PROPOSED REVISIONS TO ARTICLE 1—PROBATE CODE

October 4, 2012

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1. All South Carolina citizens have a right to a probate code that is easy to understand and enforce.
2. All South Carolina citizens have a right to a probate judge who knows and understands the Probate Code, Internal Revenue Code, and South Carolina Revenue Code as it relates to estates.
3. All South Carolina citizens have a right to have their assets protected by the probate court if they become incapacitated and after their death.
4. All South Carolina citizens have a right to have only reasonable, necessary, good faith, and best interests costs incurred during the probate process by attorneys, guardian ad litems, conservators, attorneys-in-fact, and any other professionals that provide services to an estate.

62-1-109: Should be repealed. A lawyer who is paid from estate funds has a fiduciary duty to the beneficiaries of the estate. The beneficiaries are the real parties in interest. It is their inheritance that pays the fees of the lawyer. In essence, a lawyer is paid with estate funds, but has no duty to protect the estate in any fashion, only the personal representative individually whose interests may be adverse to the beneficiaries and the estate. The lawyer gets paid by a third party, the estate, for actions taken to protect another individual party, the personal representative. Currently a lawyer could bill fees for the entire estate in protecting the individual interests of a personal representative without any approval or knowledge of the estate beneficiaries whose inheritance was being wasted.

In South Carolina, on occasion, an attorney serves as both the personal representative and attorney for the personal representative which is improper because of the conflict of interest for serving in both positions. Probate judges, on occasion, appoint an attorney to serve as the third party representative and then allow unreasonable and unconscionable fees to accrue through unreasonable and unnecessary legal fees of their appointee. It is impossible for a beneficiary to be successful in the removal of a court appointed attorney personal representative, because of the connection between the probate judge and the attorney.

The legislature should define who can serve as an attorney for the personal representative and the specific qualifications required of that attorney. The legislature should prohibit by statute the current practice of an attorney serving as both personal representative and attorney for the personal representative that is prohibited by In re James except in certain circumstances with the informed written consent of all parties interested in an estate and pursuant to Rule 43(k).

An attorney shall not serve as a fiduciary and attorney for the fiduciary.

The legislature should also define the compensation that an attorney for a personal representative should receive and limit all costs for all services to five (5) percent of the probate estate in all circumstances. The legislature should also define the specific duties of an attorney for the personal representative to the personal representative and to the beneficiaries of the estate. Floyd v. Floyd should be followed.

- Matter of James, 267 S.C. 474, 229 S.E.2d 594 (1976) requires that an attorney who serves as an executor and attorney for the estate must: (1) exhaust all non litigative means as executor to resolve the controversy; (2) explain and disclose fees to the beneficiaries; (3) obtain the consent of the estate beneficiaries to act in the dual capacity; and (4) fully disclose all relevant facts to the court.
- In Douglass ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001), the Supreme Court stated, "In reaching this conclusion, we emphasize that attorneys must conduct themselves ethically in all matters. The fact the legislature has seen fit to limit an attorney's responsibility to third parties when representing a fiduciary does not diminish this overriding ethical obligation."
- In Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991), the Supreme Court found that an attorney who had provided advice to a potential beneficiary regarding her father's will and a current controversy regarding her father had a fiduciary duty to that potential beneficiary. "While Dobson had no duty to disclose the existence of the second will against his client's (Mr. Minyard's) wishes, he owed Judy the duty to deal with her in good faith and not actively misrepresent the first will."
- In Spence v. Wingate, 385 S.C. 316, 684 S.E.2d 188 (S.C. App. 2009), the court of appeals stated, "Wife argues a genuine issue of material fact exists as to whether Wingate breached a fiduciary duty owed to her based on Wingate's representation of Wife in a prior related matter. We agree."
- In Spence v. Wingate, 378 S.C. 486, 663 S.E.2d 70 (S.C. App. 2008), the court of appeals stated, "This statute provides only that a lawyer's representation of a fiduciary in a probate matter does not, without more, impose on the lawyer responsibilities to other parties with interests in the fiduciary property. It does not address whether attorneys representing fiduciaries could be accountable to such claimants for other reasons."
- In Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (S.C. App. 2005), the court of appeals discussed at length the attorney-client privilege citing Talbot v. Marshfield, 12 L.T.R. 761 (Ch. 1865), Mason v Cattley, 22 Ch.D. 609 (1883), Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del.Ch. 1976), and Barnett Banks Trust Co., N.A. v. Compson, 629 So.2d 849 (Fla.Dist.Ct.App. 1993). The court stated, "We find the Riggs rationale persuasive… Under these facts, we hold that the attorney-client privilege does not bar Anne, as beneficiary of Trust A, from access to the Curry letters which were generated prior to litigation, and which address the administration of Trust A."
- In Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011), the Supreme Court stated, "The circuit court concluded Wingate, as the attorney for the estate, owed no duty or obligation to Mrs. Spence based on section 62-1-109 and her status as merely a 'person interested in the estate.' However, it is undisputed that the congressional life insurance policy in question was a non-probate asset and the manner in which it was paid was not controlled by the personal representative. The circuit court

specifically made this finding and neither party took exception, therefore, it is the law of the case. On its face, section 62-1-109 limits duties only to third parties 'interested in the estate, trust estate, or other fiduciary property.' Thus, section 62-1-109 negates any duty owed by an attorney to person other than the estate's representative in matters concerning estate assets or assets controlled in some manner by the personal representative. Although Wingate represented the estate, the property in question was not a part of the estate and was not controlled by the personal representative; therefore, the protection provided by section 62-1-109 does not attach to Wingate on the issue of the congressional life insurance."

62-1-110: should likewise be repealed. All communications between an attorney and a fiduciary should be available to any successors in interest or beneficiaries. Otherwise litigation would result with these communications being subject to discovery and the incurring of additional legal fees to all parties.

62-1-111: should not be enacted. South Carolina follows the American Rule wherein each party bears their costs of litigation. This section would give probate judges the freedom to award attorney fees as punishment against heirs and devisees who questioned the probate proceedings even though their actions and the proceedings were allowed by statute. The statute does not define how much may be awarded by the probate judge, for what reasons it may be awarded, and under what specific circumstances the awards may be made which leaves to the discretion of the judge all incidents of the award. It is conceivable that a probate judge could award the entire estate in fees to the personal representative he appointed as a third party PR, attorney who was also the appointed PR, and accountant leaving nothing for the protected person, heirs, or devisees. Rule 11 SCRCP currently allows for awarding of attorney fees in frivolous proceedings. This statute is unnecessary and could result in increased litigation over fees.

62-1-201: should have additional terms defined including:

- Best interest of the estate,
- Emergency,
- Extraordinary circumstances,
- Good cause,
- Good faith,
- Gross estate,
- Interest of the estate,
- Necessary expenses,
- Non probate estate,
- Probable cause,
- Reasonable expenses,
- Statutory executor,
- Timely filed, and
- Written demand.

The following terms should be edited:

(13) 'Expense of administration' includes commissions of personal representatives, fees, and disbursements of attorneys, fees of appraisers, and such other expenses that are reasonable, necessary, incurred in good faith, and in the best interest of the estate.

(15) 'Fiduciary' includes personal representative, guardian, conservator, trustee, attorney, and attorney-in-fact.

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

(22) [Informal proceedings should require notice to all interested persons.]

(25) [A lease should also include a land lease.]

(34) [A petition should require notice to all interested parties and a hearing.]

62-1-301(4): should be deleted. Survivorship and related accounts that pass outside of probate should be heard in the Court of Common Pleas. The probate court lacks jurisdiction of non probate survivorship accounts that pass by contract.

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

62-1-308: All appeals from the probate court should follow the appellate court rules.

(a) A person interested in a final order, sentence, or decree of a probate court and considering himself injured by it may appeal to the circuit court in the same county. The notice of appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within thirty (30) days after receipt of written notice of the appealed from order, sentence, or decree of the probate court.

(b) The requirement of a Statement of Issues on Appeal should be deleted completely.

(c) Where a transcript of the testimony and proceedings in the probate court was prepared, the appellant shall, within ten days after the date of service of the notice of appeal, make satisfactory arrangements with the court reporter for furnishing the transcript. If the appellant has not received the transcript within sixty (60) days of his request, the appellant may make a motion to the circuit court for an extension to serve and file the parties' briefs and Designations of Matter to be Included in the Record on Appeal, as provided in subsections (d) and (e).

(d) Within thirty days after service of the notice of appeal, all parties to the appeal shall serve on all other parties to the appeal a Designation of Matter to be Included in the Record on

Appeal pursuant to Rule 209, SCACR and file with the clerk of the circuit court one copy of the Designation of Matter to be Included in the Record on Appeals with proof of service.

(g) Each party is required to comply with the requirements of the South Carolina Appellate Court Rules.

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

62-1-403(2)(ii): should read, "To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate when there has been notice to all parties and a hearing held that comports with due process requirements." The default rule should be that parties cannot be bound unless they are a party to the proceedings and receive notice and an opportunity to be heard.

62-1-403(2)(iii): should be deleted. A party should not be bound unless they have received notice and an opportunity to be heard.