; decree for damages.

Acting sua sponte or upon the petition of any interested person, the probate judge of the county in which a deceased person was domiciled at the time of his death may order the executor de son tort to account for the property in his possession. Upon a finding that the property has been converted, wasted or otherwise damaged through improper interference, the court may assess damages including attorney’s fees and costs in the amount determined by the court not to exceed the value of the property charged to the executor de son tort.

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

REPORTER’S COMMENT

This section provides that the probate judge may cite before him the executor de son tort and require him to account for the deceased’s property. It also enables the probate judge to enter a decree against the executor de son tort for any property of the deceased that he has wasted or has lost by his illegal interference.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Rights under Section 62‑3‑620 survive death of executor de son tort, see Section 62‑3‑621.

Library References

Executors and Administrators 538 to 544.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 989 to 992.

NOTES OF DECISIONS

Under former Section 21‑13‑520 1

1. Under former Section 21‑13‑520

This section [Code 1962 Section 19‑612] specifically authorized the probate court to order the delivery of not only the records, papers and books but the other personal property or effects of the decedent. Greenfield v. Greenfield (S.C. 1965) 245 S.C. 604, 141 S.E.2d 920.

This section [Code 1962 Section 19‑612] authorizes the entry of a judgment against the executor de son tort for the value of such assets as may have been wasted or lost by the illegal interference, but not for the value of such assets as are still held intact by the executor de son tort. Greenfield v. Greenfield (S.C. 1965) 245 S.C. 604, 141 S.E.2d 920.

The language of this section [Code 1962 Section 19‑612] is clear and reflects an intention by the legislature to authorize the probate court to require an executor de son tort to account for assets not wasted or lost by delivering the same to the administratrix. Greenfield v. Greenfield (S.C. 1965) 245 S.C. 604, 141 S.E.2d 920. Executors And Administrators 540

The fact that the probate court did not interrogate defendants under oath did not deprive it of the power to enter an order against them with respect to all items belonging to decedent which they admittedly had possession of. Greenfield v. Greenfield (S.C. 1965) 245 S.C. 604, 141 S.E.2d 920. Executors And Administrators 540

This section [Code 1962 Section 19‑612] must be construed with Code 1962 Section 19‑611. Haley v. Thames (S.C. 1889) 30 S.C. 270, 9 S.E. 110.

**SECTION 62‑3‑621.** Rights under Section 62‑3‑620 survive death of executor de son tort.

The rights of the probate court and interested parties set forth in Section 62‑3‑620 shall survive the death of the executor de son tort.

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

REPORTER’S COMMENT

This section provides that the estate of an executor de son tort may be liable for the waste or conversion committed by the executor de son tort.

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Executors and Administrators 540, 541.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 991.

Attorney General’s Opinions

Interest remitted because of late payment of estate tax is an expense of administration only when incurred by reason of necessity for the estate (interpreting former Section 21‑13‑530). 1978 Op. Atty Gen, No 78‑185, p 211.

NOTES OF DECISIONS

Under former Section 21‑13‑530 1

1. Under former Section 21‑13‑530

An executor de son tort has all the liabilities, though none of the privileges, that belong to the character of an executor. Quick v. Owens (S.C. 1941) 198 S.C. 29, 15 S.E.2d 837, 137 A.L.R. 201.

Part 7

Duties and Powers of Personal Representatives

**SECTION 62‑3‑701.** Time of accrual of duties and powers.

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named personal representative in a will may protect property of the decedent’s estate and carry out written instructions of the decedent relating to his body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

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

REPORTER’S COMMENT

The authority of a personal representative relates back to death upon appointment and stems from his appointment. The personal representative may ratify acts done by others prior to appointment.

Effect of Amendment

The 2013 amendment substituted “personal representative” for “executor” and inserted “protect property of the decedent’s estate and” in the third sentence.

CROSS REFERENCES

Priority among persons seeking appointment as personal representative, see Section 62‑3‑203.

Library References

Dead Bodies 1.

Executors and Administrators 29, 74 to 82.

Westlaw Topic Nos. 116, 162.

C.J.S. Dead Bodies Sections 1 to 3.

C.J.S. Executors and Administrators Sections 82 to 87, 163 to 164, 166 to 168, 171 to 172.

RESEARCH REFERENCES

Forms

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

**SECTION 62‑3‑702.** Priority among different letters.

A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

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

REPORTER’S COMMENT

This section provides that a person to whom letters are issued has exclusive authority until the appointment is terminated or modified. It also allows the personal representative to recover any property in the hands of a second erroneously appointed representative.

CROSS REFERENCES

Priority among persons seeking appointment as personal representative, see Section 62‑3‑203.

Library References

Executors and Administrators 23.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 52.

**SECTION 62‑3‑703.** General duties; relation and liability to persons interested in estate; standing to sue.

(a) A personal representative is a fiduciary who shall observe the standards of care described by Section 62‑7‑804. A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. Upon expiration of the relevant claim period, an order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative has not received actual notice of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a proceeding for administration under Part 5. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this Code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.

HISTORY: 1986 Act No. 539, Section 1; 2005 Act No. 66, Section 5; 2010 Act No. 244, Section 44, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section is especially important because it states the basic theory underlying the duties and powers of the personal representative. The personal representative is classified as a fiduciary and must adhere to the “prudent person” rule provided for trustees by Section 62‑7‑804. In general the personal representative is required to settle and distribute the estate as fast and efficiently as possible for the best interest of the estate. The section holds the power of distribution as the most significant power the personal representative performs. Finally, the section grants a personal representative the same standing to sue and be sued in the courts of this State and any other jurisdiction as the decedent had immediately prior to his death, except as to proceedings which do not survive the decedent’s death.

The 2010 amendment, in subsection (a), changed the reference from Section 62‑7‑933 to Section 62‑7‑804, which was made necessary by the adoption of the South Carolina Trust Code.

Effect of Amendment

The 2013 amendment, in subsection (a), deleted “applicable to trustees as” before “described by Section 62‑7‑804” in the first sentence; and in the third sentence of subsection (b), inserted “Upon expiration of the relevant claim period,”, and substituted “has not received actual notice” for “is not aware”.

Library References

Executors and Administrators 74 to 114, 420, 427.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 128, 163 to 181, 183 to 263, 278, 706 to 708, 727.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Release Section 10, Persons Released.

Forms

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

South Carolina Legal and Business Forms Section 17:149 , Executors‑Powers‑General Form.

Attorney General’s Opinions

Interest remitted because of late payment of estate tax is an expense of administration only when incurred by reason of necessity for the estate. 1978 Op. Atty Gen, No 78‑185, p 211.

Appraisal forms. Under this section [Code 1962 Section 19‑456], when the decedent owned property in more than one county, separate appraisal forms or appraisements are to be used and the same, when completed, are to be returned to the judge of probate of the county where the will is probated or by whom administration was granted. 1966‑67 Op. Atty Gen, No 2257, p 66.

NOTES OF DECISIONS

In general 3

Sufficiency of evidence 4

Under former Section 21‑15‑340 2

Under former Section 21‑7‑760 1

1. Under former Section 21‑7‑760

This section [Code 1962 Section 19‑265] plainly recognizes the representation by an executor of a beneficiary of a will who is non sui juris. It requires action by a guardian, committee or trustee where such proceedings have not been instituted by some other person. It therefore contemplates that if there is an executor, and he proceeds, there need be no guardian of a minor devisee or legatee. Thompson v. Anderson (S.C. 1946) 208 S.C. 208, 37 S.E.2d 581. Infants 1238(4)

2. Under former Section 21‑15‑340

This section [Code 1962 Section 19‑454] is not applicable to life tenant. A life tenant who is an executrix is not bound to return an inventory of the property held by her in her capacity as life tenant. Brooks v. Brooks (S.C. 1879) 12 S.C. 422. Executors And Administrators 66

3. In general

Under South Carolina law, personal representative of commercial glider pilot was bound by release‑dismissal agreement, under which the pilot released potential civil claims in connection with his arrest after he flew glider over nuclear power facility and circled in nearby area. Cox v. Duke Energy, Inc., 2016, 176 F.Supp.3d 530. Release 27

Estate’s personal representative, who negotiated with and purchased estate beneficiaries’ individually‑owned real property interests, owed them a fiduciary duty to disclose to them that at the same time he was negotiating with the beneficiaries he was negotiating with a third‑party for the sale of the related property, because the negotiations with the third‑party affected the value of the beneficiaries’ interests. Turpin v. Lowther (S.C.App. 2013) 404 S.C. 581, 745 S.E.2d 397, certiorari denied. Executors And Administrators 144

4. Sufficiency of evidence

Evidence was sufficient to support the trial court’s finding that estate’s personal representative breached his fiduciary duty to estate’s beneficiaries when he failed to inform beneficiaries that he was negotiating with a third‑party for the sale of beneficiaries individually‑owned property interests; after distributing the beneficiaries interests to them, the personal representative purchased them back in a personal capacity, while negotiating for their sale to a third‑party based on information he could not have known except by virtue of his position as personal representative. Turpin v. Lowther (S.C.App. 2013) 404 S.C. 581, 745 S.E.2d 397, certiorari denied. Executors And Administrators 144

Evidence was sufficient to support trial court’s finding that the actions of the estate’s personal representative in negotiating with a third‑party for the sale of beneficiaries’ individual property interests without informing the beneficiaries were the proximate cause of beneficiaries’ damages, in action by beneficiaries against personal representative for breach of fiduciary duty; three beneficiaries testified that they relied on representative’s denial of existing contracts when they decided to sell their interests, and two testified they would not have gone along with the sale had they known about the contracts. Turpin v. Lowther (S.C.App. 2013) 404 S.C. 581, 745 S.E.2d 397, certiorari denied. Executors And Administrators 450

Evidence was sufficient to support circuit court’s upward modification of the probate court’s damage award to estate beneficiaries, in action by beneficiaries against estate’s personal representative for breach of fiduciary duty; the correct measure of damages was the amount that would compensate beneficiaries for the loss proximately caused by representative’s failure to disclose his negotiations with a third‑party for the sale of beneficiaries individually‑owned real property interests, and when representative purchased the beneficiaries’ interests in 40‑acre parcel for $511,000, he knew that its true value was $810,000 based on negotiations with a third‑party purchaser. Turpin v. Lowther (S.C.App. 2013) 404 S.C. 581, 745 S.E.2d 397, certiorari denied. Executors And Administrators 453(.5)

**SECTION 62‑3‑704.** Personal representative to proceed with court sanction.

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent’s estate under the supervision of the court, as follows:

(a) Immediately after his appointment he shall publish the notice to creditors required by Section 62‑3‑801.

(b) Within ninety days after his appointment he shall file with the court the inventory and appraisement required by Section 62‑3‑706.

(c) Upon the expiration of the relevant period, as set forth in Section 62‑3‑807, the personal representative shall proceed to allow or disallow claims and pay the claims allowed against the estate, as provided in Section 62‑3‑807.

(d) Upon the expiration of the relevant period, as set forth in Section 62‑3‑1001, the personal representative shall file the accounting, proposal for distribution, petition for settlement of the estate, proofs required by Section 62‑3‑1001, and proof of publication of notice to creditors.

(e) Within the time set forth in Section 62‑3‑806(a), serve upon all claimants a notice stating that their claim has been allowed or disallowed pursuant to that section.

(f) The time periods stated herein for completing the above requirements are not intended to supplant any other time periods stated elsewhere in this Code. The court may on its own motion, or on the motion of the personal representative or of any interested person, extend the time for completing any of the requirements of administration contained in Article 3 [Section 62‑3‑1001, et seq.] including any of the above requirements, and especially including the requirement to account, under Section 62‑3‑1001, in cases of estates which remain significantly unadministered as of the expiration of the relevant time period, either as to the marshalling of assets or as to the allowance of claims.

(g) If a personal representative or trustee neglects or refuses to comply with any provision of Section 62‑3‑706 he is subject to the contempt power of the court. The probate court, after a hearing and any notice the court may require, may issue its order imposing the sentence, fine, or penalty as it sees fit and remove the personal representative and appoint another personal representative.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 26; 1990 Act No. 521, Section 45; 1993 Act No. 181, Section 1608; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section requires the personal representative to proceed expeditiously with the settlement and distribution of the estate. It further provides that the settlement and distribution are under the court’s supervision. Where informal procedures are in effect, the section does not impose any burdens on the personal representative other than those of Part 5 and of any other pertinent provision of Article 3, requiring or permitting such direct court supervision.

Effect of Amendment

The 2013 amendment, in subsection (c), inserted “allow or disallow claims and”; in subsection (d), substituted “accounting” for “account”; added subsection (e), relating to Section 62‑3‑806, and redesignated the remaining subsections accordingly; and rewrote subsection (g).

Library References

Executors and Administrators 62 to 73, 82, 226, 258, 458 to 461.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 152 to 162, 168, 440, 503, 785 to 786.

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 1.1 TD 2, Probate Estate.

NOTES OF DECISIONS

Under former Section 21‑15‑1270 1

1. Under former Section 21‑15‑1270

The terms of a sale must be complied with. Peay v Fleming, 11 SC Eq 97 (1834). Massey v Cureton, 15 SC Eq 181 (1840). Roberts v Adams, 2 SC 337 (1871).

**SECTION 62‑3‑705.** Duty of personal representative; information to heirs and devisees.

Not later than thirty days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs (regardless of whether the decedent died intestate and determined as if the decedent died intestate) and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information must be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information must include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The personal representative’s failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers, or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 46; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section requires the personal representative to inform of his appointment those persons who appear to have an interest in the estate as it is being administered. Such notice must be given within thirty days of his appointment. The notice may be sent through ordinary mail. The notice must include the personal representative’s name and address, indicate that the information is being sent to all those who might have an interest in the estate and whether a bond was required and where the papers relating to the estate are filed. The notice should not be confused with the notice requirements relating to litigation.

Library References

Executors and Administrators 75.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 163 to 164.

RESEARCH REFERENCES

Encyclopedias

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

Forms

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

South Carolina Legal and Business Forms Section 17:149 , Executors‑Powers‑General Form.

**SECTION 62‑3‑706.** Duty of personal representative; inventory and appraisement.

(A) Within ninety days after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall:

(1) prepare an inventory and appraisement of probate property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent’s death, and the type and amount of any encumbrance that may exist with reference to any item;

(2) file the original of the inventory and appraisement with the court; and

(3) mail a copy of the filed inventory and appraisement to interested persons who have filed a demand for notice of the filing of the inventory pursuant to Section 62‑3‑204.

(B) Within ninety days of a demand by an interested person for an inventory of nonprobate property, the personal representative shall:

(1) prepare a list of the property owned by the decedent at the time of his death that is not probate property, so far as is known to the personal representative which may, at the discretion of the personal representative, include the value and nature of the decedent’s interest in the property on the date of the decedent’s death;

(2) mail a copy of the list to each interested person who has requested the list; and

(3) file proof of the mailing with the probate court.

(C) The court, upon application of the personal representative, may extend the time for filing or making either the inventory and appraisement or list of nonprobate property provided for in this section.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 27; 1990 Act No. 521, Section 47; 1993 Act No. 181, Section 1609; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section requires the personal representative within ninety days after his appointment to file an inventory and appraisement listing the fair market value of each probate asset as of the decedent’s date of death. He must list the type and amount of any encumbrances. He is also required to mail copies to interested persons who request it.

The 2013 amendment requires the personal representative to provide a list of nonprobate property to any interested person who claims it. The list of nonprobate property does not have to include information about the value and nature of the property, although the personal representative at his discretion may include information about the value and nature of the property.

The court may upon application extend the time for filing.

Library References

Executors and Administrators 62 to 73.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 152 to 162.

RESEARCH REFERENCES

Forms

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

South Carolina Legal and Business Forms Section 17:149 , Executors‑Powers‑General Form.

Treatises and Practice Aids

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

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1 TD 2, Probate Estate.

Attorney General’s Opinions

There is no apparent basis to conclude that probate court fee is to be computed on all items listed in Recapitulation Section of Form No. 350PC, nor is there apparent basis to conclude that probate court fees be computed on net worth (derived from Recapitulation Section) of estate. To avoid implied repeal of Section 8‑21‑770(a)(1), better course would be to compute probate court fees based on schedules of No. 350PC which are comparable to items (2) and (3) of old Warrant of Appraisement, being Schedules A, B, C, D(1), and F. There appears to be no statute which suggests that encumbrances (which are not listed in above schedules) are to be deducted prior to computing probate court fees. 1990 Op. Atty Gen No. 90‑37.

NOTES OF DECISIONS

In general 1

1. In general

$30,000 in cash found in a safe in the bedroom of a house bequeathed to the appellant would not be included in the bequest of the house “and all contents therein” since (1) as a general rule, the bequest of the contents of a house will not include money found therein at the testator’s death, and (2) throughout the testator’s will and codicil he evinced an intent to equally divide his property between the appellant and the respondent. Matter of Clark (S.C. 1992) 308 S.C. 328, 417 S.E.2d 856.

**SECTION 62‑3‑707.** Employment of appraisers.

The personal representative may obtain a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent’s death of any asset. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser must be indicated on the inventory and appraisement or by supplemental inventory and appraisement with the item or items he appraised. On application of any interested person, the court may require that one or more qualified appraisers be appointed to ascertain the fair market value of all or any part of the estate or may approve one or more qualified appraisers.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 48; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section allows the personal representative to employ expert appraisers and also authorizes the court to require the appointment of expert appraisers upon application by any interested person.

Effect of Amendment

The 2013 amendment, in the first sentence, deleted “the value of which may be subject to reasonable doubt” from the end; in the third sentence, inserted “and appraisement or by supplemental inventory and appraisement”; deleted the prior fourth sentence, relating to execution of the inventory; and in the fourth sentence substituted “On application” for “on motion”.

Library References

Executors and Administrators 67, 109(3).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 157, 237 to 239, 241, 243, 245 to 247, 249 to 250.

Attorney General’s Opinions

Appraisal forms. Under this section [Code 1962 Section 19‑456], when the decedent owned property in more than one county, separate appraisal forms or appraisements are to be used and the same, when completed, are to be returned to the judge of probate of the county where the will is probated or by whom administration was granted. 1966‑67 Op. Atty Gen, No 2257, p 66.

**SECTION 62‑3‑708.** Duty of personal representative; supplementary inventory.

If any property not included in the original inventory and appraisement comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall submit a supplementary, amended or corrected inventory or appraisement showing the market value as of the date of the decedent’s death of the new item or the revised market value or descriptions, the appraisers or other data relied upon, if any, and restating the unchanged information from the original inventory and appraisement and furnish copies to persons who receive the original inventory, and to interested persons who have requested or demanded the new information.

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

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Executors and Administrators 71.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 156.

**SECTION 62‑3‑709.** Duty of personal representative; possession of estate.

Except as otherwise provided by a decedent’s will, every personal representative has a right to, and shall take possession or control of, the decedent’s property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

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

REPORTER’S COMMENT

Section 62‑3‑101 provides that title to real and personal property devolves on death or thereafter to heirs or devisees “subject ... to administration.” Section 62‑3‑711 vests in the personal representative a power over title to real and personal property during administration. This section deals with the personal representative’s duty and right to possess assets, real and personal. It proceeds from the assumption that it is desirable wherever possible to avoid disruption of the possession of the decedent’s assets by his heirs or devisees. But if the personal representative considers it advisable he may take possession and his judgment is made conclusive. It is likely that the personal representative’s judgment could be questioned in a later action but this possibility should not interfere with the personal representative’s administrative authority as it relates to possession of the estate.

CROSS REFERENCES

Devolution of decedent’s personal property to his personal representative for purposes of administration, particularly the exercise of powers of the personal representative under Sections 62‑3‑709 through 62‑3‑711, see Section 62‑3‑101.

Library References

Executors and Administrators 86, 130, 154.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 187 to 201, 282, 325.

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 1.1 TD 2, Probate Estate.

Notes of Decisions

In general 1

1. In general

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

**SECTION 62‑3‑710.** Power to avoid transfers.

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

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

REPORTER’S COMMENT

This section authorizes the personal representative to recover any property transferred by the decedent in a transaction which would be void or voidable against creditors.

CROSS REFERENCES

Devolution of decedent’s personal property to his personal representative for purposes of administration, particularly the exercise of powers of the personal representative under Sections 62‑3‑709 through 62‑3‑711, see Section 62‑3‑101.

Library References

Executors and Administrators 57.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 127, 145, 150 to 151.

**SECTION 62‑3‑711.** Powers of personal representatives; in general.

(a) Until termination of his appointment or unless otherwise provided in Section 62‑3‑910, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. Except as otherwise provided in subsection (b), this power may be exercised without notice, hearing, or order of court.

(b) Except where the will of the decedent authorizes to the contrary, a personal representative may not sell real property of the estate except as authorized pursuant to the procedures described in Sections 62‑3‑911 or Sections 62‑3‑1301 et seq. and shall refrain from selling tangible or intangible personal property of the estate (other than securities regularly traded on national or regional exchanges and produce, grain, fiber, tobacco, or other merchandise of the estate for which market values are readily ascertainable) having an aggregate value of ten thousand dollars or more without prior order of the court which may be issued upon application of the personal representative and after notice or consent as the court deems appropriate.

(c) If the will of a decedent devises real property to a personal representative or authorizes a personal representative to sell real property (the title to which was not devised to the personal representative), then subject to Section 62‑3‑713, the personal representative, acting in trust for the benefit of the creditors and other interested persons in the estate, may execute a deed in favor of a purchaser for value, who takes title to the real property in accordance with the provisions of Section 62‑3‑910(B).

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 28; 2000 Act No. 398, Section 4; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section grants a personal representative the same power over title to property that an absolute owner would have, in trust, however, for the benefit of creditors and others interested in the estate. This power over title is limited in two respects. First, except where the will provides to the contrary, an order from the probate court must be obtained before personal property having an aggregate value in excess of ten thousand dollars may be sold. Secondly, and again except where the will provides to the contrary, the representative cannot exercise the power to sell real property unless he follows the mechanism of Section 62‑3‑911 or Section 62‑3‑1301 et seq.

Under this section, Section 62‑3‑101, and Section 62‑3‑709, title to personal property (as well as real property) devolves at or soon after death to heirs and devisees, and not to the personal representative. Further, the representative can exercise power over the title to real property (as well as personal property) subject to limitations.

Effect of Amendment

The 2013 amendment, in subsection (b), substituted “procedures described in Sections 62‑3‑911 or Sections 62‑3‑1301 et seq.” for “procedure described in Section 62‑3‑1301 et seq.”, substituted “ten thousand dollars” for “five thousand dollars”, and inserted “which may be issued upon application of the personal representative and after notice or consent as the court deems appropriate”; and in subsection (c), substituted “other interested persons” for “others interested”, and substituted “Section 62‑3‑910(B)” for “Section 62‑3‑910(b)”.

CROSS REFERENCES

Application of this section to the conversion of personal property of a residuary estate to cash, see Section 62‑3‑906.

Devolution of decedent’s personal property to his personal representative for purposes of administration, particularly the exercise of powers of the personal representative under Sections 62‑3‑709 through 62‑3‑711, see Section 62‑3‑101.

Transactions authorized for personal representatives, subject to restrictions imposed by this section, see Section 62‑3‑715.

Library References

Executors and Administrators 90 to 112, 136, 157.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 165, 205 to 263, 295 to 321, 329 to 343.

RESEARCH REFERENCES

Encyclopedias

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

Forms

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

South Carolina Legal and Business Forms Section 17:149 , Executors‑Powers‑General Form.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Trust: Sale of Property to a Life Beneficiary. 24 S.C. L. Rev. 691.

Administration of a Will: Conveyances by Executors and Assertions of Title. 24 S.C. L. Rev. 687.

NOTES OF DECISIONS

In general 1

Under former provisions regarding situations in which executors may sell land (Section 21‑15‑1210) 2

Under former provisions requiring court order prior to sale of personal property (Section 21‑15‑1250) 3

1. In general

Bank breached a duty of care owed to co‑lessee of safe deposit box when it opened safe deposit box for second co‑lessee’s personal representatives without providing notice to co‑lessee or the right to be present at the inventory; the lease agreement provided that in the event that the keys to the safe deposit box were lost all lessees were to be present when the box was forcibly opened or drilled, and the bank’s inventory form provided a signature line for a co‑surviving lessee, which implied that the co‑lessee was to be present during any inventory by a personal representative. Duncan v. Little (S.C. 2009) 384 S.C. 420, 682 S.E.2d 788. Warehousemen 45

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)

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)

2. Under former provisions regarding situations in which executors may sell land (Section 21‑15‑1210)

Section does not apply if the power be given to the executors jointly as several persons or in personal confidence; then all must act, and it will not survive. Mallet v Smith, 27 SC Eq 12 (1853). Smith v Winn, 27 SC 591, 4 SE 240 (1887).

Section is remedial and retrospective. Bredenburg v. Bardin (S.C. 1892) 36 S.C. 197, 15 S.E. 372.

Irrespective of this section [Code 1962 Section 19‑511], the power survives to one of several executors where it is coupled with a trust. Bredenburg v. Bardin (S.C. 1892) 36 S.C. 197, 15 S.E. 372.

3. Under former provisions requiring court order prior to sale of personal property (Section 21‑15‑1250)

Choses in action are not embraced in personal property. Rhame v Lewis, 34 SC Eq 269 (1867). Reynolds v Rees, 23 SC 438 (1885). Chapman v Charleston, 30 SC 549, 9 SE 591 (1889).

A will providing for the division of personal property in certain proportions was held by necessary implication to direct the sale by the executor of the personal property, so that an order of sale from the probate court was not necessary under this section [Code 1962 Section 19‑515]. Blackmon v. Blackmon (S.C. 1920) 113 S.C. 478, 101 S.E. 827. Executors And Administrators 158

As to right of probate court to set upset price, see Epperson v. Jackson (S.C. 1909) 83 S.C. 157, 65 S.E. 217.

Under act of 1789 an administrator still had the right to sell without such order. Harth’s Ex’rs v. Heddlestone (S.C. 1801).

Under act of 1824, order to sell became imperative as to personal property. Rhame v. Lewis (S.C. 1867).

Purchaser cannot recover back his money paid on ground of implied warranty. Prescott v. Holmes (S.C. 1854).

The doctrine of implied warranty applies to sales of personal property. Duncan v. Bell (S.C. 1819).

**SECTION 62‑3‑712.** Improper exercise of power; breach of fiduciary duty.

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 62‑3‑713 and 62‑3‑714.

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

REPORTER’S COMMENT

This section provides that the personal representative is liable for his acts and omissions and for any breach of duty to the same extent as the trustee of an express trust. The rights of purchasers and others dealing with the personal representative are governed by the next two sections. Additionally, this section should be read in conjunction with Sections 62‑3‑607 and 62‑3‑611, the first of which deals with an interested party obtaining an order restraining the personal representative from performing a specified act or exercising a specified power and the second of which deals with the right of an interested party to petition for the removal of the personal representative.

Library References

Executors and Administrators 115 to 119.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 264 to 276, 343.

**SECTION 62‑3‑713.** Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions.

Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure unless:

(1) the will or a contract entered into by the decedent expressly authorized the transaction; or

(2) the transaction is approved by the court after notice to interested persons.

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

REPORTER’S COMMENT

This section provides that certain actions of a personal representative are voidable. Exceptions to the general rule are provided in the event the will or a contract entered into by the decedent expressly authorizes the transaction or if the transaction is approved by the probate court after notice to interested parties. Presumptively, a broad authorization in the will of a decedent for his personal representative to deal with himself in both a fiduciary and an individual capacity would not fall under the first exception which is limited to “the transaction” and must, therefore, be held to require authorization for a specific transaction.

The general principles of law pertaining to a bona fide purchaser for value will protect the title to property in the hands of such a purchaser who obtained it without notice of the conflict of interest or act of self‑dealing.

Library References

Executors and Administrators 115, 144, 163.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 264 to 266, 295, 312, 329, 336, 343.

NOTES OF DECISIONS

Under former Section 21‑15‑1290 1

Under former Section 21‑15‑1300 2

1. Under former Section 21‑15‑1290

This section [Code 1962 Section 19‑519] embraces sales of land. Huger v Huger, 30 SC Eq 217 (1856). Cunningham v Cauthen, 37 SC 123, 15 SE 917 (1892).

Applied, as to purchase at highest price, in Anderson v Butler, 31 SC 183, 9 SE 797 (1889). Finch v Finch, 28 SC 164, 5 SE 348 (1888).

2. Under former Section 21‑15‑1300

Where an executor did not give bond and converted proceeds of the sale to his own use, the surety on probate judge’s bond was not liable, as this section [Code 1962 Section 19‑520] imposes a positive duty upon the executor to give bond but contains no language indicating that the probate judge must require it, and under the circumstances of this case there was no duty upon the judge of probate to require the executor to furnish bond. Ballentine v. National Sur. Corp. (S.C. 1955) 228 S.C. 1, 88 S.E.2d 772.

The giving of a bond is not essential to the validity of the purchase. Huger v. Huger (S.C. 1857).

**SECTION 62‑3‑714.** Persons dealing with personal representative; protection.

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of personal representatives under Part 5 [Sections 62‑3‑501 et seq.] which are endorsed on letters as provided in Section 62‑3‑504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

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

REPORTER’S COMMENT

This section is designed to provide protection to persons who deal with a personal representative. Persons dealing with representatives generally are not charged with the duty to inquire into any restrictions pertaining to the exercise of powers by such personal representative. Any person dealing with a representative under Part 5 will be charged with knowledge of the restrictions upon exercise of power set forth in the letters.

For example, a bona fide purchaser for value dealing with a representative will be completely protected with respect to claims by interested parties. However, the personal representative will be liable to persons interested in the estate if his dealings with such bona fide purchaser were inconsistent with directions set forth in the will or other restrictions imposed by order of the probate court. However, if such a purchaser had actual knowledge of any such restrictions, then this section will not provide protection to such purchaser; instead, he is subject to having title to the property acquired from the personal representative declared void upon the petition of some interested party.

Library References

Executors and Administrators 148, 167.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 295, 297, 318, 329, 336, 341, 343.

**SECTION 62‑3‑715.** Transactions authorized for personal representatives; exceptions.

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the restrictions imposed in Section 62‑3‑711(b) and to the priorities stated in Section 62‑3‑902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise, or refuse performance of the decedent’s contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser’s note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

Execution and delivery of a deed pursuant to this subsection affects title to the subject real property to the same extent as execution and delivery of a deed by the personal representative in other cases authorized by this Code;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including monies received from the sale of other assets, in federally insured interest‑bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) subject to the restrictions imposed in Section 62‑3‑711(b), acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing, or erect new party walls or buildings;

(8) satisfy and settle claims and distribute the estate as provided in this Code;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, but not for a term extending beyond the period of administration and, with respect to a lease with option to purchase, subject to the restrictions imposed in Section 62‑3‑711(b);

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) vote stocks or other securities in person or by general or limited proxy;

(12) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(13) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(14) insure the assets of the estate against damage, loss, and liability and himself against liability as to third persons;

(15) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien, or other security interest upon property of another persons, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(16) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(17) sell, or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(18) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(19) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(20) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(21) subject to the restrictions imposed in Section 62‑3‑711(b), sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(22) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will; (ii) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(23) make payment in cash or in kind, or partly in cash and partly in kind, upon any division or distribution of the estate (including the satisfaction of any pecuniary distribution) without regard to the income tax basis of any specific property allocated to any beneficiary and value and appraise any asset and distribute such asset in kind at its appraised value;

(24) with the approval of the probate court or the circuit court, compromise and settle claims and actions for wrongful death, pain and suffering or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State, any state of the United States, the United States, or any foreign country;

(25) donate a qualified conservation easement or fee simple gift of land for conservation on any real property of the decedent in order to obtain the benefit of the estate tax exclusion allowed under Internal Revenue Code Section 2031(c) as defined in Section 12‑6‑40(A), and the state income tax credit allowed under Section 12‑6‑3515, if the personal representative has the written consent of all of the heirs, beneficiaries, and devisees whose interests are affected by the donation. Upon petition of the personal representative, the probate court may consent on behalf of any unborn, unascertained, or incapacitated heirs, beneficiaries, or devisees whose interests are affected by the donation after determining that the donation of the qualified real property interest shall not adversely affect them or would most likely be agreed to by them if they were before the court and capable of consenting. A guardian ad litem must be appointed to represent the interest of any unborn, unascertained, or incapacitated persons. Similarly, and for the same purposes and under the same conditions, mutatis mutandis, a trustee may make such a donation for the settlor;

(26) the personal representative has the power to access the decedent’s files and accounts in electronic format, including the power to obtain the decedent’s user names and passwords.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Sections 29, 30; 1990 Act No; 521, Section 49; 2000 Act No. 283, Section 1(E); 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

The purpose of this section is to grant personal representatives a broad array of powers reasonably necessary for the proper administration of an estate. The purpose of this section is to set forth in some detail the powers which a personal representative may exercise with respect to the estate and without the necessity of obtaining an order from the probate court in order to do so. Note the introductory provision that the representative may exercise his powers, including the power of sale, only within the restrictions of Section 62‑3‑711(b) (see the comments to that section, supra.).

Effect of Amendment

The 2013 amendment added subsection (26) relating to access to electronic files, and made other nonsubstantive changes.

Library References

Executors and Administrators 90 to 113.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 165, 205 to 263.

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 1.1 TD 2, Probate Estate.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Claims Against the Estate; Attorneys’ Fees and Administrators’ Commissions. 24 S.C. L. Rev. 684.

Administration of a Will: Conveyances by Executors and Assertions of Title. 24 S.C. L. Rev. 687.

Administration of a Trust: Sale of Property to a Life Beneficiary. 24 S.C. L. Rev. 691.

Administrator’s Fees. 25 S.C. L. Rev. 505.

Attorney General’s Opinions

The authority of the probate court to authorize or approve compromises is confined to compromises whose effectuation would be within the scope and purposes of this section [Code 1962 Section 19‑482 and former Section 21‑15‑720], and this statute does not preclude the settlement of claims by an administrator or executor without the court’s approval. 1970‑71 Op. Atty Gen, No 3123, p 73.

NOTES OF DECISIONS

Under former Section 21‑15‑720 1

1. Under former Section 21‑15‑720

The action of a probate court in issuing, or of counsel in procuring, an order which, reciting this section [Code 1962 Section 19‑482] as the basis for its issuance, proceeds in the same breath to violate the rights of the beneficiaries under this section [Code 1962 Section 19‑482] by directing that the proceeds of the settlement be used to pay administrator’s claim as a creditor of the estate cannot be condoned. Bailes v. Southern Ry. Co. (S.C. 1955) 227 S.C. 176, 87 S.E.2d 481.

claims under Lord Campbell’s Act “coming into the hands” of the administrator prior to the 1937 amendment, see Ellenberg v. Arthur (S.C. 1936) 178 S.C. 490, 183 S.E. 306, 103 A.L.R. 437.

This section [Code 1962 Section 19‑482] does not apply to debts contracted with an executor or an administrator. Geigers v. Kaigler (S.C. 1877) 9 S.C. 401.

**SECTION 62‑3‑716.** Powers and duties of successor personal representative.

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

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

REPORTER’S COMMENT

This section provides that a successor personal representative has the same powers and duties imposed upon the original personal representative except any such powers or duties which are expressly made personal to the original personal representative named in the will.

Library References

Executors and Administrators 74 to 82, 120.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 163 to 164, 166 to 168, 171 to 172, 941 to 946.

**SECTION 62‑3‑717.** Corepresentatives; when joint action required.

If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate. When a corepresentative has been delegated to act for the others, written notice of the delegation signed by the others and setting forth the duties delegated must be filed with the court. Persons dealing with a corepresentative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the persons with whom they dealt had been the sole personal representative.

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

REPORTER’S COMMENT

This section provides that all corepresentatives are required to unanimously consent to any matter pertaining to the administration and distribution of the estate except when any corepresentative receives and receipts for property due the estate, when an emergency arises and action is necessary in order to preserve the estate or when the corepresentatives have delegated the right to act to one or more of their number.

This section absolves any person dealing with one corepresentative for any excesses committed by such corepresentative in the exercise of his duty to the extent that such person dealing with the corepresentative is unaware that the existence of other corepresentatives or has been advised by such corepresentative that he has the authority to so act. The thrust of this section is to protect such a person dealing with a corepresentative and to eliminate the need for such person to inquire into the validity of the actions taken by such corepresentative. However, the rules pertaining to administration under Part 5 would have the effect of at least requiring a person dealing with a personal representative to determine whether or not the letters granted by the probate court restrict the actions of the representative. That being the case, it would seem that a person exercising due diligence in determining whether or not there is an administration under Part 5 would necessarily come across the fact that more than one representative has been appointed by the probate court to represent the estate. That leads to the inescapable fact that a person dealing with the representative of an estate who exercises due diligence would necessarily come across the existence of additional corepresentatives and would, therefore, not be able to rely upon the protections purportedly granted to him as stated above, unless such corepresentative represents in some fashion that he has the authority to act for all other corepresentatives. See the third sentence of Section 62‑3‑714 in connection with the purchaser’s implicit duty to inquire into the authority of a representative to act on behalf of the estate.

Effect of Amendment

The 2013 amendment inserted “, written notice of the delegation signed by the others and setting forth the duties delegated must be filed with the court” in the third sentence.

Library References

Executors and Administrators 124.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 961 to 962.

**SECTION 62‑3‑718.** Powers of surviving personal representative.

Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated and, if one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office.

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

REPORTER’S COMMENT

This section merely provides that remaining corepresentatives will have full authority to act if one or more of their number loses the capacity to so act by reason of death or other termination of appointment as a personal representative.

Library References

Executors and Administrators 127.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 961, 971.

**SECTION 62‑3‑719.** Compensation of personal representative.

(a) Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser. The minimum commission payable is fifty dollars, regardless of the value of the personal property of the estate.

(b) Additionally, a personal representative may receive not more than five percent of the income earned by the probate estate in which he acts as fiduciary. No such additional commission is payable by an estate if the probate judge determines that a personal representative has acted unreasonably in the accomplishment of the assigned duties, or that unreasonable delay has been encountered.

(c) The provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or where the will otherwise directs, or where the personal representative qualified to act before June 28, 1984.

(d) A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

(e) If more than one personal representative is serving an estate, the court in its discretion shall apportion the compensation among the personal representatives, but the total compensation for all personal representatives of an estate must not exceed the maximum compensation allowable under subsections (a) and (b) for an estate with a sole personal representative.

(f) For purposes of this section, “probate estate” means the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy. This subsection is intended to be declaratory of the law and governs the compensation of personal representatives currently serving and personal representatives serving at a later time.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 50; 1997 Act No. 152, Section 16; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Unless provided otherwise by contract, by the will or by the personal representative’s renunciation, his compensation is limited to sums equal to five percent of personal property and five percent of sold real property, in the normal course, plus five percent of income on invested monies, unless the probate court disapproves. The probate court may set fees for less than the stated limits. The probate court may set fees higher than the stated limits if the court determines the personal representative provided extraordinary service.

Library References

Executors and Administrators 488 to 501.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 252, 812 to 841.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney and Client Section 4, Unauthorized Practice of Law.

Forms

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

LAW REVIEW AND JOURNAL COMMENTARIES

Administrator’s Fees. 25 S.C. L. Rev. 505.

Attorney General’s Opinions

An executor or administrator is not entitled to commissions on money he pays to himself, in accordance with the terms of a will, or due to him as a creditor of the estate. 1962‑63 Op. Atty Gen, No 1602, p 183.

Commission on interest income. The ten percent commission provision is applicable only to interest, not to other types of income received by an executor or administrator such as dividends from investments. 1965‑66 Op. Atty Gen, No 2128, p 248.

An executor or an administrator is entitled only to a maximum ten percent commission on interest derived from a mortgage loan made by him on an annual collection and reinvestment basis. 1965‑66 Op. Atty Gen, No 2128, p 248.

NOTES OF DECISIONS

In general 1

Amount of compensation, under former Section 21‑15‑1450 (“commissions”) 4

Excess or extra compensation, under former Section 21‑15‑1450 (“commissions”) 5

Particular applications, excess or extra compensation, under former Section 21‑15‑1450 (“commissions”) 6

Requirement that executor or administrator actually “receive” assets, under former Section 21‑15‑1450 (“commissions”) 3

Under former Section 21‑15‑1450 (“Commissions”) 2‑6

Amount of compensation 4

Excess or extra compensation 5

Particular applications, excess or extra compensation 6

Requirement that executor or administrator actually “receive” assets 3

Under former Section 21‑15‑1460 (“Action by representatives for additional compensation”) 7

Under former Section 21‑15‑1470 (“Commission shall be divided according to service”) 8

1. In general

Appropriate relief, for conduct of testator’s nonlawyer neighbor in engaging in unauthorized practice of law by drafting testator’s will, which will named neighbor as personal representative of testator’s estate, was to prohibit neighbor from receiving a statutory compensation for his service as personal representative, and to require him to disgorge any compensation he had received. Franklin v. Chavis (S.C. 2007) 371 S.C. 527, 640 S.E.2d 873, 27 Fiduc.Rep.2d 201. Wills 405

2. Under former Section 21‑15‑1450 (“Commissions”)

An executor after entering on his duties has a claim against estate based on legal consideration, although at the testator’s death no such claim exists. In re Norris’ Estate (S.C. 1929) 153 S.C. 203, 150 S.E. 693. Executors And Administrators 219

Commissions bequeathed an executor constitute “compensation” for services, and not a “gift.” In re Norris’ Estate (S.C. 1929) 153 S.C. 203, 150 S.E. 693. Executors And Administrators 490

An administrator is not entitled to commissions on an estate bequeathed to him. Ex parte Hilton (S.C. 1902) 64 S.C. 201, 41 S.E. 978, 92 Am.St.Rep. 800.

3. —— Requirement that executor or administrator actually “receive” assets

The court has steadfastly adhered to an exact definition of the word “receive” and has denied unto fiduciary any commissions upon a fund unless it could fairly be said that such fiduciary had himself actually “received” into his possession funds of the estate. Spartanburg County v Arthur, 180 SC 81, 185 SE 486 (1936). Re Estate of Ouzts, 245 SC 150, 139 SE2d 465 (1964).

Executors and administrators must actually receive and handle money in order to justify an allowance of the statutory commissions. (Construing this section [Code 1962‑Section 19‑534] as it appeared in the 1942 Code). Anderson v. Bowers, 1954, 117 F.Supp. 884.

Whether the assets of an estate be money, or other personal property, before an executor or an administrator is entitled to commissions, he must actually receive the money or other personal property, and pay away the money or distribute the personal assets in kind. In re Ouzts’ Estate (S.C. 1964) 245 S.C. 150, 139 S.E.2d 465. Executors And Administrators 495(1)

In Ball v Brown, (8 SC Eq) 374 (1831), it was held that “executors are not entitled to commissions on the proceeds of land sold by the master, under a decree against them, for foreclosure of a mortgage executed by their testator, where the land was bid off by the mortgagee for less than his debt, and the payment was effected by his giving credit for the amount of his bid.” Spartanburg County v. Arthur (S.C. 1936) 180 S.C. 81, 185 S.E. 486.

4. —— Amount of compensation

A will directing that the executor and trustee as compensation for his services should receive two and one‑half per cent on all the property of the estate received by him, and two and one‑half per cent on all the principal and income collected, and two and one‑half per cent on all moneys paid out, manifested the testator’s intention that the executor should be entitled to a straight two and one‑half per cent commission on everything received and collected and a straight two and one‑half per cent on everything disbursed, figuring on the same basis as that provided in this section [Code 1962 Section 19‑534], and that the executor was not entitled to charge two commissions on receipts and collections. Re Norris’ Estate, 153 SC 203, 150 SE 693 (1929). Cunningham v Cunningham, 81 SC 506, 62 SE 845 (1908).

5. —— Excess or extra compensation

An order of the probate court attempting to allow commissions in excess of the maximum allowable commissions is a nullity and void, and may be disregarded whenever it is encountered. Anderson v. Bowers, 1954, 117 F.Supp. 884.

A probate court could have, if necessary, appointed an administrator de bonis non to collect the assets of an estate by asserting the illegality of the payment of excess commissions to the executrix, although she had been discharged. Anderson v. Bowers, 1954, 117 F.Supp. 884.

If an executor or administrator desires additional compensation for extraordinary service, jurisdiction is vested exclusively in the court of common pleas. Anderson v. Bowers, 1954, 117 F.Supp. 884.

Under this section [Code 1962 Section 19‑534] and Code 1962 Section 19‑535, in no case can the extra compensation exceed an amount equal to the commissions allowable. Anderson v. Silcox (S.C. 1908) 82 S.C. 109, 63 S.E. 128.

6. —— Particular applications, excess or extra compensation

Probate court properly reduced compensation of personal representative of estate for administering and settling estate from the $93,775 requested to $51,300; requested amount of $93,775 would have totaled 21 percent of estate’s value, which was far beyond statutorily mandated five percent, and $51,300 was ten percent of estate’s value and reasonable. Matter of Estate of Kay (S.C.App. 2016) 418 S.C. 400, 792 S.E.2d 907. Executors and Administrators 496(1)

Personal representative of decedent’s estate did not act in bad faith in administration of estate, and thus awarding personal representative a fee equivalent to ten percent of the estate’s value was reasonable compensation; while representative could have settled estate in timelier and less costly manner, he presented substantiated evidence that he worked diligently over three years to accommodate all interested parties, and representative consulted with legal counsel on proper courses of action in administering estate. Matter of Estate of Kay (S.C.App. 2016) 418 S.C. 400, 792 S.E.2d 907. Attorney And Client 155

The executor was only entitled to a commission on the surplus left after stocks held by a broker on a margin account for the testator had been sold and the margin indebtedness paid by the broker, since such surplus was all that the executor received to distribute. In re Ouzts’ Estate (S.C. 1964) 245 S.C. 150, 139 S.E.2d 465.

Where the guardian has been discharged, and is sued on his bond by the judge of probate, he cannot deduct commissions from a judgment in favor of the judges under this section [Code 1962 Section 19‑534] allowing commissions for money paid away in credits, debits, legacies, or otherwise during the course and continuance of their managements. Smith v. Moore (S.C. 1917) 109 S.C. 196, 95 S.E. 351. Guardian And Ward 182(1)

An administrator was held not entitled to a commission on the amounts received and paid out in the management, under order of the court, of a tannery belonging to the estate. Jones v. Jones (S.C. 1893) 39 S.C. 247, 17 S.E. 587, rehearing denied 39 S.C. 247, 17 S.E. 802.

7. Under former Section 21‑15‑1460 (“Action by representatives for additional compensation”)

If an executor or administrator desires additional compensation for extraordinary service, jurisdiction is vested exclusively in the court of common pleas. Anderson v. Bowers, 1954, 117 F.Supp. 884.

8. Under former Section 21‑15‑1470 (“Commission shall be divided according to service”)

Where one of two executors performs all the services, he is entitled to all the commissions. Ex parte Hilton (S.C. 1902) 64 S.C. 201, 41 S.E. 978, 92 Am.St.Rep. 800. Executors And Administrators 498

**SECTION 62‑3‑720.** Expenses in estate litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys’ fees incurred.

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

REPORTER’S COMMENT

If any personal representative in good faith prosecutes or defends an action, he is entitled to reimbursement from the estate for reasonable expenses as well as reasonable attorney fees.

Library References

Executors and Administrators 111, 485.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 237, 239, 251 to 263, 811.

RESEARCH REFERENCES

Encyclopedias

19 Am. Jur. Trials 1, Actions by or Against a Decedent’s Estate.

Treatises and Practice Aids

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

NOTES OF DECISIONS

In general 1

1. In general

Probate court properly denied request by personal representative of decedent’s estate for his counsel’s attorney fees, expert witness fees, and certain costs of time and preparation on petition for settlement; representative’s counsel fees primarily stemmed from contest between representative and decedent’s sisters, who were also beneficiaries of estate, over amount of his compensation, and, thus, were properly assessed against representative in his individual capacity, attorney fees and costs incurred as part of representative’s administration of estate were properly borne by estate, and probate court properly considered nature of testimony and role of other witnesses in choosing which fees to assess against estate and against representative. Matter of Estate of Kay (S.C.App. 2016) 418 S.C. 400, 792 S.E.2d 907. Implied And Constructive Contracts 11

Estate funds can be used to defend against a will contest alleging undue influence. Franklin v. Chavis (S.C. 2007) 371 S.C. 527, 640 S.E.2d 873, 27 Fiduc.Rep.2d 201. Wills 405

**SECTION 62‑3‑721.** Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.

(a) After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [Sections 62‑3‑501 et seq.], the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

(b) Upon the settlement of their accounts by personal representatives the court shall allow each appraiser appointed by the court a reasonable daily fee for each day spent on appraising the property of the estate and also mileage at the same rate that members of state boards, commissions, and committees receive for each mile actually traveled in going to and from the place where the property ordered to be appraised is situated. In determining the reasonableness of the fee to each appraiser the court shall consider the value of the estate, the actual time consumed by the appraisers in the performance of their duties, and other such circumstances and conditions surrounding the appraisal as the court deems appropriate.

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

REPORTER’S COMMENT

This section allows a personal representative to seek prior approval of the probate court before an agent or advisor is hired.

Library References

Executors and Administrators 458 to 487.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 785 to 786, 795 to 811.

RESEARCH REFERENCES

Encyclopedias

19 Am. Jur. Trials 1, Actions by or Against a Decedent’s Estate.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Claims Against the Estate; Attorneys’ Fees and Administrators’ Commissions. 24 S.C. L. Rev. 684.

Administrator’s Fees. 25 S.C. L. Rev. 505.

Notes of Decisions

Construction and application 1

1. Construction and application

Failure by decedent’s sisters, who were beneficiaries of estate, to file petition contesting entitlement of personal representative of estate to compensation did not deprive representative of reasonable notice and opportunity to be heard as required by due process; parties were aware of issues that would be brought before probate court at petition for settlement, including sisters’ disagreement with representative’s compensation, any purported defects in notice were waived at hearing when parties acknowledged issues before court and proceeded with hearing, and, based on length of hearing and exhibits and documentation submitted to probate court, representative had ample notice and opportunity to be heard. Matter of Estate of Kay (S.C.App. 2016) 418 S.C. 400, 792 S.E.2d 907. Executors And Administrators 496(1)

Probate court properly denied request by personal representative of decedent’s estate for his counsel’s attorney fees, expert witness fees, and certain costs of time and preparation on petition for settlement; representative’s counsel fees primarily stemmed from contest between representative and decedent’s sisters, who were also beneficiaries of estate, over amount of his compensation, and, thus, were properly assessed against representative in his individual capacity, attorney fees and costs incurred as part of representative’s administration of estate were properly borne by estate, and probate court properly considered nature of testimony and role of other witnesses in choosing which fees to assess against estate and against representative. Matter of Estate of Kay (S.C.App. 2016) 418 S.C. 400, 792 S.E.2d 907. Implied And Constructive Contracts 11

Part 8

Creditors’ Claims

**SECTION 62‑3‑801.** Notice to creditors.

(a) Unless notice has already been given under this section, a personal representative upon his appointment must publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within one year of the decedent’s death, or within sixty days from the mailing or other delivery of such notice, whichever is earlier, or be forever barred. Written notice is the notice described in (a) above or a similar notice.

(c) The personal representative is not liable to any creditor or to any successor of the decedent for giving or failing to give notice under this section.

(d) Notwithstanding subsections (a) and (b), notice to creditors under this section is not required if a personal representative is not appointed to administer the decedent’s estate during the one year period following the death of the decedent.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 31; 1990 Act No. 521, Section 51; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides for the publication of notice and for the delivery of notice to creditors at the discretion of the personal representative. The notice is published once a week for three successive weeks in a paper of general circulation in the county. There is no requirement that demands be duly attested.

Effect of Amendment

The 2013 amendment, in subsection (a), substituted “must publish” for “shall publish”; in subsection (b), substituted “within one year of the decedent’s death” for “within eight months from of the published notice as provided in (a) above,”, and substituted “whichever is earlier” for “whichever is later”; and added subsection (d), relating to when notice is not required.

CROSS REFERENCES

Provision authorizing personal representative to disburse and distribute small estate without giving notice to creditors, see Section 62‑3‑1203.

Time limits on presentation of claims against decedent’s estate, see Section 62‑3‑803.

When personal representative must publish the notice to creditors required by this section, see Section 62‑3‑704.

Library References

Executors and Administrators 226.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 440.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Mental Health Section 38, Cost of Inpatient Care‑ Claim.

Forms

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

Attorney General’s Opinions

Absent amendment of notice statutes requiring notice in a newspaper of general circulation by the General Assembly, the term newspaper of general circulation cannot be extended to include online newspapers. S.C. Op.Atty.Gen. (October 21, 2015) 2015 WL 6745997.

NOTES OF DECISIONS

Limitations of actions 2

Under former Section 62‑15‑630 1

1. Under former Section 62‑15‑630

Twelve months is sufficient time in the absence of a special difficulty. Lowman v Lowman, 69 SC 543, 48 SE 536 (1904). Galloway v Galloway, 76 SC 524, 57 SE 528 (1907).

As a general rule, an administrator is chargeable with interest from the beginning of the year succeeding that in which he received his appointment. It is also a general rule that all funds received during the current year are to be regarded as unproductive until the end thereof, and all expenditures made during the course of the year should be regarded as made before the balance is struck that is to bear interest. Pettus v Clawson, 25 SC Eq 92 (1851). Tompkins v Tompkins, 18 SC 1 (1882). Oswald v Givens, 12 SC Eq 38 (1837). Nicholson v Whitlock, 57 SC 36, 35 SE 412 (1900).

Failure of creditor to comply with section. The statutes requiring the representatives of an estate to give notice to creditors are designed for the personal protection of executors and administrators, and do not bar a creditor who fails to comply with the statutes from enforcing his claims against the persons into whose possession the assets of the estate have come. Dubuque Fire & Marine Ins. Co. v. Wilson (C.A.4 (S.C.) 1954) 213 F.2d 115. Descent And Distribution 140; Wills 847(2)

In an action by a grain corporation against a defendant, in her capacity as executrix of her husband’s estate, to recover rent due under a grain elevator lease, the obligation of the lease was not subject to the filing and nonclaim provisions of Sections 21‑15‑630 and 21‑15‑640, since the lease was executed after the husband’s death and was, therefore, not a debt due from the deceased. Carolina Eastern Grain Corp. v. Houck (S.C.App. 1985) 284 S.C. 224, 325 S.E.2d 75.

Where a debt was to be payable “from my estate” the administrators could not be required to pay it out of the estate within one year from the date of their qualification, under this section [Code 1962 Section 19‑473], and therefore interest would not begin to run until the expiration of the administrative year. Aiken v. Welch (S.C. 1944) 204 S.C. 180, 28 S.E.2d 806. Executors And Administrators 267

After the twelve‑month period has elapsed, it is presumed that the administrator has ascertained the debts due from the deceased. Willis v. Tozer (S.C. 1895) 44 S.C. 1, 21 S.E. 617.

2. Limitations of actions

Discovery rule did not apply to nonclaim statute, which set time limitations on presentation of claims against decedent’s estate, and because creditor filed her statements of claim more than nine months after the first publication of notice, her claims were barred by nonclaim statute, which held that creditors who were not given actual notice had to present their claims within eight months after the date of the first publication. Phillips v. Quick (S.C.App. 2012) 399 S.C. 226, 731 S.E.2d 327. Executors and Administrators 225(1)

**SECTION 62‑3‑802.** Statutes of limitations.

(a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent’s death shall be allowed or paid.

(b) The running of any statute of limitations measured from some other event than death or the giving of notice to creditors is suspended during the eight months following the decedent’s death but resumes thereafter as to claims not barred pursuant to the sections which follow.

(c) For purposes of any statute of limitations, the proper presentation of a claim under Section 62‑3‑804 is equivalent to commencement of a proceeding on the claim.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 32; 1990 Act No. 521, Section 52; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides for waiver of and the suspension of the running of any statute of limitations, measured from some event other than death and notice to creditors, during the eight months following the decedent’s death, resuming thereafter.

CROSS REFERENCES

Actions for death by wrongful act, see Sections 15‑51‑10 et seq.

Library References

Executors and Administrators 225.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 426 to 435.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 68, Death of a Person Liable.

LAW REVIEW AND JOURNAL COMMENTARIES

Limitation of Actions. 25 S.C. L. Rev. 437.

The Statute of Limitations and the Doctrine of “Relation Back.” 22 S.C. L. Rev. 607.

NOTES OF DECISIONS

Under former Section 21‑3‑70 1

1. Under former Section 21‑3‑70

This section [Code 1962 Section 10‑107] applies only to cases where the statute commenced to run in the lifetime of decedent and the statutory period expired before administration. Strain v Babb, 30 SC 342, 9 SE 271 (1889). Gaston v Gaston, 80 SC 157, 61 SE 393 (1908). Foggette v Gaffney, 33 SC 303, 12 SE 260 (1890).

Where the statutory period has not expired before administration, under Code 1962 Section 19‑554, protecting an administrator or executor from suit for twelve months, that time must be added to the statutory period. Cleveland v Mills, 9 SC 430 (1878). Hayes v Clinkscales, 9 SC 441 (1878). Moore v Smith, 29 SC 254, 7 SE 485 (1888).

**SECTION 62‑3‑803.** Limitations on presentation of claims.

(a) All claims against a decedent’s estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent’s heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following:

(1) one year after the decedent’s death; or

(2) the time provided by Section 62‑3‑801(b) for creditors who are given actual notice, and within the time provided in Section 62‑3‑801(a) for all creditors barred by publication.

(b) A claim described in subsection (a) which is barred by the nonclaim statute of the decedent’s domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent’s estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative within eight months after performance by the personal representative is due; or

(2) any other claim, within the later of eight months after it arises, or the time specified in subsection (a)(1).

(d) Nothing in this section shall be construed as placing a limitation on the time for:

(1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate;

(2) to the limits of the insurance protection only, commencing a proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(3) collecting compensation for services rendered to the estate or reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 33; 1990 Act No. 521, Section 53; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Under this section, claims encompass those that are due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis. The claims are then divided into those which arose before the death of the decedent and those which arise at or after the death of the decedent.

Claims arising before death, unless barred by other statutes of limitation, are barred unless presented as follows: (1) for those creditors not barred by publication within the earlier of one year following date of death or sixty days from any actual notice; and (2) for those creditors barred by publication within the earlier of one year from date of death or eight months from any publication. Also, if a claim is barred by the nonclaim statute of the decedent’s domicile before the first publication for claims in this State, it is also barred in this State.

Claims arising at or after death must be presented as follows: (1) if against the personal representative, within eight months after his performance is due; (2) otherwise, within eight months after the claim arises.

The limitations of Section 62‑3‑803 do not apply to proceedings to enforce mortgages, pledges, or other liens upon property of the estate, or proceedings to establish liability of the decedent or the personal representative for which there is liability insurance.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Actions for death by wrongful act, see Sections 15‑51‑10 et seq.

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

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Manner of presentation of claims, see Section 62‑3‑804.

Notice of disallowance of claims presented within the time limit prescribed in this section, see Section 62‑3‑806.

Payment of claims upon expiration of time limitation provided in this section, see Section 62‑3‑807.

Library References

Executors and Administrators 225.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 426 to 435.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

S.C. Jur. Wills Section 32, Generally; Requirements for Contract’s Validity‑Statutory Requirement of Written Contract.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.3, Creditors of Donor.

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1, Probate Estate.

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1 TD 2, Probate Estate.

LAW REVIEW AND JOURNAL COMMENTARIES

1982 Survey: Property; decedents’ estates. 35 S.C. L. Rev. 127 (Autumn 1983).

Attorney General’s Opinions

This section [Code 1962 Section 19‑474] constitutes an effective nonclaim statute and thereby bars all claims against the estate that are not timely filed. 1963‑64 Op. Atty Gen, No 1777, p 296.

NOTES OF DECISIONS

In general 2

Actions to which section applies, under former Section 21‑15‑1640 8

Addition of time limits to statute of limitations, under former Section 21‑15‑1640 7

Construction with other laws 1.6

Partial payment 3

Under former Section 21‑15‑1640 6‑8

In general 6

Actions to which section applies 8

Addition of time limits to statute of limitations 7

Under former Section 21‑15‑640 4

Under former Section 21‑15‑650 5

Validity 1

1. Validity

Section 62‑3‑803(c)(2), which allows liability claims against an estate otherwise disallowed by the nonclaim sections of the statute to the extent that the decedent was protected by liability insurance, does not violate the equal protection clauses of the state and federal constitutions. The classification at issue ‑ deceased tortfeasors with liability coverage at the time the alleged tort was committed ‑ is reasonably related to the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations while protecting the distributed assets of the tortfeasor’s estate. Similarly situated tortfeasors are treated equally since a claim against liability insurance may be asserted whether the tortfeasor is subsequently deceased or merely terminated insurance coverage after the time of the alleged tort. Ex parte Estate of Evans (S.C. 1989) 299 S.C. 366, 384 S.E.2d 748, certiorari denied 110 S.Ct. 1137, 493 U.S. 1081, 107 L.Ed.2d 1042.

1.6. Construction with other laws

Discovery rule did not apply to nonclaim statute, which set time limitations on presentation of claims against decedent’s estate, and because creditor filed her statements of claim more than nine months after the first publication of notice, her claims were barred by nonclaim statute, which held that creditors who were not given actual notice had to present their claims within eight months after the date of the first publication. Phillips v. Quick (S.C.App. 2012) 399 S.C. 226, 731 S.E.2d 327. Executors and Administrators 225(1)

2. In general

Even though a decision in favor of decedent’s estate on bank’s action to collect a deficiency judgment may have appeared inequitable, equitable considerations are not a factor in a claims‑barring analysis, and thus, neither the estate’s representative’s actions in continuing to make payments on the note after his mother’s death, or in defaulting in the foreclosure proceedings could override or eliminate the requirements of the nonclaim statute. In re Estate of Hover (S.C. 2014) 407 S.C. 194, 754 S.E.2d 875. Executors and Administrators 224

The entry of a deficiency judgment against decedent’s estate in foreclosure proceeding could not override or eliminate the mandatory provisions of the probate code’s nonclaim statute, and therefore, the entry of the deficiency judgment merely constituted a valid debt against the estate that must also have been presented within the time limits of the nonclaim statute. In re Estate of Hover (S.C. 2014) 407 S.C. 194, 754 S.E.2d 875. Executors and Administrators 225(1)

Although a deficiency judgment was entered in a foreclosure proceeding after the probate code’s claims‑filing time limits and arguably arose after the decedent’s death, it did not toll the time limits of the nonclaim statute, as the claim that formed the basis of the deficiency judgment arose long before the deficiency judgment was entered; because bank pursued foreclosure proceedings, its right of recovery was limited to the sale of the real estate unless it timely filed a claim in probate court to recover any potential deficiency. In re Estate of Hover (S.C. 2014) 407 S.C. 194, 754 S.E.2d 875. Executors and Administrators 225(2)

The Probate Code’s nonclaim statute is not a general statute of limitations as the two statutes are fundamentally and operationally distinct. In re Estate of Hover (S.C. 2014) 407 S.C. 194, 754 S.E.2d 875. Executors and Administrators 225(1)

Under a liberal construction of Section 62‑3‑804, the bill of a creditor mailed to the personal representative through the creditor’s attorney constituted a presentation of its claim against the estate within the meaning of the statute where the bill included the basis for the claim (medical services rendered), the amount of the claim, and the name and address of the claimant; simply because the creditor later filed a written statement of its claim with the probate court on the prescribed form did not mean the earlier mailed bill was ineffective. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611.

Section 62‑3‑803 is a nonclaim statute; thus, unless the statute is complied with, the creditor’s claim is barred. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611.

3. Partial payment

The probate court erred in ordering partial payment of a creditor’s claim where the estate merely challenged the timeliness of the claim and not the amount; under such circumstances, the probate court may only allow a claim in full or not at all. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611.

4. Under former Section 21‑15‑640

This section [Code 1962 Section 19‑474] is designed for the personal protection of the executor, and does not bar a creditor who fails to comply with the statute from enforcing his claim against the distributees of the estate. Muckenfuss v Marchant, 105 F2d 469 (1939, CA4 SC). Dubuque Fire & Marine Ins. Co. v Wilson, 213 F 2d 115 (1954, CA4 SC).

Claims against widow in her capacity as executrix of estate of her husband are barred by creditor’s failure to file statement of debts within 5 months. Federal Deposit Ins. Corp. v. Fagan (C.A.4 (S.C.) 1982) 674 F.2d 302. Executors And Administrators 225(1)

The primary source to which a creditor of an estate must look for payment is the personal estate of the deceased in the hands of his personal representative; but after the distribution of the estate a creditor who has failed to file his claim may collect from the heirs or distributees of the estate to the extent that they have received assets therefrom. Dubuque Fire & Marine Ins. Co. v. Wilson (C.A.4 (S.C.) 1954) 213 F.2d 115.

Even though plaintiff failed to file claim with executrix within five months after she published notice for creditors to render accounts, Code 1976 Section 21‑15‑640 did not extinguish claim against estate assets that were distributed or available for distribution. Federal Deposit Ins. Corp. v. Fagan (D.C.S.C. 1978) 459 F.Supp. 933.

In light of a controlling Court of Appeals decision, a claim by a creditor against the sole distributee of an estate was not extinguished, even though it was conceded that plaintiff’s predecessor in interest had failed to file a timely claim with the executrix; defendant’s motion for summary judgment would therefore be denied. Federal Deposit Ins. Corp. v. Fagan (D.C.S.C. 1978) 459 F.Supp. 933.

In an action by a grain corporation against a defendant, in her capacity as executrix of her husband’s estate, to recover rent due under a grain elevator lease, the obligation of the lease was not subject to the filing and nonclaim provisions of Sections 21‑15‑630 and 21‑15‑640 since the lease was executed after the husband’s death and was therefore, not a debt due from the deceased. Carolina Eastern Grain Corp. v. Houck (S.C.App. 1985) 284 S.C. 224, 325 S.E.2d 75.

Section 21‑15‑640 is nonclaim statute which bars all claims which are not timely filed against estate, including assets distributed to beneficiaries of estate. A. McCoy’s, Inc. v. Garner (S.C.App. 1984) 281 S.C. 378, 315 S.E.2d 812.

Code Section 21‑15‑640 applies to tort claims as well as to liquidated claims of creditors. Moultis v. Degen (S.C. 1983) 279 S.C. 1, 301 S.E.2d 554.

Claim against estate is barred if not duly attested to as required by this section. Southern Coatings & Chemical Co., Inc. v. Belcher (S.C. 1979) 274 S.C. 76, 261 S.E.2d 162. Executors And Administrators 227(3)

This section [Code 1962 Section 19‑474] and Code 1962 Section 19‑473 relate to debts payable from the estate, and do not apply to action by cestui que trust against distributee individually for recovery of trust funds in hands of decedent at time of death. Wallace v. Timmons (S.C. 1958) 232 S.C. 311, 101 S.E.2d 844.

5. Under former Section 21‑15‑650

This section [Code 1962 Section 19‑475] is designed for the personal protection of the executor, and does not bar a creditor who fails to comply with the statute from enforcing his claim against the distributees of the estate. Muckenfuss v Marchant, 105 F2d 469 (1939, CA4 SC). Dubuque Fire & Marine Ins. Co. v Wilson, 213 F2d 115 (1954, CA4 SC).

A claim not filed within the statutory period is not barred by this section [Code 1962 Section 19‑475], and the claimant may reach available assets for the satisfaction of his demands, unless such claim be otherwise barred. Columbia Theological Seminary v. Arnette (S.C. 1932) 168 S.C. 272, 167 S.E. 465.

The object of this statute is to exempt executors and administrators from liability for a devastavit where they have administered and distributed the estate in their charge without reserving assets which would otherwise have been applicable to the delinquent creditor’s claim. Columbia Theological Seminary v. Arnette (S.C. 1932) 168 S.C. 272, 167 S.E. 465.

This section [Code 1962 Section 19‑475] does not preclude a mortgagee from foreclosing his mortgage within the statutory period, if no judgment is sought against the administrator or executor for a deficiency. Columbia Theological Seminary v. Arnette (S.C. 1932) 168 S.C. 272, 167 S.E. 465. Executors And Administrators 437(2)

6. Under former Section 21‑15‑1640—In general

An action to marshal the assets of the decedent could not be prosecuted against the administrators within the administration year. Strickland v. Chaplin (S.C. 1942) 199 S.C. 203, 18 S.E.2d 736. Executors And Administrators 437(2)

When an executor is sued before the time allowed for ascertaining the debts of the estate, and he objects to the prematurity of the suit, his defense is in the nature of a dilatory plea; and the long established practice in the Supreme Court is not to dismiss the bill but to order the plaintiff to pay the costs and that the bill stand over. At the expiration of the time allowed to the defendant, the court proceeds to the hearing. Strickland v. Chaplin (S.C. 1942) 199 S.C. 203, 18 S.E.2d 736.

This section [Code 1962 Section 19‑554] prohibits, within twelve months of decedent’s death, a suit against the personal representative to compel an accounting of decedent’s acts as guardian of the estate of an infant; such suit being one to recover a “debt” within the statute. Beach v. Addison (S.C. 1914) 98 S.C. 215, 82 S.E. 428. Executors And Administrators 437(2)

Under this section [Code 1962 Section 19‑554] and Code 1962 Section 10‑107 an action on a promissory note not under seal is not barred by limitations, where before the six years has run the maker dies, and after the six years has run, but within one year after the granting of letters of administration, the action is begun. Gaston v. Gaston (S.C. 1908) 80 S.C. 157, 61 S.E. 393.

A sale of the intestate’s land under a judgment secured against the administrator, two days after the expiration of the twelve months will be upheld, though the suit was commenced before the expiration of that period. Hendrix v. Holden (S.C. 1900) 58 S.C. 495, 36 S.E. 1010.

Since this section [Code 1962 Section 19‑554] forbids a creditor to bring suit for his debt until the expiration of twelve months after his debtor’s death, equity will not entertain a bill for partition of the debtor’s property, since to do so would subject the debtor to an unfair advantage. In re Worley’s Estate (S.C. 1897) 49 S.C. 41, 26 S.E. 949.

Under the early standing of this section [Code 1962 Section 19‑554] the limitation on actions against an administrator was only nine months. Moore v. Smith (S.C. 1888) 29 S.C. 254, 7 S.E. 485.

7. —— Addition of time limits to statute of limitations

The time limit fixed in this section [Code 1962 Section 19‑554] must be added to the time period fixed by the statute of limitations for bringing such action. Moore v Smith, 29 SC 254, 7 SE 485 (1888). Lawton v Bowman, 33 SCL 190 (1847). Wilks v Robinson, 37 SCL 182 (1832). Adm’Rx. M’Collough v Speed, 14 SCL 455 (1826). Nicks v Martindale, 16 SCL 135 (1824). Moses v Jones, 11 SCL 259 (1820).

Since creditor had no right of action against administratrix during 6‑month period following testator’s death, that period should be added to applicable 6 year statute of limitations in order to determine period within which suit could be instituted. South Carolina Dept. of Mental Health v. Glass (S.C. 1977) 269 S.C. 91, 236 S.E.2d 412.

Under this section [Code 1962 Section 19‑554] prohibiting an action against the representatives for the recovery of a debt due by a decedent until twelve months after his death, the twelve months should be added to the statutory period of six years to determine the time within which a note of decedent was barred by the statute. Moore v. Smith (S.C. 1888) 29 S.C. 254, 7 S.E. 485. Limitation Of Actions 83(2)

8. —— Actions to which section applies

This section [Code 1962 Section 19‑554] does not apply to actions for tort committed by the decedent. Bourne v Maryland Casualty Co., 185 SC 1, 192 SE 605, 118 ALR 1 (1937) (disapproved on other grounds Dunaway v United Ins. Co., 239 SC 407, 123 SE2d 353).

This section [Code 1962 Section 19‑554] does not apply to actions for wrongful death brought under Code 1962 Sections 10‑1951 to 10‑1955, since such actions are not for a “debt” within the meaning of this section [Code 1962 Section 19‑554]. Newman v. Lemmon (S.C. 1929) 149 S.C. 417, 147 S.E. 439.

This section [Code 1962 Section 19‑554] does not apply to a foreclosure suit where no judgment is asked against the administrator for deficiency, it being proper to bring such action within twelve months after such administrator’s appointment. Green v. McCarter (S.C. 1902) 64 S.C. 290, 42 S.E. 157.

This section [Code 1962 Section 19‑554] does not apply to an action begun against the decedent in his lifetime, and continued by a substitution of his legal representative. Quick v. Campbell (S.C. 1895) 44 S.C. 386, 22 S.E. 479.

The provisions apply to suits in equity against heirs or devisees, where the suit involves the estate in the hands of an executor. Cleveland v. Mills (S.C. 1878) 9 S.C. 430.

This section [Code 1962 Section 19‑554]does not apply to executors de son tort. Chambers & Sadler v Tomlinson, 19 SCL 50 (1833).

**SECTION 62‑3‑804.** Manner of presentation of claims.

Claims against a decedent’s estate must be presented as follows:

(1)(a) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and must file a written statement of the claim, in the form prescribed by rule, with the probate court in which the decedent’s estate is under administration. The claim is considered presented upon the filing of the statement of claim with the court. If a claim is not yet due, the date when it will become due must be stated. If the claim is contingent or unliquidated, the nature of the uncertainty must be stated. If the claim is secured, the security must be described. Failure to describe fully the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(b) In addition to the requirements in subsection (1)(a), a creditor seeking appointment as personal representative pursuant to Section 62‑3‑203(a)(6) must attach the written statement of the claim to the application or petition for appointment. For purposes of Section 62‑3‑803, the claim is considered to be presented when the application or petition for appointment is filed with the written statement of the claim attached.

(2) Subject to subsection (5), once a claim is presented in accordance with subsection (1), a claimant may at any time thereafter commence a legal proceeding against the personal representative by the filing of a summons and petition for allowance of claim or complaint in any court where the personal representative may be subjected to jurisdiction, seeking payment of the claim by the decedent’s estate, and serving the same upon the personal representative. If the legal proceeding is not commenced in the probate court, the claimant must provide written notice to the probate court in which the decedent’s estate is under administration that a legal proceeding has commenced for allowance of the claim, setting forth the court in which the legal proceeding is pending. Thereafter, the probate court shall not authorize the closing of the decedent’s estate until the legal proceeding has ended.

(3) In lieu of the procedure provided in subsections (1) and (2), and subject to subsection (6), a claimant may commence a legal proceeding against the personal representative, by the filing of a summons and petition for allowance of claim or complaint in any court where the personal representative may be subjected to jurisdiction, seeking payment of his claim by the estate, and serving the same upon the personal representative. The commencement of the legal proceeding under this subsection must occur within the time limit for presenting the claim as set forth in Section 62‑3‑803. If the legal proceeding is not commenced in the probate court, the claimant must file a written statement of the claim with the probate court in which the decedent’s estate is under administration providing substantially the same information as the statement in subsection (1), along with a statement that a legal proceeding to enforce the claim has commenced, and identifying the court where the proceeding is pending. Thereafter, the probate court shall not permit the closing of the decedent’s estate until the legal proceeding has ended.

(4) Notwithstanding any other provision of this section, no presentation of a claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent’s death.

(5) Notwithstanding any other provision of this section, no proceeding for enforcement or allowance of a claim or collection of a debt may be commenced more than thirty days after the personal representative has mailed a notice of disallowance or partial disallowance of the claim in accordance with the provisions of Section 62‑3‑806. However, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the thirty day period, or to avoid injustice the court, on petition presented to the court prior to the expiration of the thirty‑day period, may order an extension of the thirty‑day period, but in no event shall the extension run beyond the applicable statute of limitations.

(6) Notwithstanding any other provision of this section, no claim against a decedent’s estate may be presented or legal action commenced against a decedent’s estate prior to the appointment of a personal representative to administer the decedent’s estate.

(7)(a) A legal proceeding pending on the date of a decedent’s death in which the decedent was a necessary party shall be suspended until a personal representative is appointed to administer the decedent’s estate, unless a court otherwise orders.

(b) Pursuant to Section 62‑3‑104, this subsection does not apply to a proceeding by a secured creditor of a decedent to enforce the secured creditor’s right to its security. It does apply to a proceeding for a deficiency judgment against a decedent or the estate of a decedent.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Sections 34, 35; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

This section establishes the mechanism for presenting claims. The claim may be delivered to the personal representative and must be filed with the court. Certain information must be included for claims not yet due, contingent, unliquidated, and secured claims. In lieu of presenting a claim, a proceeding may be commenced against a personal representative in any appropriate court, but the commencement must occur within the time for presenting claims. No claim is required in matters which were pending at the time of decedent’s death. Actions on claims must be commenced within the thirty days after the personal representative has mailed a notice of disallowance, but the personal representative or the court may consent prior to the expiration of the thirty‑day period to extensions that do not run beyond the applicable statute of limitations. The 2013 amendment requires a creditor seeking appointment to attach a written statement of its claim to the application or petition for appointment. Allowing a creditor to present a claim in this manner creates an exception to the general rule of Section 62‑3‑104 and Section 62‑3‑804(6), otherwise precluding the presentation of a claim prior to the appointment of a personal representative. The 2013 amendment further clarifies that, as earlier stated in Section 62‑3‑104, an in rem proceeding by a secured creditor is not suspended until a personal representative is appointed, unless that proceeding includes an action for a deficiency judgment against a decedent or his estate.

CROSS REFERENCES

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

Claims against decedent, necessity of administration, see Section 62‑3‑104.

Priority among persons seeking appointment as personal representative, see Section 62‑3‑203.

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

Library References

Executors and Administrators 227, 228.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 438 to 439, 441 to 450, 454.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

LAW REVIEW AND JOURNAL COMMENTARIES

1982 Survey: Property; Decedent’s estates. 35 S.C. L. Rev. 127 (Autumn 1983).

NOTES OF DECISIONS

In general 1

Practice of law 2

1. In general

A petition for allowance of an estate claim in the probate court requires a creditor to complete a one‑page standard form, located on the South Carolina Judicial Department website, requesting the probate court allow the claim and attesting that such claim is valid, timely presented, and has not been paid. Medlock v. University Health Services, Inc. (S.C. 2013) 404 S.C. 25, 743 S.E.2d 830. Executors and Administrators 251

Successor personal representative of wife’s estate, who brought action against personal representative of husband’s estate arising out of husband’s actions as original personal representative of wife’s estate and as her attorney in fact before her death, was not required to file particular probate form, even though statute governing such claims required that claim be filed with probate court “in the form prescribed by rule”; statute referred to manner of filing claim, rather than particular document, and complaint accomplished what form was intended to do, in that it contained all mandatory information, was originally filed in probate court, and provided adequate notice of claim. Gordon v. Busbee (S.C.App. 2005) 367 S.C. 116, 623 S.E.2d 857, rehearing denied, certiorari denied, on subsequent appeal 397 S.C. 119, 723 S.E.2d 822. Executors And Administrators 228(3)

Under a liberal construction of Section 62‑3‑804, the bill of a creditor mailed to the personal representative through the creditor’s attorney constituted a presentation of its claim against the estate within the meaning of the statute where the bill included the basis for the claim (medical services rendered), the amount of the claim, and the name and address of the claimant; simply because the creditor later filed a written statement of its claim with the probate court on the prescribed form did not mean the earlier mailed bill was ineffective. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611.

Section 62‑3‑804 does not specify a particular form for presentation of a claim to a personal representative, nor does the statute include an “intent” requirement; thus, bills sent by a creditor constituted a proper claim against the estate even though the bills were not addressed to the personal representative of the estate and were printed on forms used to file medicare claims where (1) the bills indicated the basis, claimant’s name and address, and the amount, (2) the bills were subsequently filed with the clerk of the probate court, and (3) the personal representative and his attorneys were aware of the claim against the estate and used the amount of the claim in pursuing their wrongful death and survival claims and in ultimately negotiating settlement of those claims. Matter of Estate of Tollison (S.C.App. 1995) 320 S.C. 132, 463 S.E.2d 611. Executors And Administrators 227(1)

2. Practice of law

A non‑attorney may represent a business entity in the probate court to make an estate claim and subsequently petition for allowance of the claim without engaging in the unauthorized practice of law. Medlock v. University Health Services, Inc. (S.C. 2013) 404 S.C. 25, 743 S.E.2d 830. Attorney and Client 12(12)

**SECTION 62‑3‑805.** Classification of claims.

(a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration, including attorney’s fees, and reasonable funeral expenses;

(2) debts and taxes with preference under federal law;

(3) reasonable and necessary medical expenses, hospital expenses, and personal care expenses of the last illness of the decedent, including compensation of persons attending the decedent prior to death;

(4) debts and taxes with preference under other laws of this State, in the order of their priority, including medical assistance paid under Title XIX State Plan for Medical Assistance as provided for in Section 43‑7‑460;

(5) all other claims.

(b) Except as is provided under subsection (a)(4), no preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

(c) Any person advancing or lending money to a decedent’s estate for the payment of a specific claim shall, to the extent of the loan, have the same priority for payment as the claimant paid with the proceeds of the loan.

HISTORY: 1986 Act No. 539, Section 1; 1994 Act No. 481, Section 8; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section sets up the classification of claims where the assets of the estate are insufficient to pay all claims in full. Claims due and payable are not entitled to a preference over claims not due.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Provisions that rights to exempt property have priority over all claims against estate except claims described in this section, see Section 62‑2‑401.

Library References

Executors and Administrators 259 to 268.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 397, 504 to 516.

RESEARCH REFERENCES

Encyclopedias

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

Forms

South Carolina Legal and Business Forms Section 17:131 , Debts‑Payment‑General Clause.

Treatises and Practice Aids

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

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1 TD 2, Probate 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

Creditor holding security interest would have priority over, or at least be accorded more preferential treatment than, persons or entities who would be paid pursuant to classification scheme established in Section 62‑3‑805(a)(1), (2), and (3). 1990 Op. Atty Gen No. 90‑58.

NOTES OF DECISIONS

Judgments, under former Section 21‑15‑660 6

Miscellaneous, under former Section 21‑15‑660 8

Mortgages, under former Section 21‑15‑660 5

Priorities and order of payment, generally, under former Section 21‑15‑660 3

Public debts, under former Section 21‑15‑660 4

Purpose and construction, under former Section 21‑15‑660 2

Retention of funds, under former Section 21‑15‑660 7

Under former Section 21‑15‑660 1‑8

Judgments 6

Miscellaneous 8

Mortgages 5

Priorities and order of payment, generally 3

Public debts 4

Purpose and construction 2

Retention of funds 7

Under former Section 21‑15‑680 9

1. Under former Section 21‑15‑660

A change in the order of the payment of debts is not prohibited by the Constitution. McLure v. Melton (S.C. 1886) 24 S.C. 559, 58 Am.Rep. 272, appeal dismissed 10 S.Ct. 407, 133 U.S. 380, 33 L.Ed. 660.

2. —— Purpose and construction

This section [Code 1962 Section 19‑476] directs the general assets according to the rank of the debt; it does not deal with the lien. Klinck v Keckley, 11 SC Eq 250 (1835). Haynsworth v Frierson, 45 SCL 476 (1858). Edwards v Sanders, 6 SC 316 (1875) (ovrld on other grounds Piester v Piester, 22 SC 139). Shell v Young, 32 SC 462, 11 SE 299 (1890).

This section [Code 1962 Section 19‑476] is directory and is intended for the protection of the administrator or executor. Huger v. Dawson’s Ex’rs (S.C. 1832) 3 Rich. 328.

3. —— Priorities and order of payment, generally

The order of payment is determined as of the death of the testator. Hutchinson v Bates, 17 SCL 111 (1828). Tucker v Condy, 28 SC Eq 281 (1854) Morton & Courteny v Caldwell, 22 SC Eq 161 (1849). Wilson v Administrators of McConnell, 30 SC Eq 500 (1857). Fraser & Dill v City Council of Charleston, 23 SC 373 (1885).

A note is not entitled to priority because it is secured by a mortgage, but it remains a simple contract debt. Tunno v Happoldt, 13 SCL 188 (1822). Hopkins v McLure, 133 US 380, 33 L Ed 660, 10 S Ct 407 (1890).

Husband is entitled to recover from his wife’s estate money paid by him for her funeral expenses. In re Johnson’s Estate (S.C. 1942) 198 S.C. 526, 18 S.E.2d 450.

Medical and funeral expenses not being allowed preference under this section [Code 1962 Section 19‑476] when estate is in the hands of a receiver, see Cudd v. Hannon (S.C. 1938) 187 S.C. 424, 198 S.E. 17.

Section has no application to liens which could be enforced against the property on which they attached, as it is not the lien which the act deals with but the character of the debt, and it is that which is to determine its rank in the order of payment. Purdy v. Strother (S.C. 1937) 184 S.C. 210, 192 S.E. 159.

One who provides the reasonable funeral expenses of the deceased is entitled to recover them back from his estate as money justly due on a quasi contract, which the law implies and imputes to the personal representative on the ground that the administrator or executor is bound under the law to provide a decent funeral from the assets of the estate. Waters v. Register (S.C. 1907) 76 S.C. 132, 56 S.E. 849.

Under this section [Code 1962 Section 19‑476] providing that the funeral expenses and the expenses of the last illness of a deceased person shall be first paid, in the administration of his estate, it is proper for the court, in proceedings supplementary to an execution brought to subject a fund belonging to the estate of a deceased person to the payment of a judgment against the decedent, on which an execution was returned unsatisfied during the lifetime of the judgment debtor, to provide that the funeral expenses and the expenses of the last illness shall be paid before the fund is applied to the payment of the judgment. De Loach v. Sarratt (S.C. 1900) 58 S.C. 117, 36 S.E. 532. Creditors’ Remedies 939

Funeral expenses and the expenses of the last illness should be paid before a judgment recovered in the lifetime of the deceased. De Loach v. Sarratt (S.C. 1900) 58 S.C. 117, 36 S.E. 532.

Administrator cannot pay attorney’s fees in the prosecution of the slayer of the intestate. Woodard v. Woodard (S.C. 1892) 36 S.C. 118, 15 S.E. 355.

The intestate’s funeral expenses do not have priority over chattel mortgages, in the distribution of the proceeds of a sale of chattels by the administrator, since this section [Code 1962 Section 19‑476], prescribing the order of payment of debts, refers only to such assets in the hands of the administrator as remain after satisfaction of the liens existing at time of the intestate’s death. George H. Hurst & Sons v. Rhame (S.C. 1925) 130 S.C. 367, 126 S.E. 133.

4. —— Public debts

Past‑due taxes on real estate were to be paid out of the general funds in the hands of the master and not out of the proceeds of the sale of the mortgaged premises as a lien upon such property prior to all other liens. Purdy v. Strother (S.C. 1937) 184 S.C. 210, 192 S.E. 159.

An assessment by a municipality on a decedent’s land authorized by the Constitution for permanent street improvements does not create a debt due the public, so as to create a debt entitled to priority under this section [Code 1962 Section 19‑476]. Weatherly v. Medlin (S.C. 1927) 141 S.C. 290, 139 S.E. 633.

Where a county treasurer deposited county funds in an unincorporated bank, the debts are, upon the death of the banker and the insolvency of his estate, debts due the public, within this section [Code 1962 Section 19‑476], and payable in full before other debts. Lockwood v. Lockwood (S.C. 1904) 68 S.C. 328, 47 S.E. 441. Executors And Administrators 416

Debt of a surety on a county treasurer’s bond is a debt due to the public. Baxter v. Baxter (S.C. 1885) 23 S.C. 114.

5. —— Mortgages

A mortgage ranks to the extent of its specific lien. Piester v Piester, 22 SC 139 (1885). McLure v Melton, 24 SC 559 (1884) error dismd 133 US 380, 33 L Ed 660, 10 S Ct 407. McLure v Melton, 34 SC 377, 13 SE 615 (1891).

Mortgage of chattels is a mortgage within this section [Code 1962 Section 19‑476]. Edwards v Sanders, 6 SC 316 (1875) (ovrld on other grounds Piester v Piester, 22 SC 139).

After the lien created by the mortgage is exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure. Hopkins v. McLure (U.S.S.C. 1890) 10 S.Ct. 407, 133 U.S. 380, 33 L.Ed. 660.

The failure of a mortgagee to file a claim for the debt did not free intestate’s personal assets from their applicability to its payment. Columbia Theological Seminary v. Arnette (S.C. 1932) 168 S.C. 272, 167 S.E. 465.

A decree of foreclosure ascertaining the amount of the mortgage debt and directing the sale of the property and the application of the net proceeds of the sale to the mortgage debt was not such a judgment as was contemplated in this section [Code 1962 Section 19‑476], relating to the order of payment of debts out of assets in the hands of the administrator, in the absence of a specific adjudication that ascertained amount to be paid by the mortgagor or of a judgment against the mortgagor for the amount of the debt; so that the creditors in the foreclosure action were not entitled to claim the rank of judgment creditors in the application of the deceased mortgagor’s assets to his debts. McConnell v. Barnes (S.C. 1927) 142 S.C. 112, 140 S.E. 310, 57 A.L.R. 483.

After the death of the mortgagor, the mortgagee has the right to have the proceeds of the particular property covered by the lien applied to his debt; and if a deficiency results, the mortgagee takes his place in equal rank with the holders of bonds, debts by specialty, and debts by simple contract, as provided by this section [Code 1962 Section 19‑476]. Weatherly v. Medlin (S.C. 1927) 141 S.C. 290, 139 S.E. 633.

6. —— Judgments

A judgment having lost active energy, but twenty years not having elapsed, will operate as a judgment against the estate of a debtor. (Decided after the 1946 amendment to Code 1962 Section 10‑1561 and holding that the court may not prolong the statutory duration of lien on real estate) Ex parte Goldsmith, 68 SC 528, 47 SE 984 (1904). Hughes v Slater, 214 SC 305, 52 SE2d 419 (1949).

The assets of a deceased debtor are distributable among his creditors with reference to the rank of their demands at the time of his death; and this order will not be disturbed so as to give preference to the first creditor who obtains judgment against the executor. Maxwell v Greene, 171 SC 253, 172 SE 146 (1933). Tucker v Condy, 28 SC Eq 281 (1854).

The order is not disturbed by prior judgments against the executor or administrator. Hutchinson v Bates, 17 SCL 111 (1828). Tucker v Condy, 28 SC Eq 281 (1854).

Under this section [Code 1962 Section 19‑476], a judgment after the debtor’s death is preferred to simple contract debts in the distribution of the cash received on converting the personal property of the estate. Weatherly v. Medlin (S.C. 1927) 141 S.C. 290, 139 S.E. 633.

As to judgment for bill of nonresident unlicensed physician, see Parks v. McDaniel (S.C. 1906) 75 S.C. 7, 54 S.E. 801, 117 Am.St.Rep. 878.

But not foreign judgments, which rank only as simple contracts. Cameron v. Wurtz’s Adm’r (S.C. 1827).

Judgments mean final judgments. Thomas v McElwee, 34 SCL 131 (1847). Ex parte Farrars (S.C. 1880) 13 S.C. 254.

7. —— Retention of funds

An executor may retain funds for his whole debt against a creditor who has not rendered in his claim. Sebring v Keith, 20 SCL 340 (1834). Cooper v Peyton, 9 SC Eq 259 (1831).

8. —— Miscellaneous

Bonds and specialty debts prior to March 9, 1874, retain preference over bonds, specialty debts and simple contract debts since then. Heath v Belk, 12 SC 582 (1880).

9. Under former Section 21‑15‑680

Unsevered crops are not regarded as realty. Norwood v. Carter (S.C. 1935) 176 S.C. 472, 180 S.E. 453. Crops 1

Where a life tenant dies after March first, rent contracts made before that date for the year go to the personal representative of the life tenant, under this section [Code 1962 Section 19‑478]. Newton v. Odom (S.C. 1903) 67 S.C. 1, 45 S.E. 105.

Under this section [Code 1962 Section 19‑478] the proceeds of the crop are assets in the administrator’s hands, though the expenses of the cultivation of such crop have not yet been paid, and are to be applied to the payment of taxes and obligations contracted in the production of the crop, before distribution. Berry v. Berry (S.C. 1899) 55 S.C. 303, 33 S.E. 363.

This section [Code 1962 Section 19‑478] has no application to rents to accrue to the deceased from a tenant in occupation of his lands, and as to such rents the right of the devisees is superior to that of the executor. Huff v. Latimer (S.C. 1890) 33 S.C. 255, 11 S.E. 758.

**SECTION 62‑3‑806.** Allowance of claims.

(a) As to claims presented in the manner described in Section 62‑3‑804(1) within the time limit prescribed in Section 62‑3‑803, within sixty days after the presentment of the claim, or within fourteen months after the death of the decedent, whichever is later, the personal representative must serve upon the claimant a notice stating the claim has been allowed or disallowed in whole or in part. Service of such notice shall be by United States mail, personal service, or otherwise as permitted by rule and a copy of the notice shall be filed with the probate court along with proof of delivery setting forth the date of mailing or other service on the claimant. A notice of disallowance or partial disallowance of a claim must contain a warning that the claim will be barred to the extent disallowed unless the claimant commences a proceeding for allowance of the claim in accordance with Section 62‑3‑804(2) within thirty days of the mailing or other service of the notice of disallowance or partial disallowance. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant commences a proceeding for allowance of the claim in accordance with Section 62‑3‑804(2) not later than thirty days after the mailing or other service of the notice of disallowance or partial disallowance by the personal representative. For good cause shown, the court may reasonably extend the time for filing the notice of allowance or disallowance of a properly filed claim.

(b) The personal representative of a decedent’s estate may commence a proceeding to obtain probate court approval of the allowance, in whole or part, of any claim or claims presented in the manner described in Section 62‑3‑804(1), within the time limit prescribed in Section 62‑3‑803, and not barred by subsection (a). The proceeding may be commenced by the filing of a summons and petition with the probate court, and service of the same upon the claimant or claimants whose claims are in issue; and such other interested parties as the probate court may direct by order entered at the time the proceeding is commenced. Notice of hearing on the petition shall be given to interested parties in accordance with Section 62‑1‑401.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent’s estate is an allowance of the claim. Upon obtaining such a judgment a claimant must file a certified copy of its judgment with the probate court in which the decedent’s estate is being administered.

(d) Unless otherwise provided in any judgment in another court entered against the personal representative and except for claims under 62‑3‑803, allowed claims bear interest at the legal rate (as determined according to Section 34‑31‑20(A)) for the period commencing upon the later of fourteen months after the date of the decedent’s death or the last date upon which the claim could have been properly presented under Section 62‑3‑803, unless based on a contract making a provision for interest, in which case the claim bears interest in accordance with the terms of the contract.

(e) Allowance of a claim is evidence the personal representative accepts the claim as a valid debt of the decedent’s estate. Allowance of a claim may not be construed to imply the estate will have sufficient assets with which to pay the claim.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Sections 36, 37; 1988 Act No. 659, Section 19; 2010 Act No. 244, Section 17, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides the procedure by which the personal representative acts on claims and claimants react to disallowed claims. Within thirty days after the mailing of notice of disallowance, if the notice warns of the impending bar, a claimant must commence a proceeding against the personal representative. This relates to claims allowed in whole or in part. A claimant has thirty days to react to a disallowed claim. A judgment in a proceeding in another court to enforce a claim constitutes an allowance of a claim.

Unless otherwise provided, or unless interest is based upon contract, allowed claims bear interest at the legal rate commencing thirty days after the time for original presentation of the claims has expired.

The personal representative or the claimant may begin an action in the court for allowance of the claim. This gives the court jurisdiction over any claim or claims presented to the personal representative or filed with the court.

The 2010 amendment added “service of” and “summons and” in the first sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for allowance of claims. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP. The 2010 amendment also added “of hearing” after “Notice” in the last sentence to clarify the notice of hearing requirements referred to in Section 62‑1‑401.

The 2013 amendment defines allowance and imposes an affirmative duty on the personal representative to either allow or disallow a claim within time frames imposed by the code.

Under the 2013 amendment, unless the court approves an extension of time, the personal representative must either allow or disallow all properly presented claims and serve notice of the allowance or disallowance of the claim on the claimant within the later of sixty days from the presentment of the claim and fourteen months from the date of the decedent’s death.

Service of the notice of allowance or disallowance can be made by mail or some other form of delivery. If a notice of disallowance is sent by mail, the thirty day period for filing a petition for allowance of claim, starts to run on the date of mailing.

A claim can be allowed, disallowed, or allowed in part and disallowed in part. The code does not establish a penalty for failure of the personal representative to comply with the requirement to notify the claimant, but instead relies on the authority of the probate court to remove a personal representative for failure to perform his duties under the code.

The 2013 amendment imposes on a person obtaining a judgment against an estate in a court other than the probate court an obligation to provide the probate court with a certified copy of the judgment.

The 2013 amendment modifies the interest rules in regard to the properly presented claims against the decedent’s estate. Interest on a claim begins to run upon the later of fourteen months after the decedent’s death or the last day upon which the claim could be properly presented, unless the claim is based on a contract providing for interest.

The 2013 amendment requires that interested persons be notified of hearings on petitions for allowance of claim.

CROSS REFERENCES

Manner of presentation of claims, see Section 62‑3‑804.

Personal representative to proceed with court sanction, see Section 62‑3‑704.

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

Library References

Executors and Administrators 234 to 241.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 455 to 469.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

NOTES OF DECISIONS

In general 1

1. In general

Petitions to allow claims under Section 62‑3‑806 are treated the same as any other proceeding for purposes of ascertaining their legal or equitable nature. Matter of Howard (S.C. 1993) 315 S.C. 356, 434 S.E.2d 254. Courts 202(5)

**SECTION 62‑3‑807.** Payment of claims.

(a) Prior to the closing of the estate and no later than fourteen months after the decedent’s death, the personal representative must proceed to pay the claims allowed against the estate in the order of priority prescribed, and after making provision for the homestead, for exempt property under Section 62‑2‑401, for claims already presented which have not been allowed or whose disallowance is the subject of a legal proceeding, or the time to file such a proceeding has not expired, and for unbarred claims which may yet be presented, including costs and expenses of administration. Upon application of the personal representative and for good cause shown, the probate court may extend the time for payment of creditor claims.

(b) Upon the expiration of the applicable time limitation provided in Section 62‑3‑803 for the presentation of claims, any claimant whose claim has been allowed, or partially allowed, under Section 62‑3‑806 may petition the probate court, or file an appropriate motion if the administration is under Part 5, for an order directing the personal representative to pay the claim, to the extent allowed, and to the extent assets of the estate are available for payment without impairing the ability of the personal representative to fulfill the other obligations of the decedent’s estate.

(c) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if:

(1) the payment was made before the expiration of the time limit set forth in Section 62‑3‑803 for the presentation of a claim, and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(2) the payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 38; 1990 Act No. 521, Section 54; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This provides a remedy for a claimant whose claim has been allowed but has not been paid. Under Section 62‑3‑807(c), a personal representative is liable for claims paid out of order.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

When personal representative shall proceed to pay claims allowed against estate, as provided in this section, see Section 62‑3‑704.

Library References

Executors and Administrators 258, 266 to 287.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 503, 514 to 529.

RESEARCH REFERENCES

Encyclopedias

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

Forms

South Carolina Legal and Business Forms Section 17:249 , Time Payment‑Delayed Distribution of Legacies‑Specification of Period.

**SECTION 62‑3‑808.** Individual liability of personal representative.

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity or identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

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

REPORTER’S COMMENT

This section clarifies that the personal representative is not individually liable for contracts properly entered into in his fiduciary capacity on obligations arising from ownership or control of the estate. He is liable for torts committed in the course of his administration only if he is personally at fault.

It also provides for a variety of appropriate proceedings to determine the issues of liability between the estate and the personal representative.

Library References

Contracts 179.

Executors and Administrators 74 to 81, 95, 420 to 430.

Westlaw Topic Nos. 95, 162.

C.J.S. Contracts Sections 30, 364.

C.J.S. Executors and Administrators Sections 163 to 164, 166 to 168, 171 to 172, 217 to 222, 278, 706 to 711, 725 to 730.

**SECTION 62‑3‑809.** Secured claims.

Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise, payment is upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, upon the amount of the claim allowed less the fair market value of the security as agreed by the parties, or as determined by the court; or

(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.

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

REPORTER’S COMMENT

This provides for payment of allowed secured claims in full if the security is surrendered by the creditor.

Where the creditor exhausts his security before receiving payment, he receives the claim allowed less the fair market value of security as agreed or determined by the court.

If the security has not been exhausted, the creditor is paid the amount of the claim less the value of the security if covered.

Library References

Executors and Administrators 264.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 397, 504.

Attorney General’s Opinions

Creditor holding security interest would have priority over, or at least be accorded more preferential treatment than, persons or entities who would be paid pursuant to classification scheme established in Section 62‑3‑805(a)(1), (2), and (3). 1990 Op. Atty Gen No. 90‑58.

**SECTION 62‑3‑810.** Claims not due and contingent or unliquidated claims.

(a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage or other security interest, obtaining a bond or security from a distributee, or otherwise.

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

REPORTER’S COMMENT

This provides various arrangements by which the personal representative can secure future payment of claims which are not due, contingent, or unliquidated.

Library References

Executors and Administrators 202.2.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 405.

**SECTION 62‑3‑811.** Counterclaims.

In allowing a claim, the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate, a court shall reduce the amount allowed by the amount of any counterclaims allowed and, if such counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

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

REPORTER’S COMMENT

This provides for the reduction of a claim against the estate by any counterclaim, liquidated or unliquidated.

Library References

Executors and Administrators 275.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 519 to 521.

**SECTION 62‑3‑812.** Execution and levies prohibited.

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, liens, or other security interests upon real or personal property in an appropriate proceeding.

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

REPORTER’S COMMENT

This prohibits executions and levies against property of the estate under judgments against the decedent or the personal representative, but excepts enforcement of mortgages, pledges, and liens in appropriate proceedings.

Library References

Exemptions 37, 59.

Westlaw Topic No. 163.

C.J.S. Exemptions Sections 39, 51 to 52, 60 to 61, 63 to 68, 73, 76, 88 to 91, 119 to 121, 150 to 158.

**SECTION 62‑3‑813.** Compromise of claims.

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

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

REPORTER’S COMMENT

This section gives the personal representative the authority to compromise claims in the best interests of the estate. The consent of the probate judge is not necessary.

Library References

Executors and Administrators 269.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 519.

**SECTION 62‑3‑814.** Encumbered assets.

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew, or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

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

REPORTER’S COMMENT

This gives the personal representative essential authority to deal with encumbered assets.

Library References

Executors and Administrators 92, 264, 275.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 205 to 206, 209 to 211, 397, 504, 519 to 521.

**SECTION 62‑3‑815.** Administration in more than one state; duty of personal representative.

(a) All assets of estates being administered in this State are subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this State or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent’s domicile, prior charges and claims, after satisfaction of the exemptions, allowances, and charges, each claimant whose claim has been allowed either in this State or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this State, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges, and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this State is not the state of the decedent’s last domicile, the claims allowed in this State shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this State the amount to which they are entitled, local assets shall be marshaled so that each claim allowed in this State is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this State from assets in other jurisdictions.

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

REPORTER’S COMMENT

This section deals with various matters related to the payment of claims where there is administration in more than one state. As to the order of priorities of payment of claims, local creditors are not preferred over creditors in the decedent’s domicile.

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Library References

Executors and Administrators 271.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 529.

**SECTION 62‑3‑816.** Final distribution to domiciliary representative.

The estate of a nonresident decedent being administered by a personal representative appointed in this State shall, if there is a personal representative of the decedent’s domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless: (1) by virtue of the decedent’s will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this State without reference to the local law of the decedent’s domicile; (2) the personal representative of this State, after reasonable inquiry is unaware of the existence or identity of a domiciliary personal representative; or (3) the court orders otherwise in a proceeding for a closing order under Section 62‑3‑1001 or incident to the closing of an administration under Part 5 [Sections 62‑3‑501 et seq.]. In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article [Sections 62‑3‑101 et seq.].

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

REPORTER’S COMMENT

The estate of a nonresident decedent being administered in this State is, upon conclusion of the local administration, paid over to the domiciliary personal representative.

CROSS REFERENCES

Applicability of provisions of this article in respect to a nonresident decedent, see Section 62‑4‑207.

Library References

Executors and Administrators 523.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 929 to 930.

Part 9

Special Provisions Relating to Distribution

**SECTION 62‑3‑901.** Successors’ rights if no administration.

In the absence of administration, the devisees are entitled to the estate in accordance with the terms of a probated will and the heirs in accordance with the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by exemption or intestacy may establish title thereto by proof of the decedent’s ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and subject to the rights of others resulting from abatement, retainer, advancement, ademption, and elective share.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 39; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section governs the rights of heirs and devisees when the administrator of an estate is not able to proceed for one reason or another or in the absence of administration. This section provides that in the absence of administration the rights of the heirs or devisees will be established by the laws of intestate succession or by the terms of a probated will. Without an administration, heirs and devisees take the property subject to charges, such as charges incident to administration and creditors’ claims. In addition, successors in title are “subject to the rights of others” which may result from “abatement, retainer, advancement, ademption and elective share.”

Effect of Amendment

The 2013 amendment added “elective share” at the end.

Library References

Descent and Distribution 68.

Wills 708.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Section 68.

C.J.S. Wills Sections 451 to 452.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 96, Devisees’ Rights If No Administration.

Forms

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

**SECTION 62‑3‑902.** Distribution; order in which assets appropriated; abatement.

(a) Except as provided in subsection (b), and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), as, for instance, in case the will was executed before the effective date of this Code, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

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

REPORTER’S COMMENT

The purpose of Section 62‑3‑902 is to provide a defined order in which assets of an estate are used or applied for the payment of debts, in the absence of intent by the testator that an alternate order of abatement be used. The design of this section is to insure that the testator’s intent, whether expressed or implied by the terms of the will, would be given first priority in the order of abatement. The section is to be used only to resolve doubts as to the testator’s intent, rather than defeating his purpose.

Under this section, there is no distinction made with regard to the character of the assets. A devise encompasses any testamentary passage of property, whether real estate or personalty. Within classifications, abatement will be prorata.

Effect of Amendment

The 2013 amendment in subsection (a) inserted “and except as provided in connection with the share of the surviving spouse who elects to take an elective share,”.

CROSS REFERENCES

Abatement of devises where a testator fails to provide by will for children born or adopted after will’s execution, see Section 62‑2‑302.

Abatement of devises where a testator has failed to provide by will for surviving spouse, see Section 62‑2‑301.

Satisfaction of liability for elective share of surviving spouse in accordance with provisions of this section, see Section 62‑2‑207.

Transactions authorized for personal representatives, subject to the priorities stated in this section, see Section 62‑3‑715.

Library References

Executors and Administrators 288 to 318.

Wills 804 to 818.

Westlaw Topic Nos. 162, 409.

C.J.S. Executors and Administrators Sections 533 to 579.

C.J.S. Wills Sections 1719 to 1741.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 173, Order of Distribution; Abatement.

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.

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

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1, Probate 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.

Notes of Decisions

In general 1

1. In general

Master’s finding that testator’s son was entitled to one‑half of the gross value of estate’s receivables, including one half of United States Department of Agriculture (USDA) farm subsidies, was premature under the abatement statute; master completely disregarded the possibility that the assets of the estate might have been insufficient to pay all debts, claims, and devises. Estate of Livingston v. Livingston (S.C.App. 2013) 404 S.C. 137, 744 S.E.2d 203, certiorari granted, certiorari dismissed as improvidently granted 412 S.C. 610, 773 S.E.2d 579. Wills 810

**SECTION 62‑3‑903.** Right of retainer.

The amount of a liquidated indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor’s interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

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

REPORTER’S COMMENT

This section provides that if the amount of liquidated indebtedness of a successor to the estate is due, then the personal representative is to offset any devise to that successor by the amount of the liquidated indebtedness. In the event the indebtedness is liquidated but not yet due, the representative can use the present value of the indebtedness to offset that amount against the devise to the successor.

Library References

Executors and Administrators 275.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 519 to 521.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 174, Order of Distribution; Abatement‑Right of Retainer Against Indebtedness of Successor.

**SECTION 62‑3‑905.** Penalty clause for contest.

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

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

Library References

Wills 651, 719.

Westlaw Topic No. 409.

C.J.S. Wills Sections 1380, 1383 to 1384, 1390 to 1392, 1402, 1415, 1422, 1718.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 4, Right to Attach Conditions and Restrictions‑Penalty Clause for Contest.

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 8.5, No‑Contest Clauses.

Restatement (3d) Property (Wills & Don. Trans.) Section 8.5 TD 3, No‑Contest Clauses.

NOTES OF DECISIONS

In general 1

1. In general

Family discord and strife did not constitute probable cause for testator’s children to bring action challenging validity of will and trusts on grounds of undue influence, and thus, no‑contest clauses in will and trusts were valid and enforceable and had the effect of disinheriting children for bringing underlying challenge to will, even though the children were treated less advantageously under the estate plan than other beneficiaries, where testator maintained his physical and mental health up until his death, he was fully capable of executing testamentary documents, he anticipated that certain beneficiaries would contest the validity of his estate plan, and he explicitly amended his will and trusts to include language that would revoke the interest of anyone who challenged the validity of the estate plan. Russell v. Wachovia Bank, N.A. (S.C. 2006) 370 S.C. 5, 633 S.E.2d 722. Wills 651

**SECTION 62‑3‑906.** Distribution in kind; valuation; method.

(a) Unless a contrary intention is indicated by the will, such as the grant to the personal representative of a power of sale, the distributable assets of a decedent’s estate must be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section 62‑2‑401 shall receive the items selected.

(2) Any devise payable in money may be satisfied by value in kind provided:

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution; and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under item (2), securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The personal property of the residuary estate must be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. Subject to the provisions of Section 62‑3‑711(b), in other cases, personal property of the residuary estate may be converted into cash for distribution.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution, notifying such persons of the pending termination of the right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

(c) When a personal representative or a trustee is empowered under the will or trust of a decedent to satisfy a pecuniary devise or transfer in trust, in kind with assets at their value for federal estate tax purposes, the fiduciary, in order to implement the devise or transfer in trust, shall, unless the governing instrument provides otherwise, distribute assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution in satisfaction of the pecuniary devise or transfer.

(d) Personal representatives and trustees are authorized to enter into agreements with beneficiaries and with governmental authorities, agreeing to make distribution in accordance with the terms of Section 62‑3‑906 for any purpose which they consider to be in the best interests of the estate, including the purpose of protecting and preserving the federal estate tax marital deduction as applicable to the estate, and the guardian or conservator of a surviving beneficiary or the personal representative of a deceased beneficiary is empowered to enter into such agreements for and on behalf of the beneficiary or the deceased beneficiary.

(e) The provisions of Section 62‑3‑906 are not intended to change the present laws applicable to fiduciaries, but are statements of the fiduciary principles applicable to these fiduciaries and are declaratory of these laws.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 41; 2000 Act No. 398, Section 5; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑906(a) establishes a preference for distributions “in kind.”

Section 62‑3‑906(a) sets out the rights of the three classes of successors specific devisees (62‑3‑906(a)(1)), general pecuniary devisees (62‑3‑906(a)(2)), and residuary devisees (62‑3‑906(a)(3)).

As to specific devisees, Section 62‑3‑906(a)(1) provides that the specific devisee is entitled to the thing devised to him.

Section 62‑3‑906(a)(2) authorizes the personal representative to make “in kind” distributions to satisfy devises payable in money (general pecuniary devises) provided (1) the devisee has not demanded payment in cash, (2) the property is fairly valued as of the date of distribution under Section 62‑3‑906(a)(3) and, (3) a residuary devisee has not requested that the asset remain part of the residue estate.

Residuary devisees are to receive “in kind” distribution provided (1) there is no objection to the proposed distribution and (2) it is practicable to distribute undivided interests.

Section 62‑3‑906(b) provides that the personal representative may submit a proposal for distribution to all parties in interest. This section effectively eliminates the interested party’s right to object to the distribution if he fails to object to the plan in writing within thirty days from receipt of the proposal.

The 2013 amendment added to 62‑3‑906(b) the requirement of notice of deadline to object to proposed distribution.

CROSS REFERENCES

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

Library References

Executors and Administrators 303.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 543.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 176, Proposal for Distribution.

S.C. Jur. Wills Section 177, Authorization for Distribution Agreements.

**SECTION 62‑3‑907.** Distribution in kind; evidence.

(A) If distribution in kind is made, the personal representative must execute a deed of distribution with respect to real property and such other necessary or appropriate instrument of conveyance with respect to personal property, assigning, transferring, or releasing the assets to the distributee as evidence of the distributee’s title to the property.

(B) If the decedent dies intestate or devises real property to a distributee, the personal representative’s execution of a deed of distribution of real property constitutes a release of the personal representative’s power over the title to the real property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62‑3‑711(a). The deed of distribution affords the distributee and his purchasers or encumbrancers the protection provided in Sections 62‑3‑908 and 62‑3‑910.

(C) If the decedent devises real property to a personal representative, either in a specific or residuary devise, the personal representative’s execution of a deed of distribution of the real property constitutes a transfer of the title to the real property from the personal representative to the distributee, as well as a release of the personal representative’s power over the title to the real property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62‑3‑711(a). The deed of distribution affords the distributee, and his purchasers or encumbrancers, the protection provided in Sections 62‑3‑908 and 62‑3‑910.

(D) The personal representative’s execution of an instrument or deed of distribution of personal property constitutes a transfer of the title to the personal property from the personal representative to the distributee, as well as a release of the personal representative’s power over the title to the personal property, which power is equivalent to that of an absolute owner, in trust, however, for the benefit of the creditors and others interested in the estate, provided by Section 62‑3‑711(a).

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 42; 2000 Act No. 398, Section 6; 2002 Act No. 174, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides that evidence of distribution “in kind” will be in the form of an instrument or deed of distribution which the personal representative will give to the distributees. This instrument serves as a transfer of the interest an estate had in an asset or assets. Sections 62‑3‑907 should be read in conjunction with Sections 62‑3‑908 through 62‑3‑910 to determine rights of distributees and purchasers therefrom. In addition the personal representative may use this instrument as a release under Section 62‑3‑709 where the representative determines that certain assets of the decedent’s estate should be left in the possession of the party who would ultimately receive these assets by way of distribution “in kind.”

The 2013 amendments revised subsection (a) to provide that, while a deed of distribution is required for real property, with respect to personal property the personal representative may execute an appropriate instrument evidencing the conveyance of title.

Library References

Executors and Administrators 305.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 539.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 178, Evidence of Distributee’s Title to Property.

**SECTION 62‑3‑908.** Distribution; right or title of distributee.

Proof that a distributee has received an instrument or deed of distribution of assets in kind whether real or personal property, or payment in distribution, from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. An improper distribution includes, but is not limited to, those instances where the instrument or deed of distribution is found to be inconsistent with the provisions of the will or statutes governing intestacy.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 43; 2000 Act No. 398, Section 7; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑908 contemplates that all actions for overpayment to a devisee be funneled through the personal representative.

Library References

Executors and Administrators 305.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 539.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 179, Evidence of Distributee’s Title to Property‑Proof as Conclusive Evidence of Succession to Interest in Property.

NOTES OF DECISIONS

In general 1

1. In general

Deed of distribution conveyed estate’s one‑half interest in marital home to mother; father’s will granted son, as executor, the power to sell, transfer or convey property. Osterneck v. Osterneck (S.C.App. 2007) 374 S.C. 573, 649 S.E.2d 127, rehearing denied, certiorari denied. Executors And Administrators 138(5); Executors And Administrators 145

**SECTION 62‑3‑909.** Improper distribution; liability of distributee.

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

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

REPORTER’S COMMENT

This section provides that an innocent distributee does not have the protection of a bona fide purchaser. The purpose of Section 62‑3‑909 is to shift questions concerning propriety of distribution from fiduciary to distributees. It should be remembered that a distribution under Section 62‑3‑703 may be “authorized at the time” but may still be improper under this section.

The provisions of Sections 62‑3‑909 and 62‑3‑910 establish the proposition that liability follows the property.

Library References

Executors and Administrators 310, 311, 318.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 549, 558.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 184, Improper Distribution; Liability of Distributee.

**SECTION 62‑3‑910.** Purchasers from distributees or personal representatives protected.

(A) If property distributed in kind (whether real or personal property) or a mortgage or other security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested persons, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any instrument described in this section on which the deed recording fee prescribed by Chapter 24, Title 12, has been paid, and which has been recorded is prima facie evidence that the sale was made for value.

(B) If a will devises real property to a personal representative or authorizes a personal representative to sell real property (the title to which was not devised to the personal representative), a purchaser for value who receives a deed from the personal representative takes title to the real property free of rights of any heirs or devisees or other interested person in the estate and incurs no personal liability to the estate or to any heir or devisee or other interested person in the estate. The purchaser is protected whether or not the sale was proper and regardless of whether the heirs or devisees to whom title devolved pursuant to Section 62‑3‑101 executed or consented to the deed; however, creditors, and others interested in the estate have a right of recourse against the personal representative under Section 62‑3‑712 if the sale constitutes a breach of the personal representative’s fiduciary duty. This section protects a purchaser of real property from a personal representative who has title to the real property or who has sold real property to the purchaser pursuant to an authorization in the will. To be protected under this provision, a purchaser need not inquire whether a personal representative acted properly in making the sale, even if the personal representative and the purchaser are the same person, or whether the authority of the personal representative had terminated before the sale. Any instrument described in this section on which the deed recording fee prescribed by Chapter 24, Title 12 has been paid, and which has been recorded is prima facie evidence that the sale was made for value.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 44; 2000 Act No. 398, Section 8; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑910 provides that an instrument of distribution (as defined in Section 62‑3‑907) is an essential element in the chain of title to ensure that purchasers or lenders from or to a distributee would have good title.

Effect of Amendment

The 2013 amendment, rewrote the last sentence of subsection (a), to include reference to Chapter 24, Title 12; in subsection (b), in the second sentence, substituted “; however” for “, because the personal representative exercises the power of sale in trust, for the benefit of”, and substituted “have a right of recourse” for “, who have recourse”, and rewrote the last sentence, to include reference to Chapter 24, Title 12.

Library References

Descent and Distribution 87.

Wills 744.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Section 81.

C.J.S. Wills Sections 1639 to 1643.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 185, Improper Distribution; Liability of Distributee‑Purchasers from Distributees Protected.

**SECTION 62‑3‑911.** Partition for purpose of distribution.

For purposes of this section, “interested heirs or devisees” means those heirs or devisees who are entitled to an interest in the real or personal property that is subject to partition pursuant to this section. When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the personal representative or one or more of the interested heirs or devisees may petition the court prior to the closing of the estate, to make partition. After service of summons and petition and after notice to the interested heirs or devisees, the court shall partition the property in the manner provided in this section.

(1) The court shall partition the property in kind if it can be fairly and equitably partitioned in kind.

(2) If the property cannot be fairly and equitably partitioned in kind, the court shall direct the personal representative to sell the property and distribute the proceeds subject to the following provisions of this item.

(a) The court shall provide for the nonpetitioning interested heirs or devisees who wish to purchase the property to notify the court of that interest no later than ten days prior to the date set for a hearing on the partition. The nonpetitioning interested heirs or devisees shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

(b) In the circumstances described in subitem (a) of this section, and in the event the interested heirs or devisees cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the heirs or devisees in the property described in the petition for partition.

(c) In the event that the interested heirs or devisees object to the value of the property interests as determined by the appointed appraisers, those heirs or devisees shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value of the interest or interests. An evidentiary hearing limited to the proposed valuation of the property interests of the interested heirs or devisees shall be conducted, and an order as to the valuation of the interests of the interested heirs and devisees shall be issued.

(d) After the valuation of the interests in the property is completed as provided in subitems (b) or (c) of this item, the interested heirs or devisees seeking to purchase the interests of the other interested heirs or devisees shall have forty‑five days to pay the price set as the value of those interests to be purchased, in such shares and proportions, and in such manner, as the court shall determine. Upon the payment, the court shall direct the personal representative to execute and deliver the proper instruments transferring title to the purchasers.

(e) In the event that the interested heirs or devisees seeking to purchase the partitioned property fail to pay the purchase price as provided in subitem (d) of this item, the court shall proceed according to the traditional practices of circuit courts in partition sales.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 56; 2010 Act No. 244, Section 18, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section makes provision for the probate court to partition personal property.

The 2010 amendment added “service of summons and petition and after” in the second sentence to clarify that a summons and petition are required to commence a formal proceeding, including a formal proceeding for purpose of distribution and to make partition. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201 and also see Sections 14‑23‑280, 62‑1‑304, and Rules 1 and 81, SCRCP.

Under the 2013 amendment Section 62‑3‑911 has been rewritten to provide a method of partition in probate court comparable to the procedure in circuit court pursuant to Section 15‑61‑25.

CROSS REFERENCES

Partition, generally, see SCRCP, Rule 71.

Powers of personal representatives, in general, see Section 62‑3‑711.

Library References

Partition 36.

Westlaw Topic No. 288.

C.J.S. Partition Section 66.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 183, Partition for Purposes of Distribution of Property.

Forms

South Carolina Legal and Business Forms Section 11:1 , Legal Principles.

Notes of Decisions

Jurisdiction 1

1. Jurisdiction

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

**SECTION 62‑3‑912.** Private agreements among successors to decedent binding on personal representative.

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents’ estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

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

REPORTER’S COMMENT

Section 62‑3‑912 sanctions settlement agreements among successors allowing them to vary the distributions of an estate, whether testate or intestate, without the necessity of seeking court approval.

Library References

Descent and Distribution 82.

Wills 740.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Section 78.

C.J.S. Wills Sections 1624 to 1631.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 135, Private Agreements Among Successors to Decedent; Effect on Personal Representative.

**SECTION 62‑3‑913.** Distributions to trustee.

(a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in Section 62‑7‑813.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

HISTORY: 1986 Act No. 539, Section 1; 2005 Act No. 66, Section 6; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section gives the right to the personal representative to require a trustee to register where the state law allows for registration. In addition this section permits the representative to require that a trustee post a bond unless the trust document provides otherwise.

This section grants powers to the representative to withhold distributions to a trust where the representative feels that the beneficiaries may not be informed of the existence of the trust or when the representative has doubts as to the capability and competency of the trustee or of the trustee’s intention to hold the funds without profit to himself.

Under this section, testamentary trustees would enjoy the status of a devisee, distributee, and successor.

Library References

Executors and Administrators 288.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 533.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 182, Distributions to Trustee.

**SECTION 62‑3‑914.** Disposition of unclaimed assets.

(a) If after the expiration of eight months from the appointment of the personal representative of a decedent it appears to the satisfaction of the court by whom the appointment was granted that the personal representative of the estate is unable to ascertain the whereabouts of a person entitled to be heir or devisee of the estate or whether a person who, if living, would be entitled as heir or devisee of this estate is dead or alive, the court may issue a notice addressed to all persons interested in the estate as heirs or devisees calling on the person whose whereabouts or the fact of whose death is unknown, his personal representatives, or heirs or devisees, to appear before the court on a certain day and hour as specified in this notice and to show cause why the personal representative should not be ordered to distribute the estate as if the person whose whereabouts or the fact of whose death is unknown had died before the decedent, and notifying all persons entitled to the estate as heir or devisee, or otherwise, to appear on a designated day and time before the court to intervene for their interest in the estate. The day fixed in the notice, on which cause must be shown, must not be less than one month after the date of the first publication of the notice.

(b) The notice must be published once a week for three successive weeks in a newspaper published in the county in which the court is held. The court has the right, in its discretion, to order the notice to be published once a week for three successive weeks in one other newspaper published in another place most likely to give notice to interested persons.

(c) The publication of the notice as prescribed in subsection (b) must be proved by filing with the court copies of the newspapers containing the publication of the notice or the affidavit of the publishers or printers of the respective newspapers.

(d) At the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if no person appears as required, the court must decree distribution of the estate to be made as if the person whose whereabouts or the fact of whose death is unknown had died before the decedent. Distribution by the personal representative is a full and complete discharge to the personal representative.

(e) At the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if the person whose whereabouts or the fact of whose death was unknown appears, all further proceedings must be discharged.

(f) If the identity of the person appearing is disputed by the personal representative, an heir or devisee of the decedent or the legal representatives of an heir or devisee, the court must proceed to hear and determine the controversy. If the controversy is determined against the person appearing, distribution of the estate must be made as prescribed in subsection (d); but if the controversy is determined in favor of the party appearing, he is considered to be the person whose whereabouts or the fact of whose death was unknown. The determination in either case is subject to appeal as provided in Section 62‑1‑308.

(g) At the expiration of the time fixed in the notice for cause to be shown, due proof of publication having been made and filed as required by subsection (c), if a person appears claiming to be heir, devisee, or personal representative of the person whose whereabouts or the fact of whose death is unknown or to be otherwise entitled to his estate and claiming a distributive share in the decedent’s estate, the court shall proceed to hear and determine whether the person whose whereabouts or the fact of whose death is unknown died before or after the decedent, and if the determination is that the person whose whereabouts or the fact of whose death is unknown died before the decedent, distribution of the decedent’s estate must be made accordingly; but if the court determines that the person whose whereabouts or the fact of whose death is unknown died after the death of the decedent, the distributive share of the person must be paid and delivered by the personal representative to the person legally entitled to receive it, the determination in either case, is subject to appeal as provided in Section 62‑1‑308.

(h) Instead of the procedure required in this section, an unclaimed devise or intestate share of five thousand dollars or less may be paid or transferred by the personal representative to the South Carolina State Treasurer.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 45; 1990 Act No. 521, Sections 57, 58, 103; 1997 Act No. 152, Section 17; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑914 provides that the distributive share to a missing heir, devisee, or claimant must be paid to the conservator of the missing person or, if there is no conservator, to the State Treasurer, to become part of the escheat fund. This section sets aside the assets belonging to a missing person.

The 2013 amendment revised subsection (c) to permit proof of publication by either filing with the court copies of the newspaper itself or an affidavit of the publisher or printer of the newspaper. The de minimus amount in subsection (h) now includes an intestate share and has been increased to $5000.

Library References

Escheat 3.

Westlaw Topic No. 152.

C.J.S. Escheat Section 4.

RESEARCH REFERENCES

Encyclopedias

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

S.C. Jur. Wills Section 182, Distributions to Trustee.

NOTES OF DECISIONS

Under former Section 21‑15‑1680 1

Under former Section 21‑15‑1710 2

Under former Section 21‑15‑1750 3

1. Under former Section 21‑15‑1680

A distributee absent from the State for more than seven years before the death of the intestate is presumed to be dead then, and the administrator must distribute accordingly. Burns v. Ford (S.C. 1830).

2. Under former Section 21‑15‑1710

The surety on the official bond of a probate judge was held liable for loss partially caused by judge’s willful failure to observe the provisions of this section [Code 1962 Section 19‑562]. Hunter v. Boykin (S.C. 1940) 195 S.C. 23, 10 S.E.2d 152.

3. Under former Section 21‑15‑1750

The acceptance of dower by the widow bars her right to the distributive share of the estate. 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).

**SECTION 62‑3‑915.** Distribution to person under disability.

A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator or any other person authorized by this Code or otherwise to give a valid receipt and discharge for the distribution.

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

REPORTER’S COMMENT

Section 62‑3‑915 provides that the personal representative will be absolved if he distributes to a conservator of a disabled or incompetent distributee.

Library References

Executors and Administrators 304.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 543.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 180, Distribution to Person Under Disability.

**SECTION 62‑3‑916.** Apportionment of estate taxes.

(a) For purposes of this section:

(1) “Estate” means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this State.

(2) “Person” means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(3) “Persons interested in the estate” means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent’s estate. It includes a personal representative, conservator, and trustee.

(4) “State” means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(5) “Tax” means the federal estate tax and the basic and any additional estate tax imposed by the State of South Carolina and interest and penalties imposed in addition to the tax.

(6) “Fiduciary” means personal representative or trustee.

(b)(1) To the extent that a provision of a decedent’s will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to item (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this item:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(3) Any tax not apportioned in items (1) or (2) shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If pursuant to items (1) and (2) the decedent’s will or revocable trust directs a method of apportionment of tax different from the method described in this Code, the method described in the will or revocable trust controls.

(c)(1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Code, the determination of the court in respect thereto shall be prima facie correct.

(5) The expenses reasonably incurred by the fiduciary and by any other person interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in subsection (b) and charged and collected as a part of the tax apportioned. If the court finds it is inequitable to apportion the expenses as provided in subsection (b), it may direct apportionment thereof equitably.

(d)(1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this section.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e)(1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interest includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b) hereof, and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(f) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(g) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months’ period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent’s estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action, the determination of apportionment by the court having jurisdiction of the administration of the decedent’s estate in the other state is prima facie correct.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Sections 59, 60; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑916(b) establishes a true apportionment of estate taxes among all takers, whether they be probate or nonprobate, unless a will or revocable trust states otherwise.

The 2013 amendment incorporates into the South Carolina Probate Code the Uniform Estate Tax Apportionment Act as revised in 2003 (UETAA or new UETAA). The new UETAA replaces the Uniform Probate Code’s former estate tax apportionment provision (Section 3‑916), which incorporated into the Uniform Probate Code the former UETAA. The new UPC apportionment statute is actually 15 sections (although a couple are blank, marked “reserved”) and with comments extending for more than 20 pages.

Before the 2013 amendment, this statute did not specifically allow a variance from the statutory apportionment by revocable trust, only by will. The 2013 amendment requires a specific and unambiguous direction for the payment and allows it in a will or in a revocable trust. Per the UPC comments, a general direction to pay debts from the residue does not meet this standard.

CROSS REFERENCES

Estate tax imposed by State of South Carolina, see Sections 12‑16‑10 et seq.

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

Rights of creditors, see Section 62‑6‑205.

Federal Aspects

Federal estate tax provisions generally, see 26 U.S.C.A. Sections 2001 et seq.

Federal estate tax provisions relative to deductions from gross estate, see 26 U.S.C.A. Section 2053.

Library References

Descent and Distribution 81.

Internal Revenue 4821.

Taxation 3344.

Wills 736.

Westlaw Topic Nos. 124, 220, 371, 409.

C.J.S. Descent and Distribution Section 71.

C.J.S. Internal Revenue Section 729.

C.J.S. Social Security and Public Welfare Section 352.

C.J.S. Wills Sections 1623 to 1741.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (3d) Property (Wills & Don. Trans.) Section 9.3, Before‑Tax Treatment of an Election.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.3 TD 3, Before‑Tax Treatment of an Election.

LAW REVIEW AND JOURNAL COMMENTARIES

Note: Estate tax apportionment under the new South Carolina Probate Code. 39 S.C. L. Rev. 607 (Spring 1988).

Part 10

Closing Estates

**SECTION 62‑3‑1001.** Required filings with court; petition for order compelling personal representative to perform duties; court orders.

(a) Within the later of: (i) the expiration of the applicable time limitation for any creditor to commence a proceeding contesting a disallowance of a claim pursuant to Section 62‑3‑806 (a); (ii) the time when all legal proceedings commenced for allowance of a claim have ended in accordance with Sections 62‑3‑804 and 62‑3‑806; and (iii) if a state or federal estate tax return was filed, within ninety days after the receipt or a state or federal estate tax closing letter, whichever is later, a personal representative shall file with the court:

(1) a full accounting in writing of his administration, unless the accounting is waived pursuant to subsection (e);

(2) a proposal for distribution of assets not yet distributed, unless the proposal for distribution of assets is waived pursuant to subsection (e);

(3) an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate; and

(4) proof that a notice of right to demand hearing and copies of the accounting, the proposal for distribution, and the application for settlement of the estate have been sent to all interested persons including all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred, unless the notice of right to demand hearing is waived pursuant to subsection (e).

(b) If the personal representative does not timely perform his duties pursuant to subsection (a), and all interested persons have not waived the requirement pursuant to subsection (e), an interested person may petition for an order compelling the personal representative to perform his duties pursuant to subsection (a). After notice and hearing in accordance with Section 62‑1‑401, the court may issue an order requiring the personal representative to perform his duties pursuant to subsection (a).

(c) After thirty days from the filing by the personal representative of proof that a notice of right to demand hearing has been sent to all persons entitled to the notice pursuant to subsection (a), or at any time after the filing of the application of settlement if notice of right to demand hearing has been waived pursuant to subsection (e), the court may enter an order or orders approving settlement and directing or approving distribution of the estate, terminating the appointment of the personal representative, and discharging the personal representative from further claim or demand of any interested person. However, if an interested person files with the court a written demand for hearing within thirty days after the personal representative files proof that a notice of right to demand hearing has been sent to all persons entitled to the notice pursuant to subsection (a), the court may enter its order or orders only after notice to all interested persons in accordance with Section 62‑1‑401 and hearing.

(d) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate pursuant to this section, and after notice of hearing to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding constitutes prima facie proof of due execution of a will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

(e) Notwithstanding the provisions of this section, a personal representative shall not be required to file an accounting in writing of his administration, a proposal for distribution of assets not yet distributed, or a notice of right to demand hearing if and to the extent these filings are waived by all interested persons.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 46; 1990 Act No. 521, Section 61; 1991 Act No. 143, Section 1; 1997 Act No. 152, Section 18; 2010 Act No. 244, Section 19, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1001 describes procedures for obtaining orders of complete settlement of an estate.

The closing process under Section 62‑3‑1001(a) requires notice to all interested parties including unpaid creditors. The court upon application may order or approve an accounting, may interpret the terms of the will, direct or approve distribution of estate assets, discharge the personal representative, and close the estate. Such a discharge of the personal representative terminates his authority. The personal representative or any other interested person may petition for an order of complete settlement under this section after the claim period has expired, but a devisee may not seek such an order until a year has elapsed from the issuance of the appointment of the representative.

The 2010 amendment revised subsections (3) and (4) to conform to current practice allowing the personal representative to pursue informal proceedings to close the estate by filing an application rather than a petition. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in S.C. Code Section 62‑1‑201(1). The 2010 amendment also revised subsection (c) to delete “on appropriate conditions, determining testacy, determining the persons entitled to distribution of the estate, and, as circumstances require,” and adding “in accordance with Section 62‑1‑401” in the last sentence to clarify procedure. The 2010 amendment added “of hearing” in subsection (d) to clarify the notice of hearing requirements referred to in Section 62‑1‑401.

The 2013 amendment clarifies that all interested persons may waive the filings otherwise required by Section 62‑3‑1001(a)(1), (2), or (4).

CROSS REFERENCES

Computation of time for publication of notices, see Section 15‑29‑10.

Distribution of estate of nonresident decedent to domiciliary personal representative unless, inter alia, the court orders otherwise in a proceeding under this section, see Section 62‑3‑816.

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

Provision that administration under Part 5 of this article is ordinarily terminated by an order in conformity with this section, see Section 62‑3‑505.

Provision that order closing estate as provided in this section terminates the appointment of a personal representative, see Section 62‑3‑610.

Library References

Executors and Administrators 502 to 508(3).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 847 to 864.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

S.C. Jur. Wills Section 95, Closing Orders.

Treatises and Practice Aids

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

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

Restatement (3d) Property (Wills & Don. Trans.) Section 1.1 TD 2, Probate Estate.

NOTES OF DECISIONS

In general 1

1. In general

Annuitants were barred by the law of the case doctrine from challenging trial court’s finding that probate court discharged personal representative of pension plan administrator’s estate from any liability to the estate, on appeal from judgment for personal representative in annuitants’ fraud action, where annuitants did not appeal that portion of trial court’s judgment. Rumpf v. Massachusetts Mut. Life Ins. Co. (S.C.App. 2004) 357 S.C. 386, 593 S.E.2d 183. Appeal And Error 853

**SECTION 62‑3‑1002.** Payment of taxes; certificate from Department of Revenue.

No final accounting of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of such court finds, that all taxes imposed by the provisions of Chapter 6, Title 12 upon such fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the South Carolina Department of Revenue and the receipt for the amount of the tax therein certified shall be conclusive as to the payment of the tax to the extent of such certificate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 47; 1990 Act No. 521, Section 62; 1993 Act No. 181, Section 1610; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1002 precludes the court’s approval of a final accounting by a fiduciary without a finding that the taxes imposed by Chapter 6, Title 12, have been paid.

Effect of Amendment

The 2013 amendment substituted “No final accounting” for “No final account”.

Library References

Executors and Administrators 503.

Taxation 3370.

Westlaw Topic Nos. 162, 371.

C.J.S. Executors and Administrators Section 860.

**SECTION 62‑3‑1003.** Payment of taxes; filing federal estate tax return.

No final accounting of a personal representative in any probate proceeding who is required to file a federal estate tax return may be allowed and approved by the court before whom the proceeding is pending unless the court finds that any tax imposed on the property by Chapter 16, Title 12, including applicable interest, has been paid in full or that no such tax is due.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 48; 1990 Act No. 521, Section 63; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENTS

Section 62‑3‑1003(a) requires the personal representative to circulate to interested distributees and creditors and to file a formal accounting on the later of (1) seven months after first publication of the notice to creditors and (2) thirty days after receipt of a South Carolina estate tax closing letter. Section 62‑3‑1003(b) provides a procedure for obtaining an order approving the accounting and the proposed distribution.

REPORTER’S COMMENT

Section 62‑3‑1002 precludes the court’s approval of a final accounting by a fiduciary without a finding that the taxes imposed by Chapter 16, Title 12, have been paid.

Effect of Amendment

The 2013 amendment substituted “No final accounting” for “No final account”, and substituted “that any tax imposed” for “that the tax imposed”

CROSS REFERENCES

Computation of time for publication of notices, see Section 15‑29‑10.

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

Provision that order closing estate as provided in this section terminates the appointment of a personal representative, see Section 62‑3‑610.

When personal representative shall file account, proposal for distribution, and proofs required by this section, see Section 62‑3‑704.

Library References

Executors and Administrators 503.

Internal Revenue 4833.

Westlaw Topic Nos. 162, 220.

C.J.S. Executors and Administrators Section 860.

C.J.S. Internal Revenue Sections 670, 735 to 736.

C.J.S. Social Security and Public Welfare Section 352.

NOTES OF DECISIONS

Effect of discharge of administrator or executor, under former Section 14‑23‑350 4

Effect of failure to advertise, under former Section 14‑23‑350 3

“One month” defined, under former Section 14‑23‑350 2

Under former Section 14‑23‑350 1‑4

Effect of discharge of administrator or executor 4

Effect of failure to advertise 3

“One month” defined 2

Under former Section 21‑15‑1410 5

Under former Section 21‑15‑1440 6

1. Under former Section 14‑23‑350

An administrator, once appointed, cannot resign. Westbrook v. U. S. Plywood Corp., 1959, 177 F.Supp. 801.

An administrator can only be discharged after a compliance with this section [Code 1962 Section 15‑461]. Westbrook v. U. S. Plywood Corp., 1959, 177 F.Supp. 801.

The absence from the judgment roll of a petition and order showing the appointment of a guardian ad litem for infant heirs does not render the probate court’s judgment discharging a personal representative void on its face so as to subject it to collateral attack by such heirs in an action on the representative’s bond. Fouche v. Royal Indem. Co. of N.Y. (S.C. 1950) 217 S.C. 147, 60 S.E.2d 73.

It is the duty of the guardian himself to give the required notice as to the proceeding for his discharge, and it is not contemplated that the probate judge should do so. First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co. (S.C. 1945) 207 S.C. 15, 35 S.E.2d 47, 162 A.L.R. 1003.

The surety on official bond of a probate judge was liable for loss partially caused by the judge’s willful failure to observe the provisions of this section [Code 1962 Section 15‑461]. Hunter v. Boykin (S.C. 1940) 195 S.C. 23, 10 S.E.2d 152.

Formerly this section [Code 1962 Section 15‑461] had a proviso that the publication of notice of application for discharge should be tri‑weekly in Charleston and Richland Counties. Quick v. Campbell (S.C. 1895) 44 S.C. 386, 22 S.E. 479.

The provisions of this section [Code 1962 Section 15‑461] and Code 1962 Sections 15‑445 and 15‑446 were not intended to limit the jurisdiction of the court of common pleas, but only to prescribe the limits of the jurisdiction of the probate courts as between themselves. Jordan v. Moses (S.C. 1879) 10 S.C. 431. Courts 1

2. —— “One month” defined

The publication for one month of an application for discharge of an administrator means one calendar month. Brock v. Kirkpatrick (S.C. 1905) 72 S.C. 491, 52 S.E. 592.

3. —— Effect of failure to advertise

This section [Code 1962 Section 15‑461] is mandatory that no discharge shall be lawfully given until the required advertisement had been published. Chamberlain v First Nat. Bank of Greenville, 202 SC 115, 24 SE2d 158 (1943). Westbrook v United States Plywood Corp., 177 F Supp 801 (1959, DC SC).

Where, at the time a wrongful death action was brought, the original administratrix of the deceased’s estate had resigned and been discharged, and the plaintiff appointed administrator, but it affirmatively appeared from the judgment of discharge that there had been no publication of the notice required by this section [Code 1962 Section 15‑461], the appointment of the plaintiff was invalid and a nullity, there being no vacancy in the office of the administrator of the estate, and he was without authority to bring the wrongful death action. Westbrook v. U. S. Plywood Corp., 1959, 177 F.Supp. 801.

Where the jurisdictional defect or irregularity in failing to publish the advertisement required by this section [Code 1962 Section 15‑461] affirmatively appears on the face of the judgment purporting to give the discharge, the discharge is invalid and can be collaterally attacked. Westbrook v. U. S. Plywood Corp., 1959, 177 F.Supp. 801.

4. —— Effect of discharge of administrator or executor

The granting of a discharge to an administrator in accordance with the provisions of this section [Code 1962 Section 15‑461] does not conclusively determine that the estate has been wholly and completely settled. McNair v Howle, 123 SC 252, 116 SE 279 (1923). Anderson v Bowers, 117 F Supp 884, 54‑1 USTC ¶9226, 45 AFTR 597 (1954, DC SC).

The approval of the final report and discharge of a former administrator may have the force and effect of a judgment vacating the office, yet it is not conclusive that the estate has been wholly settled so as to preclude the appointment of an administrator de bonis non. McNair v Howle, 123 SC 252, 116 SE 279 (1923). Anderson v Bowers, 117 F Supp 884, 54‑1 USTC ¶9226, 45 AFTR 597 (1954, DC SC).

A probate court could have, if necessary, appointed an administrator de bonis non to collect the assets of an estate by asserting the illegality of the payment of excess commissions to the executrix, although she had been discharged. Anderson v. Bowers, 1954, 117 F.Supp. 884.

Under its broad constitutional and statutory powers, a probate court may appoint an administrator de bonis non after it has discharged the general administrator, even though that order of discharge has not been revoked. McNair v. Howle (S.C. 1923) 123 S.C. 252, 116 S.E. 279.

Where an administrator has fully, fairly, and faithfully administered the estate in his hands, and, after due advertisement, as set out in this section [Code 1962 Section 15‑461], and after due service of personal notice upon those entitled thereto, has obtained an order of discharge from the probate court, such decree should protect him from further liability and should relieve him from any obligation again to take up the burden of the trust by reason of after‑discovered claims or assets. McNair v. Howle (S.C. 1923) 123 S.C. 252, 116 S.E. 279. Executors And Administrators 513(15)

After a lapse of six years, an order discharging an administrator of a surety on an administrator’s bond, as set out here, will become binding on the heirs of the estate for the protection of which the bond was given and on a cosurety thereon. Quick v. Campbell (S.C. 1895) 44 S.C. 386, 22 S.E. 479.

5. Under former Section 21‑15‑1410

Where returns are filed during certain years and omitted during other years, the commissions are allowed only for the years in which returns are filed. However, this will not prevent the administrator from receiving and retaining his commissions allowed by law upon the payment to the parties entitled thereto of any balance in his hands. Ross v. Beacham, 1940, 33 F.Supp. 3. Executors And Administrators 500

Section 21‑15‑1410 is applicable to executors and administrators of decedent’s estates and is inapplicable to trustees appointed by will who are required to file annual returns with the probate court in accordance with Section 21‑29‑80. Cartee v. Lesley (S.C. 1986) 290 S.C. 333, 350 S.E.2d 388. Trusts 289

The surety on official bond of a probate judge is liable for loss partially caused by judge’s willful failure to observe the provisions of this section [Code 1962 Section 19‑531]. Hunter v. Boykin (S.C. 1940) 195 S.C. 23, 10 S.E.2d 152.

An administrator who had failed to file return at the expiration of eleven months (now five months) in conformity with this section [Code 1962 Section 19‑531] was held required to return the commissions retained for services during that time, although the return was filed immediately upon the court’s order and the administrator had faithfully performed all other duties required of him. Brannon v. Woodward (S.C. 1934) 175 S.C. 1, 178 S.E. 249. Executors And Administrators 500

Executor forfeits commissions for failure to render annual (now semiannual) accounts. The commissions provided for an executor in a will as compensation for services rendered are forfeited under this section [Code 1962 Section 19‑531], during the years the executor fails to render annual (now semiannual) accounts. In re Norris’ Estate (S.C. 1929) 153 S.C. 203, 150 S.E. 693.

Where a legacy was given for the performance of duties as an executor and the executor failed to file annual (now semiannual) reports during the period of his term as required by this section [Code 1962 Section 19‑531], he was not entitled to this legacy. In re Norris’ Estate (S.C. 1929) 153 S.C. 203, 150 S.E. 693.

An executor is not entitled to commissions for his trouble in the management of an estate, where he failed to make annual (now semiannual) returns, under this section [Code 1962 Section 19‑531]; but such failure will not prevent him from receiving and retaining his commissions allowed by law upon the payment over to the parties entitled thereto of any balance in his hands. Blackmon v. Blackmon (S.C. 1920) 113 S.C. 478, 101 S.E. 827. Executors And Administrators 500

An administrator who fails to make returns is not entitled to commissions, except on the balance decreed to be paid into court. Epperson v. Jackson (S.C. 1909) 83 S.C. 157, 65 S.E. 217.

Mode of stating account. Cunningham v. Cauthen (S.C. 1892) 37 S.C. 123, 15 S.E. 917.

6. Under former Section 21‑15‑1440

Surety suing for release from obligation of administrator’s bond could not demand final winding up of estate under administration or of administrator’s estate, but had cause of action for relief on bond only. American Surety Co. of New York v. Muckenfuss (S.C. 1934) 172 S.C. 169, 173 S.E. 290. Executors And Administrators 531

Administrator de bonis non of estate under administration not necessary party, since surety was not interested in estate after death of administrator. American Surety Co. of New York v. Muckenfuss (S.C. 1934) 172 S.C. 169, 173 S.E. 290. Executors And Administrators 531

**SECTION 62‑3‑1004.** Liability of distributees to claimants.

After assets of an estate have been distributed and subject to Section 62‑3‑1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

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

REPORTER’S COMMENT

Section 62‑3‑1004 allows a creditor of an estate to pursue assets distributed against one or more distributees. A distributee’s liability to a claimant is for amounts received as distributions in excess of exempt property but no more than the value of the property received, valued as of the time of the distribution.

A distributee has a right of contribution against other distributees if he gives timely notice to the distributees so that they can participate in the proceedings under which the claimant is asserting his claim.

CROSS REFERENCES

Proceedings to enforce a claim against estate of decedent or his successors prior to distribution, see Section 62‑3‑104.

Library References

Descent and Distribution 119 to 152.

Wills 827 to 848.

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Sections 112 to 130.

C.J.S. Wills Sections 1943 to 1973.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 186, Claims After Distribution; Recovery from Distributees or Personal Representative.

NOTES OF DECISIONS

Under former Section 21‑17‑10 1

Under former Section 21‑17‑30 2

Under former Section 21‑17‑40 3

1. Under former Section 21‑17‑10

For additional related cases, as to lands devised subject to lien of judgment against executor of devisor, Brock v Kirkpatrick, 60 SC 322, 38 SE 779 (1901); as to cases on liability of heirs and devisees. Brock v Kirkpatrick, 60 SC 322, 38 SE 779 (1901). Wheeler v Floyd, 24 SC 413 (1884). Hendrix v Holden, 58 SC 495, 36 SE 1010 (1900). Ariail v Ariail, 29 SC 84, 7 SE 35 (1888). Causey v Varn, 6 SE 152 (1887, SC). Mobley v Cureton, 6 SC 49 (1875). Adger v Pringle, 11 SC 527 (1879). Cleveland v Mills, 9 SC 430 (1878).

In an action at law the executor cannot be joined. Vernon & Co. v Executors of Ehrich, 11 SC Eq 257 (1835). But when a creditor sues in equity, the executor should be made a party. Vernon & Co. v Executors of Ehrich, 11 SC Eq 257 (1835). Goodhue v Barnwell, 14 SC Eq 198 (1839).

2. Under former Section 21‑17‑30

This section [Code 1962 Section 19‑703] exempts lands bona fide alienated before the action brought. Galloway v. Galloway (S.C. 1907) 76 S.C. 524, 57 S.E. 528.

3. Under former Section 21‑17‑40

Bona fide alienation defined and explained. Smith v Grant, 15 SC 136 (1881). Warren v Raymond, 17 SC 163 (1882).

This section [Code 1962 Section 19‑704] does not unconstitutionally deprive a creditor of remedy for the collection of his debt and, therefore, his property, without due process, in view of the remedy provided by Code 1962 Sections 19‑492 et seq., whereby a creditor may apply to the probate judge, at any time after the qualification of any executor or administrator to have the decedent’s real estate sold to pay debts. J. F. Floyd Mortuary, Inc. v. Newman (S.C. 1952) 222 S.C. 421, 73 S.E.2d 444.

“Action brought,” as used in this section [Code 1962 Section 19‑704], is not the mere filing of claim in the probate court or with the executor or administrator. J. F. Floyd Mortuary, Inc. v. Newman (S.C. 1952) 222 S.C. 421, 73 S.E.2d 444.

**SECTION 62‑3‑1005.** Rights of successors and creditors.

Unless previously barred by adjudication and except as provided in any accounting, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the application for settlement of the estate, required by Section 62‑3‑1001. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent’s estate.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 64; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

The 2013 amendment conforms this section to changes to 3‑1001, allowing waiver of accounting and proposal for distribution.

CROSS REFERENCES

Proceedings to enforce a claim against estate of decedent or his successors prior to distribution, see Section 62‑3‑104.

Library References

Executors and Administrators 513.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 865 to 870.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

**SECTION 62‑3‑1006.** Limitations on actions and proceedings against distributees.

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (i) if a claim by a creditor of the decedent, at one year after the decedent’s death, and (ii) any other claimant and any heir or devisee, at the later of three years after the decedent’s death or one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 65; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1006 creates a statute of limitations for claims against distributees by creditors or other persons claiming to be entitled to distribution from the estate. The time limitation provided for heirs and devisees or claimants other than creditors is three years after the decedent’s death or, for creditors, one year after the time of the distribution thereof.

As in Section 62‑3‑1005, this section does not create a time bar for any action to recover property received as a result of fraud.

Library References

Descent and Distribution 143.

Wills 847(2).

Westlaw Topic Nos. 124, 409.

C.J.S. Descent and Distribution Section 126.

C.J.S. Wills Section 1943.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Limitation of Actions Section 44, Estates and Probate.

**SECTION 62‑3‑1007.** Certificate discharging liens securing fiduciary performance.

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the court that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

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

REPORTER’S COMMENT

Under Section 62‑3‑1007, after termination of the personal representative’s appointment, and upon the filing of an application showing that no action is pending concerning the estate, the personal representative or his sureties may obtain from the court a certificate to the effect that the personal representative appears to have fully administered the estate. A certificate issued by the court affects a release of any security given in connection with the personal representative’s bond, but does not prevent an action against the personal representative or his surety.

Library References

Executors and Administrators 531.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 910.

**SECTION 62‑3‑1008.** Subsequent administration.

If other property of the estate is discovered after an estate has been settled and the personal representative discharged or for other good cause, the court upon application of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently opened estate. If a new appointment is made, unless the court orders otherwise, the provisions of this Code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 49; 2010 Act No. 244, Section 20, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1008 provides a procedure for reopening an estate following discharge of the personal representative. Such a supplemental or subsequent administration of a decedent’s estate would be required if other property of the estate is discovered after the personal representative’s discharge. Upon petition of an interested party and upon notice as required by the court, the court may reappoint the former personal representative or a different person to administer the subsequently discovered assets.

In administering the subsequently discovered assets, the procedure of this Code would apply as appropriate, except that previously barred claims could not be asserted in the subsequent administration.

The 2010 amendment deleted “petition” and replaced it with “application” to allow any interested person to make application for a subsequent administration. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in Section 62‑1‑201.

Library References

Executors and Administrators 23.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 52.

Part 11

Compromise of Controversies

**SECTION 62‑3‑1101.** Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved by the court after hearing, is binding on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62‑5‑433.

HISTORY: 1986 Act No. 539, Section 1; 1997 Act No. 152, Section 19; 2010 Act No. 244, Section 21, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1101 provides that compromises of controversies regarding estates can be made binding on interested parties by court confirmation.

Such controversies would include disagreements regarding the admission to probate of and instrument as the will of the decedent, the construction, validity, and effect of a probated will, the rights of successors to decedent’s estate, and the personal representative’s administration of the estate.

Approval of the compromise agreement is by order of the probate court following a formal proceeding. The order confirming the agreement is binding upon parties to the proceeding, and is binding upon unborn or unascertained persons and upon persons who could not be located.

After court confirmation, the agreement is binding even though the agreement affects a trust contained in an instrument separate from decedent’s will, and even though it affects an unalienable right.

The agreement as confirmed by the court is not binding on creditors of the estate or trust estate, or on taxing authorities, unless they are parties to the agreement.

The 2010 amendment deleted “in a formal proceeding in” and replaced the foregoing with “by” and deleted “for that purpose” and replaced it with “after hearing.” The intention of the amendment was to require court approval in an informal proceeding after hearing. See Section 62‑3‑1102 regarding application procedure for approval of compromise and certain agreements.

Library References

Wills 212.

Westlaw Topic No. 409.

C.J.S. Wills Sections 490 to 493.

RESEARCH REFERENCES

Treatises and Practice Aids

Will Contests Section 12:21, Settlement Agreements.

NOTES OF DECISIONS

In general 1

1. In general

For purposes of statute allowing competent persons having beneficial interests to enter into written, court‑approved settlements in probate proceedings, testator’s joint revocable trust, not residual beneficiary of trust, was person that held beneficial interest, and thus residual beneficiary’s signature was not required on compromise agreement between trustee and testator’s niece and nephew, who alleged that will and trust were products of undue influence; trust was considered the devisee under statute, order binding trustee would be binding on trust beneficiaries in probate proceeding, and trustee had fiduciary obligation to administer trust in best interests of beneficiaries. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Trusts 140(1); Wills 212

**SECTION 62‑3‑1102.** Procedure for securing court approval of compromise.

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) Upon application to the court and after notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 22, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1102 provides the procedure by which agreements for compromise of estate controversies are confirmed by the probate court. Subsection (1) requires the agreement be in written form setting forth all of the terms of the compromise. The agreement must be signed by all persons having a beneficial interest in or claim against the estate, whose interest or claim is affected by the agreement. If an interested party is a minor, the agreement may be executed on his behalf by his parent.

Execution of the agreement is not required by unknown parties or by parties whose whereabouts are unknown or cannot reasonably be ascertained. The agreement should clearly specify the effect of the compromise on the minors, on unknown parties, and on unlocated parties. Subsection (2) would imply that the agreement is not to be signed by the personal representative or trustees of the affected testamentary trust prior to submission of the agreement to the probate court, but the agreement should specify the proposed effect on the personal representative and affected trusts.

Subsection (2) requires submission of the agreement to the probate court for approval. The application for approval may be made by an interested party or by the personal representative. The application would request approval of the agreement and would request an order directing or permitting the personal representative and the trustee of an affected testamentary trust to execute the agreement.

Pursuant to subsection (3), a hearing after notice to all interested parties is conducted by the probate judge. In addition to parties to the agreement, the personal representative and trustees of affected trusts must be notified of the hearing.

The advocates of the agreement must prove to the court that a controversy existed in good faith among the interested parties. This requirement is to avoid sham arrangements designed to prejudice unknown parties or parties whose addresses are unknown but would be bound by an order confirming the agreement.

The advocates of the agreement must prove that the effect of the agreement on persons, including minors and incompetents represented by fiduciaries or other representatives, is fair, equitable, and reasonable.

Upon such proof to the court, the court will by order approve the agreement and will direct the personal representative and all fiduciaries subject to the court’s jurisdiction to execute the agreement.

The agreement as confirmed by the court will govern further disposition of the decedent’s estate in accordance with the terms of the agreement. Subsection (3) further provides that minor children who are represented only by their parents may be bound only if their parents executed the agreement with other competent persons. In the event this requirement cannot be met, execution of the agreement on behalf of the minor could be made binding if by a court appointed guardian.

The 2010 amendment revised subsection (3) to delete “After” at the beginning and replaces it with “Upon application to the court and after” to allow application to the probate court to secure court approval of a compromise. Unlike a petition, an application does not require a summons or petition. See 2010 amendments to certain definitions in Section 62‑1‑201.

Library References

Compromise and Settlement 4.5, 66.

Westlaw Topic No. 89.

C.J.S. Compromise and Settlement Sections 1, 8, 25 to 27.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 122, Issues of Law.

S.C. Jur. Compromise and Settlement Section 19, Validity, Enforcement and Avoidance.

Treatises and Practice Aids

Will Contests Section 12:21, Settlement Agreements.

Notes of Decisions

In general 1

1. In general

Even if compromise agreement resolved bona fide challenge to father’s will, compromise agreement was not just and reasonable, as would allow for court approval, despite argument by attorney general that agreement avoided potential of substantial litigation costs to charitable beneficiaries; agreement, which was orchestrated by attorney general, destroyed estate plan father had established, in favor of arrangement overseen virtually exclusively by attorney general, which turned over money to family members and purported family members who were, under plain terms of father’s will, given either limited devises or excluded. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 740(3)

In an estate controversy, in determining whether to approve a proposed compromise agreement, court’s duty is not to decide the ultimate question of the merits of the claims giving rise to controversy; rather, statutory standard is whether controversy is in good faith and whether agreement is just and reasonable. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 740(3)

A compromise agreement in an estate controversy is void unless executed in compliance with the governing statute. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 740(3)

Proposed compromise agreement in estate controversy was eligible for court consideration despite objection of trust, which was entitled to residue of estate, where trust was given notice of proposed compromise ultimately reached, trust fully participated in extensive hearings held over four‑month period, and trust was given opportunity to voice its objections. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 741

Upon appeal of approval of a compromise agreement in an estate controversy, the question for an appellate court is whether the ruling court abused its discretion in approving the compromise. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 741

Part 12

Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

**SECTION 62‑3‑1201.** Collection of personal property by affidavit.

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or the instrument evidencing the debt, obligation, stock, or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor. Before this affidavit may be presented to collect the decedent’s personal property, it must:

(1) state that the value of the entire probate estate (the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy), wherever located, less liens and encumbrances, does not exceed twenty‑five thousand dollars;

(2) state that thirty days have elapsed since the death of the decedent;

(3) state that no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction;

(4) state that the claiming successor, which for the purposes of this section includes a person who remitted payment for reasonable funeral expenses, is entitled to payment or delivery of the property;

(5) be approved and countersigned by the probate judge of the county of the decedent’s domicile at the time of his death, or if the decedent was not domiciled in this State, in the county in which the property of the decedent is located, and only upon the judge’s satisfaction that the successor is entitled to payment or delivery of the property; and

(6) be filed in the probate court for the county of the decedent’s domicile at the time of his death, or, if the decedent was not domiciled in this State, in the county in which property of the decedent is located.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 50; 1990 Act No. 521, Sections 66, 67; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1201 provides for a simplified handling of small estates of twenty‑five thousand dollars or less through the use of an affidavit. The small estate affidavit may be used starting thirty days after the death of the decedent if the entire estate of the decedent, wherever located, after deduction of liens and encumbrances, does not exceed twenty‑five thousand dollars. The affiant must state that the value of the estate does not exceed twenty‑five thousand dollars, that thirty days have elapsed since the decedent’s death, that no person has applied for appointment as, or has been appointed as, personal representative in any jurisdiction, and that the affiant as successor to the decedent is entitled to payment or delivery of the property.

Upon presentment of such an affidavit, holders of property of the decedent, or persons obligated to the decedent, must transfer the property, or discharge their debt, to the successor. Stock transfer agents in subparagraph (6) are directed to transfer stock based on such affidavits.

The small estate affidavit cannot be used to transfer title to real estate and it cannot be used by creditors of the estate to reach assets of the estate.

The 2013 amendment increases the size of the estate in which a small estate affidavit can be utilized to twenty‑five thousand dollars, establishes that a person who advances reasonable funeral expenses is a successor for purposes of this section regardless of his status as an heir or devisee, and clarifies which probate court must approve and record the affidavit.

CROSS REFERENCES

Effect of affidavit, see Section 62‑3‑1202.

Necessity of order of probate for will, except as provided in this section, see Section 62‑3‑102.

Library References

Executors and Administrators 3(1), 84 to 89.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 7, 9 to 10, 174 to 181, 183 to 204.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 52, Necessity of Order of Probate for Will.

**SECTION 62‑3‑1202.** Effect of affidavit.

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. Any person who receives or is presented with a valid affidavit executed pursuant to Section 62‑3‑1201 and who has not received actual written notice of its revocation or termination must not fail to deliver the property identified in the affidavit, provided it contains the following provision: “No person who may act in reliance on this affidavit shall incur any liability to the estate of the decedent.” Any person to whom payment, delivery, transfer, or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

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

REPORTER’S COMMENT

Section 62‑3‑1202 discharges and releases any person who transfers personal property of a decedent or who pays his debt to the decedent pursuant to the small estate affidavit pursuant to Section 62‑3‑1201 to the same extent he would have been released from liability had he dealt with a court‑appointed personal representative of the decedent. The person so released is not required to inquire into the accuracy of the affidavit nor to insure the proper application of the personal property by the successor.

This section creates a liability in the recipient of property through the use of an affidavit to any personal representative of the estate and to any person having a superior right, including creditors of the decedent or of the estate, or other successors of the decedent.

The 2013 amendment requires the person receiving or presented with the affidavit to deliver the property identified in the affidavit if the affidavit contains the quoted language, unless that person has received actual written notice of the affidavit’s revocation or termination.

Library References

Executors and Administrators 3(1), 84 to 89.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 7, 9 to 10, 174 to 181, 183 to 204.

**SECTION 62‑3‑1203.** Small estates; summary administrative procedure.

(a) If it appears from the inventory and appraisal that the value of the entire probate estate (the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy), less liens and encumbrances, does not exceed twenty‑five thousand dollars and exempt property, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, after publishing notice to creditors pursuant to Section 62‑3‑801, but without giving additional notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 62‑3‑1204.

(b) If it appears from an appointment proceeding that (1) the appointed personal representative, individually or in the capacity of a fiduciary, is either the sole devisee under the probated will of a testate decedent or the sole heir of an intestate decedent, or (2) the appointed personal representatives, individually or in their capacity as a fiduciary, are the sole devisees under the probated will of a testate decedent or the sole heirs of an intestate decedent, the personal representative, after publishing notice to creditors as under Section 62‑3‑801, but without giving additional notice to creditors may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 62‑3‑1204.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 69; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Sections 62‑3‑1203 and 62‑3‑1204 provide for an expedited administration by a personal representative. Under Section 62‑3‑1203, if the personal representative determines after inventory and appraisal that: (1) the estate assets, after deduction of liens and encumbrances, do not exceed the total of twenty‑five thousand dollars, plus exempt property, plus costs and expenses of administration, reasonable funeral expenses, and medical and hospital expenses of the decedent’s last illness, or (2) that the sole personal representative is also the sole heir or devisee of the decedent or that corepresentatives are all of the only heirs or devisees of the decedent, then the personal representative may immediately pay the administration, funeral, medical, and hospital expenses and distribute the balance to distributees. Other than the publication of notice under Section 62‑3‑801, additional notice to creditors of this election is not required. Following the disbursement of the assets, the personal representative would file the closing statement required by Section 62‑3‑1204.

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Executors and Administrators 3(1), 7.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 4, 7, 9 to 10, 979 to 988.

**SECTION 62‑3‑1204.** Small estates; closing by sworn statement of personal representative.

(a) Unless prohibited by order of the court and except for estates being administered under Part 5 (Sections 62‑3‑501 et seq.), after filing an inventory with the court, and paying any court fees due, the personal representative may close an estate administered under the summary procedures of Section 62‑3‑1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) either

(i) to the best knowledge of the personal representative, the value of the entire probate estate (the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy), less liens and encumbrances, did not exceed twenty‑five thousand dollars and exempt property, costs, and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent; or

(ii) the estate qualifies for summary administration according to the provisions of subsection (b) of Section 62‑3‑1203;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto;

(3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware and whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no unresolved claims, actions or proceedings involving the personal representative are pending in any court one year after the date of the decedent’s death, the appointment of the personal representative terminates.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 70; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1204 provides the procedure for closing the estate following the disbursement and distribution of assets pursuant to Section 62‑3‑1203. The procedure would not be used if prohibited by the probate court or if the estate was in administration under Part 5.

The personal representative would file with the probate court his verified statement stating that: (1) to the best of his knowledge the estate assets do not exceed the limitations in or would qualify as a summary administrator according to the requirements described in Section 62‑3‑1203; (2) he has disbursed and distributed the assets to the proper persons, he has sent a copy of the closing statement to the distributees, unpaid creditors, and claimants whose claims are not barred, and he has sent to all distributees a written account of his administration of the estate.

If no action regarding the estate is pending one year after the date of the decedent’s death, the court will terminate the appointment of the personal representative who filed the closing statement.

Effect of Amendment

The 2013 amendment, in subsection (a), substituted “after filing an inventory with the court, and paying any court fees due, the” for “a”; in subsection (a)(1)(i), substituted “twenty‑five thousand dollars” for “ten thousand dollars”; in subsection (a)(3), substituted “the personal representative is aware and” for “he is aware”; and in subsection (b), inserted “unresolved claims,”, and substituted “any court one year after the date of the decedent’s death,” for “the court one year after the closing statement is filed”.

Library References

Executors and Administrators 3(1), 471.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 7, 9 to 10, 799.

LAW REVIEW AND JOURNAL COMMENTARIES

Administrator’s Fees. 25 S.C. L. Rev. 505.

Part 13

Sale of Real Estate by Probate Court

**SECTION 62‑3‑1301.** Only procedure for sale of lands by court.

The provisions of this Part are hereby declared to be the only procedure for the sale of lands by the court, except where the will of the decedent authorizes to the contrary.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 51; 2013 Act No. 100, Section 1, eff January 1, 2014.

CROSS REFERENCES

Powers of personal representatives, in general, see Section 62‑3‑711.

Library References

Executors and Administrators 319 to 325.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 584 to 586, 601.

RESEARCH REFERENCES

Encyclopedias

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

Forms

South Carolina Legal and Business Forms Section 8:29 , Deed‑Personal Representative.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Conveyances by Executors and Assertions of Title. 24 S.C. L. Rev. 687.

Administration of a Trust: Sale of Property to a Life Beneficiary. 24 S.C. L. Rev. 691.

NOTES OF DECISIONS

In general 1

Concurrent jurisdiction 2

Mandamus to compel sale 3

Prerequisites to sale 5

Validity of order of sale 4

Validity of order of sale, collateral attack, under former provisions regarding sale of realty; principles of jurisdiction 4

1. In general

The jurisdiction to sell real estate in aid of assets, being founded on the insufficiency of the personal assets to pay the decedent’s debts, must be judicially determined before ordering a sale of the realty. Dyson v Jones, 65 SC 308, 43 SE 667 (1903). Hand v Kelly, 102 SC 151, 86 SE 382 (1915). Dorn v Stidham, 139 SC 66, 137 SE 331 (1927).

A probate court has jurisdiction to sell real estate in aid of assets, and may marshal and administer the assets of a decedent. Dyson v. Jones (S.C. 1903) 65 S.C. 308, 43 S.E. 667.

Determination of the right to sell the realty must include an accounting of the personal assets, it not being known whether there is insufficiency of personal assets until both assets and debts are ascertained. Dyson v. Jones (S.C. 1903) 65 S.C. 308, 43 S.E. 667.

Having the power to determine the fact of insufficiency of the personal assets, the probate court has the power to determine the extent of the insufficiency of the personal assets, especially in view of the express jurisdiction to marshal and administer assets. Dyson v. Jones (S.C. 1903) 65 S.C. 308, 43 S.E. 667.

Whenever it shall appear to “his satisfaction” that the personal estate is insufficient for the payment of the debts of an intestate, the probate judge shall determine the necessity of a sale, lands to be sold, etc. Hodges v. Fabian (S.C. 1889) 31 S.C. 212, 9 S.E. 820, 17 Am.St.Rep. 25.

The interest of the testator in the land can be sold but not the rights of the parties to the action in such lands as heirs of another party. McLaurin v. Rion (S.C. 1886) 24 S.C. 407.

It seems that a probate judge can determine the validity of an alleged deed, under which one of the defendants claims title to the land about to be sold as descended from the intestate. Gregory v. Rhoden (S.C. 1886) 24 S.C. 90.

This power is derived from the State Constitution ‑ SC Const, Art 5, Section 19 (now Art 5, Section 1). McNamee v. Waterbury (S.C. 1873) 4 S.C. 156.

2. Concurrent jurisdiction

It seems that the probate court’s jurisdiction to make a sale of realty as provided for in this section [Code 1962 Section 19‑551] is concurrent with that of the court of common pleas. See McNamee v Waterbury, 4 SC 156 (1873). Jordan v Moses, 10 SC 431 (1879). Finley v Robertson, 17 SC 435 (1882). Scruggs v Foot, 19 SC 274 (1883). Shaw v Barksdale, 25 SC 204 (1886). Dorn v Stidham, 139 SC 66, 137 SE 331 (1927).

But the principle of comity will be respected. Beatty v. National Surety Co. (S.C. 1925) 132 S.C. 45, 128 S.E. 40.

Probate court and court of common pleas have concurrent jurisdiction over an action against an administrator for an accounting of funds from the sale of realty as here provided for, and the court first acquiring jurisdiction should retain it. Epperson v. Jackson (S.C. 1909) 83 S.C. 157, 65 S.E. 217.

3. Mandamus to compel sale

Mandamus will not be against a probate judge to compel him to make a sale of realty in aid of assets or to execute title to lands sold in aid of the assets. Burnett v. Burnside (S.C. 1890) 33 S.C. 276, 11 S.E. 787.

4. Validity of order of sale, collateral attack

If a probate judge has jurisdiction of the subject matter and of the parties, his order for a sale of decedent’s lands as set out in this section [Code 1962 Section 19‑551] must be regarded as a judgment of a competent court upon a matter within its jurisdiction and not subject to collateral attack. Hodges v Fabian, 31 SC 212, 9 SE 820 (1889). Bradley v Calhoun, 116 SC 7, 106 SE 843 (1921).

Although the insufficiency of the personal property for the payment of a decedent’s debts is the foundation of a probate court’s jurisdiction to sell realty of decedent, yet his order of sale is not void at the moment the proceeds of the sale touch the full payment of the debts. Hodges v. Fabian (S.C. 1889) 31 S.C. 212, 9 S.E. 820, 17 Am.St.Rep. 25.

Under the provisions of this section [Code 1962 Section 19‑551] and Code 1962 Section 15‑444, an order of a probate judge for the sale of land, the proceeds of which were in excess of the insufficiency of the assets to pay decedent’s debts, was valid and not subject to collateral attack. Hodges v. Fabian (S.C. 1889) 31 S.C. 212, 9 S.E. 820, 17 Am.St.Rep. 25.

5. Prerequisites to sale

An action by a creditor for the sale of realty in aid of the assets cannot be brought until the will of testator has been probated or letters of administration granted. Whitesides v. Barber (S.C. 1886) 24 S.C. 373. Executors And Administrators 333

**SECTION 62‑3‑1302.** Sale of real estate.

The court may, as herein provided, authorize the sale of the real property of a decedent.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 52; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1302 establishes the circumstances under which the probate court has the power to sell the land of the decedent.

Effect of Amendment

The 2013 amendment substituted “real property of a decedent” for “real estate of such deceased person”.

Library References

Executors and Administrators 325, 329(1).

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 586, 595.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Will: Conveyances by Executors and Assertions of Title. 24 S.C. L. Rev. 687.

Administration of a Trust: Sale of Property to a Life Beneficiary. 24 S.C. L. Rev. 691.

Contracts: Real Estate Listing Agreements Binding After the Owner’s Death. 33 S.C. L. Rev. 43, August 1981.

NOTES OF DECISIONS

Under former Section 21‑15‑920 1

1. Under former Section 21‑15‑920

In Fogle v Protestant Episcopal Church of Parish of St. Michael, 48 SC 86, 26 SE 99 (1896), considering this section [Code 1962 Section 19‑492] the court said: “It is true, this section [Code 1962 Section 19‑492] provides that proceedings thereunder may be instituted in the probate court, but as the court of common pleas would have concurrent jurisdiction in such cases, the provisions of said section are also applicable to the court of common pleas.” Muldrow v Jeffords, 144 SC 509, 142 SE 602 (1928). Jordan v Moses, 10 SC 431 (1879).

Under this section [Code 1962 Section 19‑492] the probate court and court of common pleas of the county in which the decedent was last an inhabitant have concurrent jurisdiction to order the sale of his lands in aid of the personalty for the payment of his debts. Dorn v. Stidham (S.C. 1927) 139 S.C. 66, 137 S.E. 331. Courts 472.4(2.1)

The determination of the probate court, on an application to sell realty to pay debts, as to the claims against the decedent’s estate, is binding on all the parties, in the absence of fraud. Dyson v. Jones (S.C. 1903) 65 S.C. 308, 43 S.E. 667. Executors And Administrators 349(1)

Order for sale of land in aid of assets is binding on all parties to the proceedings and destroys their right to claim homestead in the land sold. Culler v. Crim (S.C. 1898) 52 S.C. 574, 30 S.E. 635. Executors And Administrators 349(1)

**SECTION 62‑3‑1303.** Issuance of summons upon petition for sale.

At any time after the qualification of the personal representative, on petition to the court by an interested person requesting the sale of real property of the decedent, a summons shall be issued to the personal representative (if not the petitioner), the heirs at law of the decedent (if the decedent died intestate or the time to challenge a will admitted to probate has not expired), the devisees under the decedent’s will (if any), any person who has properly presented a claim against the estate which remains unresolved, any interested person effected by the proceeding, and any other person as required by the court in its discretion.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 53; 1990 Act No. 521, Section 71; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1303 specifies the process by which an action for the sale of real estate is commenced. The action is commenced by a petition filed after qualification of the personal representative. The petition may be filed by an interested person.

Upon filing of the petition, Section 62‑3‑1303 provides that a summons will be issued to the specified interested persons.

Effect of Amendment

The 2013 amendment rewrote the section.

Library References

Executors and Administrators 332 to 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 601 to 608.

**SECTION 62‑3‑1304.** Form of summons.

The form of such summons must be in like form as summonses for civil actions in the circuit courts.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 54; 1990 Act No. 521, Section 72; 2013 Act No. 100, Section 1, eff January 1, 2014.

Library References

Executors and Administrators 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 608.

**SECTION 62‑3‑1305.** Service of summons and petition.

To such summons a copy of the petition must be attached and copies of the summons and petition served on the personal representative (if not the petitioner), the heirs at law of the decedent (if the decedent died intestate or the time to challenge a will admitted to probate has not expired), the devisees under the decedent’s will (if any), any person who has properly presented a claim against the estate which remains unresolved, any interested person effected by the proceeding, and any other interested person as required by the court in its discretion, in like manner as summonses and complaints are served in civil actions in the circuit courts. If there are minors the court shall appoint guardians ad litem who must be served with copies of the summons and petition and the appointment, and who must acknowledge acceptance of their appointment as guardians ad litem to the probate court prior to being served with the summons and petition. Nothing herein precludes the parties interested in the proceeding from accepting service of the summons and petition and consenting to the sale as prayed for in the petition.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 55; 1990 Act No. 521, Section 73; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides for the manner of service of the summons and petition and incorporates by reference the methods of service of summons and complaints in civil actions in the circuit courts. This section further provides for appointment of guardian ad litem to represent minors and specifies that the guardian ad litem will be served with copies of the summons and petition. A copy of the order appointing the guardian ad litem and a statement of the guardian to serve must be endorsed on the petition. This section further provides that any of the parties may accept service of the summons and petition and may also consent to the sale prayed for in the petition.

Effect of Amendment

The 2013 amendment rewrote the section.

CROSS REFERENCES

Service by publication in custody, support, parental rights, etc., proceedings, see Section 15‑9‑710.

Service of process on persons of unsound mind, see SCRCP, Rule 4.

Library References

Executors and Administrators 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 608.

**SECTION 62‑3‑1306.** Execution of process by sheriff; fees.

The sheriffs of the several counties in this State are required to serve all processes which may be issued, if so ordered by the court under the provisions of this Part, for which they shall receive the same fees as are allowed them by law for similar services, which must be paid from the proceeds of sale or by the petitioner.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 56; 1990 Act No. 521, Section 74; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1306 provides for service of the summons and petition within the State of South Carolina by the sheriffs of the various counties in which interested parties are located. This section specifies that the sheriffs’ fees for service shall be as in other circumstances and are to be paid by the petitioner or from the proceeds of the sale.

Library References

Executors and Administrators 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 608.

**SECTION 62‑3‑1307.** Publication as to nonresidents and parties with unknown residences.

If there is any party who resides beyond the limits of this State or whose residence is unknown and who does not consent in writing to the sale, the court may authorize publication of the summons as provided by this Code and if such party does not appear and show sufficient cause within the time named in the summons the court shall enter of record his consent as confessed and proceed with the sale.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 57; 1990 Act No. 521, Section 75; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides for service of the summons and petition by publication on interested parties who are not residents of South Carolina or whose addresses are unknown. If the party consented to the sale, service would not be required. If the party after such service did not appear or answer, the probate judge will enter of record his consent by default.

Library References

Executors and Administrators 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 608.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Lis Pendens Section 12, Publication.

**SECTION 62‑3‑1308.** Filing notice of pendency of action.

Upon the filing of the petition, the petitioner shall file in the office of the clerk of the circuit court a notice of pendency of action authorized by Sections 15‑11‑10 to 15‑11‑50 and upon the filing of such notice it has the same force and effect as notice of pendency of action filed in an action in the circuit court.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 58; 1990 Act No. 521, Section 76; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section prescribes the filing of a notice of pendency of action, or lis pendens, by the probate judge in the office of the clerk of court for the county in which the land is located, at the time the petition is filed, pursuant to Sections 15‑11‑10 to 15‑11‑50. Such filing will eliminate from consideration by the court any party who acquires subsequent to the filing of the notice a lien upon or an interest for value in the land.

CROSS REFERENCES

Notice of lis pendens, see Sections 15‑11‑10 et seq.

Library References

Executors and Administrators 337.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Section 608.

RESEARCH REFERENCES

Encyclopedias

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

**SECTION 62‑3‑1309.** Time for answer.

The time to answer a summons and petition for sale of real property of a decedent is the same as the time to answer in any civil litigation case. Interested persons who wish to file an answer or return to the petition must do so in writing in the same manner as an answer to a complaint in other civil litigation cases. In addition the court may hear motions and accept such subsequent pleadings as would be heard or accepted in other civil litigation cases. After the filing and service of the summons and petition and the time for filing responsive pleadings has elapsed, the court will convene a hearing on the merits of the petition. If based on the evidence presented at the hearing the court finds the real property should be sold it shall then, in its discretion, either (a) order the personal representative to sell the same at private sale upon such terms and conditions as the court may impose; or (b) proceed to sell the same upon the next or some subsequent convenient sales day after publishing a notice of such sale three weeks prior thereto in some paper published in the county. Upon the sale being made, after the payment of the costs and expenses thereof, the proceeds of the sale will be paid over to the personal representative. The personal representative shall administer such proceeds in like manner as proceeds of personal property coming into his hands. Nothing in this part may be construed to abridge homestead exemptions. Notice of hearings in regard to the petition will be provided to interested persons in accordance with Section 62‑1‑401.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 59; 1990 Act No. 521, Section 77; 2010 Act No. 244, Section 23, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1309 incorporates the rules of civil litigation to determine the time limits to file an answer or return to the petition. Following this period, the probate judge would schedule a hearing of the case.

If the probate judge determines that the land should be sold in accordance with the petition, he would either order a private sale or schedule a public auction of the land. The notice of the sale must be published once a week for three weeks during the three weeks preceding the sale in a newspaper published in the county of the probate court.

Following the sale, the net proceeds of the sale will be paid over to the personal representative for distribution in accordance with law as if it were personal property originally belonging to the estate.

Section 62‑3‑1309 further provides that the proceedings are not to abridge the rights of homestead exemption in the land.

The 2010 amendment revised this section to delete “for return” in the first sentence and replace it with “to answer or otherwise respond by motion to the summons and petition”, delete “make a return” and replace it with “answer or otherwise respond by motion,” add “subsequent pleadings,” and delete “return” and replace it with “motions” in the second sentence The foregoing 2010 amendment is intended to clarify that an answer or other response to a summons and petition must be served in an action to sell real estate, which is a formal proceeding as referred to in Section 62‑1‑201(17).

The amendments to this section in 2013 were largely clarifying revisions, and did not change substantive law. All answers to the petition must be in writing and served on the petitioner and other parties in the same manner as an answer to a complaint in circuit court, and within the same time limits as would apply in circuit court. Further, the same rules apply as to motions in the case of a petition for sale of real property of a decedent as apply in circuit court to answers. Consequently, as in circuit court, answers may not be due while certain motions are pending, and the same rules for amending petitions and answers would apply.

The 2013 amendments added the requirement that all interested persons be served with notice of hearings regarding a petition to sell real property of a decedent in accordance with Section 62‑1‑401.

Library References

Executors and Administrators 332 to 348, 374.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 586, 601 to 618, 643.

Attorney General’s Opinions

Publication of notice of sale. Notice of an intended sale of real estate by the probate court to pay the debts of a decedent under this section [Code 1962 Section 19‑499] must be published once a week for at least three weeks prior to the date of the sale. 1965‑66 Op. Atty Gen, No 1985, p 39.

**SECTION 62‑3‑1310.** Bond for handling of proceeds by personal representative.

The regular bond of the personal representative must protect the creditors, heirs, devisees, or other interested persons, if any, in the handling of the proceeds of sale by the personal representative, but in case no such bond has been given, the court may require the giving of a bond by such personal representative as provided in Sections 62‑3‑603, 62‑3‑604, and 62‑3‑605.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 60; 1990 Act No. 521, Section 78; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1310 provides that the regular bond of the personal representative protects claimants to the proceeds of the sale. If no bond has been filed previously, the personal representative may be required to file one pursuant to Sections 62‑3‑603 and 62‑3‑605. If a bond has previously been filed, the personal representative may be required to increase the amount of the bond.

The 2013 amendment gives the court discretion to require bond.

Library References

Executors and Administrators 26, 351, 529.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 71 to 77, 630, 909.

**SECTION 62‑3‑1311.** Filing of papers; requirement of returns.

The court shall file and keep the original petition with due proof of service thereon and all original papers connected with the sale and shall require from such personal representative his final account showing the distribution of the funds received by him.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 61; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑3‑1311 requires the filing and preserving in the probate court of all original documents relating to the action for the sale of the land including the petition, proofs of service, and order.

This section further requires the personal representative file a final accounting to document the distribution of the proceeds of sale of the land.

Library References

Executors and Administrators 345, 483, 484.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 605 to 608, 618, 811.

**SECTION 62‑3‑1312.** Entry of releases of liens on property sold.

In case any lands of the deceased subject to the lien of any judgment, mortgage, or other lien is sold under the provisions of this Part the court may enter a release of the lands so sold upon the records in the office of the clerk of court or register of deeds of the county from the lien of such judgment, mortgage, or other lien and in case such mortgage, judgment, or other lien debt has been paid in full out of the proceeds of the sale of such lands the court may have cancellation of the same entered on the record thereof. The foregoing does not relieve any judgment, mortgage, or other lien creditor of the duty, as provided otherwise by law, of releasing or canceling such liens. Each release satisfaction or cancellation provided for herein must refer by proper notation to the file number of such estate in the court. The provisions of this section do not apply when the order of sale directs the sale of any lands which must be sold subject to any existing mortgage, judgment, or other lien, but only when such lands are sold freed and discharged from all such liens.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 62; 1990 Act No. 521, Section 79; 1997 Act No. 34, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

REPORTER’S COMMENT

This section provides that the probate judge must file in the offices of the clerk of court and of the register of mesne conveyances releases of the land sold from the lien of any mortgage, judgment, or other lien on said land. If the lien claim is paid in full from the proceeds of sale, the probate judge will file a cancellation of the lien. Such filing of releases by the probate judge will not be required if such releases are timely filed by the lien claimants. Such releases by the probate judge must make reference to the probate court file number for the estate.

This section specifies that releases must also be filed by the lien claimants even if a release has been filed by the probate judge.

This section further provides that the probate judge may sell the land subject to any existing lien on the land, and, in which case, no release from the lien would be required.

Editor’s Note

1997 Act No. 34, Section 1, directed the Code Commissioner to change all references to “Register of Mesne Conveyances” to “Register of Deeds” wherever appearing in the 1976 Code of Laws.

Library References

Executors and Administrators 388, 390, 398.

Westlaw Topic No. 162.

C.J.S. Executors and Administrators Sections 323, 670 to 678.

RESEARCH REFERENCES

Encyclopedias

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