

Article 3 amendments adopted by Senate Judiciary subcommittee during 2012 session

Sections 62-3-104, 62-3-203, 62-3-804- to clarify that, in certain circumstances, a claim can be filed against an estate prior to a personal representative being appointed

Amend the bill, as and if amended, page 102, by striking lines 1-42 in their entirety, and inserting the following:

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

REPORTER’S COMMENTS

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 2012 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 the claim to the application or petition for appointment.

Amend the bill further, as and if amended, page 109, lines 20-43, page 110, lines 1-43, page 111, lines 1-43, and page 112, lines 1-22, by striking those lines in their entirety, and inserting the following:

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

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

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

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

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

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

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

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

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

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

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

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

~~(d) Appointment of one who does not have priority may be made in formal or informal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary. 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, ~~except as provided in Section 62-3-1202A~~; 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.

~~(h) If it comes to the knowledge of a probate judge that any person within his jurisdiction has died leaving an estate upon which no application has been made for appointment or no personal representative appointed or no will offered for probate or appointment granted, he must, immediately after the lapse of four months from the death of such person, notify the South Carolina Department of Revenue thereof together with his opinion as to whether or not any part of the estate is likely to be taxable."~~

REPORTER'S COMMENTS

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 to certain definitions in §62-1-201.

The 2012 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.

Amend the bill further, as and if amended, page 175, lines 12-43, page 176, lines 1-43, and page 177, lines 1-30, by striking the lines in their entirety and inserting the following:

“Section 62-3-804. Claims against a decedent’s estate ~~may~~ 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 ~~clerk of the probate court in which the decedent’s estate is under administration.~~ The claim is ~~deemed presented on~~ upon the first to occur of receipt filing of the ~~written~~ statement of claim ~~by the personal representative or the filing of the 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 ~~correctly~~ 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 62-2-203(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) ~~The 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, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim, and the claimant must file a written statement of the claim as in (1) above, with the clerk of the probate court. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death 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 permit the closing of the decedent’s estate until the legal proceeding has ended.~~

(3) ~~If a claim is presented under subsection (1), no proceeding thereon may be commenced more than thirty days after the personal representative has mailed a notice of disallowance with~~

warning of the impending bar; but, 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 such thirty day period, may order an extension of the thirty day period, but in no event may the extension run beyond the applicable statute of limitations. 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 item 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 that 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 a decedent's estate.

(7) Legal proceedings against or involving a decedent and pending on the date of a decedent's death must be suspended until a personal representative is appointed to administer a decedent's estate."

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 which do not run beyond the applicable statute of limitations.

The 2012 amendment requires a creditor seeking appointment to attach a written statement of the 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.

Section 62-3-805-to return the priority of funeral expenses claims to the same position as it existed previously

Amend the bill further, as and if amended, page 177, lines 32-42 and page 178, lines 1-23, by striking the lines in their entirety and inserting the following:

“Section 62-3-805. (a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration, including attorney’s fees, and reasonable funeral expenses;

(2) debts and taxes with preference under federal law;

~~(2)(i)~~(3) reasonable and necessary medical and expenses, hospital expenses, and personal care expenses of the last illness of the decedent, including compensation of persons attending the decedent prior to death;

~~(ii) medical assistance paid under Title XIX State Plan for Medical Assistance as provided for in Section 43-7-460;~~

~~(3) debts and taxes with preference under federal law;~~

(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) ~~above~~, no preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

(c) Any person advancing or lending money to a decedent’s estate for the payment of a specific claim shall, to the extent of the loan, have the same priority for payment as the claimant paid with the proceeds of the loan.”

REPORTER’S COMMENTS

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.