

PROPOSED REVISIONS TO ARTICLE 3—PROBATE CODE

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1. All South Carolina citizens have a right to decide who will receive their property at death.
2. All South Carolina citizens have a right to expect that their property will pass as quickly as possible after their death and at the lowest possible cost.
3. All South Carolina citizens have a right to expect the probate court to enforce all laws that apply to their property.
4. All South Carolina citizens have a right to expect the probate court to not incur or pay unreasonable and unnecessary fees to lawyers or personal representatives.
5. All South Carolina citizens have a right to pass their property free of any costs and fees generated by the probate court.

62-3-106: should read, “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 order 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 and have been heard. An interested person who has not received notice is not bound by the order.**”

62-3-107: should read, “Unless administration under Party 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 of declining the appointment. **All final orders shall state in the order that they are final orders as to specific matter.**”

62-3-203: should read, “(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) **an executor as defined in IR Code 2203 or any person in actual or constructive possession of any property of the decedent.**

- (3) a transferee who is subject to estate tax liability pursuant to IR Code 6324.
 - (4) the surviving spouse of the decedent who is a devisee of the decedent;
 - (5) other devisees of the decedent;
 - (6) the surviving spouse of the decedent;
 - (7) 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), (4), (5), and (6) of subsection (a) are treated as having predeceased the decedent);
 - (8) forty-five days after the death of the decedent, any creditor;
 - (9) four months after the death of the decedent, upon application by the South Carolina Department of Revenue, a person suitable to the court.
 - (10) 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 state 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, must appoint a person in possession of estate property.
 - (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 must appoint a person who is acceptable to heirs and devisees whose interest in the estate appear to be worth in total more than half of the probable distributable value.
- (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 only with specific findings of fact by the court that those of equal or lower priority are unqualified and only after notice and hearing to all interested parties:
- (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 or her place; or
 - (2) in the absence of agreement, formally after notice and hearing to all interested parties; 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.

(f) A personal representative appointed by a court of the decedent's domicile has priority over all other personal representatives 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."

62-3-204: should read, "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. The clerk shall mail a copy of the demand to the personal representative **when one has been appointed**. After filing of a demand, the personal representative must give a copy of the demanded filing to the demandant **prior to filing**. 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 null and void as to binding any interests of the demandant in any fashion**. The Petitioners receiving the order or the person making the filing **shall 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 this case."

62-3-306: should read, "(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 **and to all heirs and devisees**.

(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 **served** on each of the heirs and devisees. An applicant's failure to give information as required by this section is a breach of his duty to the heirs and devisees **and the personal representative shall be removed and replaced with a successor personal representative.**"

62-3-307: should read, "(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.”

62-3-309: should read, “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 62-3-3for08 or, for any other reason, he may decline the application **after issuing specific findings of fact providing sufficient notice for the declination**. A declination of informal appointment is not adjudication and does not preclude appointment in formal proceedings.”

62-3-310: should read, “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 (30)** 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 **must** require formal proceedings to appoint someone of equal or lesser priority.”

62-3-601: should read, “Prior to receiving letters, a personal representative shall qualify by filing with the appointing court **the required bond** and a statement of acceptance of the duties of the office. **Failure to post bond or sign a statement of acceptance of the duties of the office voids the appointment.**”

62-3-602: should read, “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 **for any reason**. Notice **and service** of any proceeding **or action** 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.”

62-3-603: should read, “(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 **in a certified statement or agreement pursuant to SCRPC Rule 43(a)**;
- (2) The personal representative is the sole heir or devisee;
- (3) The personal representative is a state agency, bank, or trust company **if all heirs and devisees agree to waive the bond requirement in a certified statement or agreement pursuant to SCRPC Rule 43(a)**; or
- (4) The personal representative is named in the will company **if all heirs and devisees agree to waive the bond requirement in a certified statement or agreement pursuant to SCRPC Rule 43(a)**.

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 **must require bond unless all heirs and devisees agree to waive the bond requirement in a certified statement or agreement pursuant to SCRPC Rule 43(a).**

(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 that the personal administrator or administrator has sufficient personal funds to cover any liability that may arise;** 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.

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.”

62-3-604: should read, “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 **fair market** value of the personal estate of the decedent **after a thorough and complete investigation of the decedent’s readily known assets** 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 **reasonable** 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 **any** interested person or upon the court’s own motion, the court may increase or decrease the amount of the bond.”

62-3-605: should read, “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 **ten** days after receipt of notice is cause for his removal and appointment of a successor personal representative **by the court within ten days.** ”

62-3-607: should read, “(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 **shall be** made parties. (b) The matter shall be set for hearing within ten days. Notice shall be given to the personal representative and his attorney of record, if any, and to **all other interested parties of the estate.**”

62-3-609: should read, “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. **The representative of the estate of the deceased or protected personal representative shall be liable to all interested parties for any damages resulting from the representative’s failure to act.**”

62-3-610: should read, “(a) unless otherwise provided, an order closing an estate as provided in Section 62-3-1001 terminates an appointment of a personal representative. (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. **The court shall accept the resignation.** If no one applies or petitions for appointment of a successor representative, **the court shall make an appointment pursuant to Section 62-3-203 within ten days. The personal representative’s attorney of records shall be deemed to have resigned upon the resignation of the personal representative.**”

62-3-611: should read, “(a) a person interested in the estate may petition for removal of a personal representative for cause at any time. Upon the filing of the petition, the court **shall hear the petition within thirty days of filing.** Notice shall be given by the petitioner to the personal representative, and to **all interested persons in the estate.** 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 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 **the personal representative misrepresented a material fact 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 of the personal representative **also terminates the personal representative's attorney of record from any authority regarding this estate."**

62-3-619: should read, "Any person who obtains, receives, or possess 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. **The executor de son tort is liable to any interested party in the decedent's property for any and all damages resulting from the executor de son tort's improper acts."**

62-3-620: should read, "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 **shall** 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, the court **shall** assess damages including attorney's fees and costs **for the damages incurred to any interested party by the acts of the executor de son tort."**