

Act 100, R. 46, S. 143  
Probate and Trust Code Revisions  
Signed by the Governor: June 7, 2013  
Effective date: January 1, 2014

Act 100, S. 143 contains changes to the existing probate and trust codes for Articles 1, 2, 3, 4, 6, and 7. This Act does not include provisions from Article 5, the article that contains provisions of law on guardians, conservators, and powers of attorneys.

CHANGES IN EXISTING LAW:

**ARTICLE I. GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT (5 PARTS)**

**PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS**  
**Sections 62-1-100 through 62-1-111**

Most of the provisions in Part 1 are not changed. The changes to § 62-1-106, concerning the effect of fraud and evasion, clarify that a person injured by the effects of fraud can obtain relief against the perpetrator of the fraud and anyone benefitting from the fraud, and the person does not have to choose between the two, as existing law could be read. The change to § 62-1-107 clarifies that the SC Rules of Evidence that apply in circuit court apply in a probate court, unless specifically excluded by a provision in the SC Probate Code. The provisions related to evidence as to the status of death are deleted and the other provisions are incorporated into Article 1, Part 5, dealing with Uniform Simultaneous Death provisions. A new provision, § 62-1-111, is added to clarify a probate court's authority to award attorneys fees and costs and to conform to the provisions of the SC Trust Code in § 62-7-1004, which provides for attorneys fees in a similar manner.

**PART 2. DEFINITIONS**  
**Section 62-1-201**

Most of the definitions in Part 2 are not changed. The act changes the definitions of "Person" and "State" to conform to the language that currently exists elsewhere in the Probate Code in § 62-5-702. The terms "Fair Market Value" and "Probate Estate" are defined. The changes to the term "Guardian" are technical corrections to the language, but there is still a differentiation from a guardian ad litem, and the term statutory guardian, which is obsolete, is now deleted. The term "Stepchild" is also deleted because the intestacy statutes no longer list stepchildren as intestate heirs.

**PART 3. SCOPE, JURISDICTION, AND COURTS**  
**Sections 62-1-301 through 62-1-309**

Several provisions in Part 3 are changed by this act. Section 62-1-302, relating to exclusive jurisdiction of the probate court and concurrent jurisdiction with the circuit court, retains most of the existing items under the exclusive jurisdiction of the probate court. There are clarifications to the provisions on the family court jurisdiction over minors, as well as clarification that protective and guardianship proceedings of adults are subject to the provisions of the Adult Guardianship and Protective Proceedings Jurisdiction Act, which became effective in 2011. There is also clarification that actions removable to circuit court include actions to try title concerning property in which the decedent's estate had an interest and matters involving the

internal or external affairs of a trust, with the exception of a “special needs” trust, which still remains under the probate court jurisdiction. It also clarifies that, for pending actions in circuit court, including partition actions and actions to quiet title, the circuit court has jurisdiction to determine heirs and successors so duplicative proceedings do not have to proceed in both probate and circuit courts.

Additionally, the act clarifies the procedures to follow when a probate judge is disqualified or recused and the procedures to follow when there is an order transferring venue. Accordingly, when venue of a proceeding or file is transferred to another county, subsequent matters concerning that proceeding or file, including appeals, are now retained by the county to which the venue has been transferred. If a special probate judge is appointed because a probate judge is disqualified or recused from hearing a proceeding or an entire file, venue remains with the county where the proceeding or file commenced, unless a probate court otherwise transfers venue. Section 62-1-308, dealing with appeals, clarifies and provides more detail for the appeals process from the probate court, and retains the ability of a litigant to appeal to circuit court from probate court. The procedural rules for appeals from the circuit court are now in accordance with the rules for appeals to the appellate courts, which give guidance and clarification to the parties and the courts on what documents to include.

#### **PART 4. NOTICE, PARTIES, AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS**

##### **Sections 62-1-401 through 62-1-403**

Part 4 is not amended by this act, because these provisions, relating to notice and representations in litigation, were substantially amended in 2010, when the General Assembly enacted changes on what types of probate proceedings are classified as “formal” and which ones are classified as “informal.”

#### **PART 5. UNIFORM SIMULTANEOUS DEATH ACT**

##### **Sections 62-1-500 through 62-1-508**

The provisions of Part 5 are substantially changed by this act. Definitions for “co-owners with rights of survivorship,” “governing instrument,” and “payor” are added. There is now a 120-hour survival requirement to clarify an individual’s survivorship with relation to a testate and intestate decedent, unless the individuals fall within the exceptions listed in § 62-1-506, making the intestacy rule on inheritance consistent with other transfers at death. The exceptions include circumstances where imposing the 120-hour survival requirement contradicts the terms of a will or trust, deprives the decedent’s estate or beneficiary of tax exemptions, invalidates property interests, or results in an escheat. Another exception is included in § 62-1-505, where a decedent is considered to have survived the death of the decedent’s killer, unless the killer survives for more than 120 hours by clear and convincing evidence. This provision is intended to be consistent with § 62-2-801, which currently covers a murder-suicide issue. Part 5 of this article includes provisions concerning evidence of death, and also includes new provisions concerning obligations and protection of payors and bonafide purchasers who operate in good faith without notice that an individual is not entitled to receive the benefit, and also for the liability of the payor who receives notice of lack of entitlement of an individual. The provisions also provide for an individual’s liability when it is determined that he is not entitled to receive benefits.

## **ARTICLE II. INTESTATE SUCCESSION AND WILLS (9 PARTS)**

### **PART 1. INTESTATE ESTATE**

#### **Sections 62-2-100 through 62-2-114**

Most of the provisions in Part 1 are not changed. The change to § 62-2-103 eliminates step-children as heirs of persons who die without a will (intestate heirs). The change to §62-2-104 clarifies that the intestacy 120-hour survivorship rule includes anyone in gestation at the time of decedent's death, so that the individual qualifies as an heir if he or she survives 120 hours. Section 62-2-114 requires now that an action to deny or limit a parent's intestate share is handled as a formal proceeding, which requires service of a summons, petition, and notice rather than just making a motion. It also stipulates that a disqualified parent's share passes as though the parent has predeceased the decedent.

### **PART 2. ELECTIVE SHARE**

#### **Sections 62-2-201 through 62-2-207**

This act substantially changes the method of calculating the elective share. Currently, only probate assets offset an elective share, but the changes in this act allow non-probate transfers to a surviving spouse to be included in any calculation of an elective share. It confirms that the value of an illusory revocable trust is still subject to the elective share (as per the 1991 *Seifert* case, which is discussed in more detail in the Reporter's Comments). It also gives the surviving spouse the right to allow a trustee to convert a trust in which a surviving spouse has only a life estate/income interest to a unitrust, which is explained in more detail in Article 7. This could provide an annual payout of 3 to 5% of the trust value, which could be needed with the much lowered interest rates currently offered. This provides further protection for a surviving spouse in the current economy when fixed-rate investments produce little income. Also, § 62-2-207 clarifies that the elective share is a pecuniary, rather than a fractional, amount, which makes it less burdensome for the surviving spouse as to the income and appreciation during the administration of the estate. Section 62-2-205 changes the time limits for presenting a petition for an elective share from 8 months after death or 6 months after probate of the will to also include an opportunity for a surviving spouse to claim an elective share if a surviving spouse is served with an action challenging a will. This prevents an unfair result for a surviving spouse who relies on a will only to have it challenged and a different will probated after the current time period for presenting an elective share claim has expired.

### **PART 3. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS**

#### **Sections 62-2-301 through 62-2-302**

The only amendments in Part 3 of this article extend the time for an omitted spouse or an omitted child to make a claim against an estate to parallel the time limits that are now effective for a surviving spouse to claim an elective share. In other words, the changes now allow an omitted spouse or an omitted child to make a claim against an estate as of the later of: (1) 8 months after death; (2) 6 months after the probating of a will; or (3) 30 days after the notice and service of an action to challenge a will. This is to prevent the same unfair result as could exist for an omitted spouse or child, as referenced above, for a surviving spouse. The changes continue to detail the procedures that an omitted spouse or omitted child must follow in order to pursue such a claim.

#### PART 4. EXEMPT PROPERTY

##### **Sections 62-2-401 through 62-2-403**

Section 62-2-401 increases the maximum value of property exempt from creditors from \$5,000 to \$25,000. Section 62-2-403 is revised to allow veteran's benefit payments to be exempted for deceased veterans of any period of war as defined by Federal Law. Previously this section only covered veterans for specific wars up to WWII.

#### PART 5. WILLS

##### **Sections 62-2-501 through 62-2-512**

The amendment to § 62-2-501 changes "person" to "individual" to clarify and emphasize that only individuals create wills. "Person" is defined elsewhere in the Probate Code in language similar to what exists in other statutes, as "an individual, a corporation, an organization, or other legal entity." Section 62-2-502 is also revised to change "person" to "individual." The self-proving affidavit example in § 62-2-503 is revised without changing substance, other than clarifying when individuals under the age of 18 may sign the document. Section 62-2-504 now defines an interested witness to include a beneficiary's issue in addition to the beneficiary's spouse, who is currently included under existing law. Section 62-2-504 allows a purge of an interested witness's profit under the will so that the witness may serve as a credible witness to validate a will. The other changes are stylistic, including the changes to § 62-2-505.

Section 62-2-506 provides how to handle subsequent wills that do not expressly revoke a previous will. Under this revision, the subsequent will completely revokes the previous will by inconsistency, if the testator intended that the subsequent will revokes a prior will. The provision clarifies what presumptions (a presumption of revocation of a prior will or a presumption to supplement a prior will) may be rebutted and codifies that the rebuttal requires clear and convincing evidence.

The change to § 62-2-507 defines "disposition or appointment of property," "divorce or annulment," "divorced individual," "governing instrument," and "revocable." The significant substantive changes expand the scope of this section to cover life insurance and retirement plan beneficiary designations, transfer on death accounts, and other revocable dispositions to the former spouse established before a divorce or annulment, so that the effect of the divorce or annulment is that the former spouse is not the beneficiary. The change to § 62-2-512 allows a testator to dispose of personal properties other than money or property used in a trade or business by a handwritten or signed list, but also deletes references to securities or title documents, since those are dealt with in other provisions of the law.

#### PART 6. CONSTRUCTION

##### **Sections 62-2-601 through 62-2-611**

Most of the sections concerning the rules of construction of wills are not substantially changed. Section 62-2-601 gives probate judges express authority to reform the terms of a will if a testator's actual intention is proven by clear and convincing evidence. This prevents injustice in situations where a mistake has been made because now a judge is no longer bound by a strict interpretation of the terms of a will, when evidence clearly indicates other intent. This codifies a general common law view, and also mirrors § 62-7-415 from the Trust Code, which has been in effect since 2006. Section 62-2-602 clarifies that property acquired by the testator's estate, after the testator's death, passes under a will, not by intestacy. This clarifies an issue not clearly covered under the current law, which refers to property acquired after the execution of a will, and

maintains the state's presumption against intestacy. Section 62-2-603 clarifies that words of survivorship are sufficient to create a presumption that the testator did not intend the antilapse provisions to apply to his or her will. Section 62-2-606 is changed stylistically for clarity and to clarify that its coverage with respect to conservators apply similarly to agents under a durable power of attorney. Section 62-2-610 clarifies provisions concerning inheritances of deceased devisee descendents.

## PART 7. CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

### **Section 62-2-701**

This section is not changed. The different methods to make a will, to revoke or not revoke a will, or to determine heirs of intestate estates remain the same.

## PART 8. GENERAL PROVISIONS

### **Sections 62-2-801 through 62-2-806**

Section 62-2-801, concerning disclaiming of a person's interest in property, is substantially reformatted, but the substance remains the same with a few changes. The changes enhance clarity and readability. The section defines "disclaimer," "disclaimant," "disclaimed," and "fiduciary." It also expressly states that disclaimers under the Internal Revenue Code are valid under this section and that disclaimers under this section may be valid for state law purposes even if the Internal Revenue Code requirements are not met. The section further explains when fiduciaries, trustees, and parents may disclaim property. Lastly, the act provides for methods to deliver disclaimers for interests in intestate succession, testamentary trusts, inter vivos trusts, beneficiary designations, property jointly held, and other disclaimers by fiduciaries, individuals with power of appointment, and agents. Section 62-2-802 changes "person" to "individual," in order to provide that an individual is considered a surviving spouse even if the individual is a party to a decree ending the divorce or confirming equitable distribution, so long as the parties are living together as husband and wife at the time of the decedent's death.

Section 62-2-803 is changed mostly for clarification of the existing statute. The act clarifies that the decedent's killer is not entitled to any benefit from the decedent by including in the list retirement plans, annuities, elective shares, and other financial assets. The act clearly revokes any nomination of the killer as a fiduciary or representative. Section 62-2-806 allows the modification of a will to achieve the testator's tax objectives, provided that it is not contrary to the testator's probable intent. This allows a court to effectively change the will for tax purposes and is analogous to § 62-7-416 of the Trust Code, which has been in effect since 2006.

## PART 9. DELIVERY AND SUPPRESSION OF WILLS

### **Section 62-2-901**

This section requires an individual in custody of a will to deliver it directly to a judge, as provided under current law, or allows the individual to deliver a will to a named personal representative (PR) who then has a duty to deliver the will to a judge. The duty to deliver the will to a judge only occurs after actual notice of the death of the testator. The act also clarifies that the probate court has to publish the receipt only once a week for 3 weeks, instead of for an entire 15 days. Further, the criminal penalties for failure to deliver a will are removed and, instead, an intentional or fraudulent actor is subject to the contempt of the court and may be liable for any person's damages caused by the action or inaction.

## **ARTICLE III. PROBATE OF WILLS AND ADMINISTRATION (13 PARTS)**

### **PART 1. GENERAL PROVISIONS**

#### **Sections 62-3-102 through 62-3-108**

Section 62-3-102 clarifies the existing law that a will found valid in another state is valid to transfer property in South Carolina. Section 62-3-104 clarifies that a claim may not be filed against an estate before a personal representative (PR) is appointed. The act provides an exception for instances where a creditor is also applying to be a PR, and in those cases, the creditor has to attach its claim to the application to be a PR. Lastly, § 62-3-108 is edited for stylistic changes to make it read more clearly.

### **PART 2. VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY FOR ADMINISTRATION; DEMAND FOR NOTICE**

#### **Sections 62-3-201 through 62-3-204**

These provisions continue to establish venue for formal and informal probates of estates, and refer to § 62-1-303, so the changes to that provision regarding venue and recusal of a judge are included. As to the priority for appointment as the PR of an estate, the provisions continue to allow a creditor to be appointed as a PR 45 days after a decedent's death, but they add a requirement that the claims filed have to be attached to the application for the creditor to be appointed as a PR. Additionally, one of the changes in the act allows a probate judge to act as a PR of a family member's estate, but the proceedings have to be held in a different county from that where the judge sits. The act also gives judges more flexibility in some cases, so that a judge may appoint as a PR a person without priority in certain cases. Section 62-3-204 continues to allow an interested person to demand to receive all notices related to a decedent's estate, but it also allows the demand to expire after 1 year. It also requires a PR to give a demandant a copy of the filings requested, and if a hearing is demanded, to require compliance with § 62-1-401.

### **PART 3. INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS**

#### **Sections 62-3-301 through 62-3-310**

Section 62-3-301 allows a will to be probated without a PR being appointed. Section 62-3-303 allows a copy of an un-probated will of a nonresident decedent to be informally probated in certain cases. Section 62-3-310 provides that applicants seeking to be appointed informally are required to give notice only to individuals with an equal right to appointment.

### **PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS**

#### **Sections 62-3-402 through 62-3-414**

Section 62-3-406, dealing with the process for proving execution of a will in contested cases, is edited for both substantive and stylistic changes. The act provides that wills that are notarized, but not self-proved, are presumed to satisfy the execution requirements. Also, if available, an attesting witness is required if the will is not notarized or self-proved. Section 62-3-408 requires courts in this state to recognize final orders of another state's court if they are determinative with regard to construction of a will, in addition to testacy and validity. Section 62-3-409 now provides that wills from a place that does not provide probate may only be probated if they are not ineligible for probate in that place. This is a change from requiring that they are effective in that other location. Section 62-3-410 provides that the deadline of after-discovered wills are

subject to the provisions for modification in addition to the provisions for the vacating of the wills.

#### PART 5. ADMINISTRATION UNDER PART 5

##### **Sections 62-3-501 through 62-3-505**

The act makes only a small technical change to Part 5 that does not substantively change it. The provisions governing the ability to secure complete administration and settlement of a decedent's estate in a single *in rem* proceeding remain the same.

#### PART 6. PERSONAL REPRESENTATIVE, APPOINTMENT, CONTROL, AND TERMINATION OF AUTHORITY

##### **Sections 62-3-601 through 62-3-621**

Section 6-3-604 clarifies that a court may dispense with a bond, in its discretion. Section 62-3-605 raises the value of a putative interest of an interested person to demand a bond from \$1,000 to \$5,000. Also, it eliminates the provision that a delay in providing a bond may be a cause for removal of a PR, so long as good cause is shown for the delay. Section 62-3-610 provides that an order closing the estate and resignation of a PR relieves the PR's attorney of any further duties to the court. Section 62-3-611 provides that the termination of a PR for cause relieves the PR's attorney from further duties to the court.

Section 62-3-614 broadens the circumstances that allow a special administrator to be appointed informally. Currently, there are only two specific circumstances when this is allowed, but the act allows the appointment so that timely actions may be taken regarding estate assets. Section 62-3-619, dealing with executors in their own wrong (those who improperly have property belonging to the estate), is edited to make the section much easier to read and understand without changing the substance. Section 62-3-620 is also edited for readability and to allow the court to assess attorney's fees against an executor de son tort. Section 62-3-621 is substantially edited, but continues to provide that the estate of an executor de son tort is liable for waste or conversions done by the executor de son tort.

#### PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

##### **Sections 62-3-701 through 62-3-721**

Section 62-3-701 allows a named PR to protect a decedent's estate before the PR is appointed. Section 62-3-703 clarifies the reference to the trustee's standard of care. The act also gives a PR the authority to distribute intestate property after the relevant claim period, provided that the PR has not received actual notice of an action to probate a will. The current version does not expressly require the PR to wait until after the relevant claim period and allows distribution if the PR is not "aware" of a claim.

Section 62-3-704 removes specific penalties for failure of a PR or trustee to comply with § 62-3-706 and instead subjects the person to the contempt power of the court. The court then has complete discretion over the consequences. The section is also edited to be consistent with changes to Part 8, which requires a PR to allow or disallow claims within a certain time period.

Section 62-3-706 now requires the PR to prepare an inventory of only probate property, rather than of all property, and requires a copy of the appraisal and inventory to be delivered only to people who file a proper demand notice. However, if a proper demand is made, within 90 days, the PR has to compose a list of the non-probate property, its value and the decedent's

interest in it (to the extent of the PR's knowledge); mail a copy of the information to the demanding person; and provide proof of this mailing to the court.

Section 62-3-708 requires the PR to file the supplementary inventory and appraisal, but does not require the supplements to be delivered to interested persons unless they request it. Other changes clarify the section.

Section 62-3-711 allows PRs without the power of sale under a will to sell real property in the estate in a few additional situations described in §§ 62-3-911 and 62-3-1301 et. seq. It also allows the PR without the power of sale under a will to sell personal property without an order from the court if the aggregate value is \$10,000 or less. This doubles the current maximum. Further, the act allows issuance of a court order of the sale of personal property upon application with notice or consent at the court's discretion.

Section 62-3-715 allows PRs to access a decedent's electronic files, user names, and passwords. Section 62-3-717 requires that, when a co-representative is delegated the authority to act, then written notice, signed by the other co-representatives, has to be filed with the court.

## PART 8. CREDITORS' CLAIMS

### **Sections 62-3-801 through 62-3-807**

There are several changes in Part 8. Section 62-3-801 clarifies that a PR does not need to publish nor deliver notice if the decedent has been dead for a year. Section 62-3-804 reiterates that a claim may not be made against an estate until a personal representative is appointed, and it sets forth the procedures for a creditor to make a claim, including allowing a creditor who is seeking appointment as a PR to attach its application to the creditor's claim, as fulfillment of the requirements of presentation under § 62-3-803. Section 62-3-804 requires legal proceedings pending at the time of a decedent's death are suspended until the appointment of a personal representative, but the provisions also clarify that the suspension is not required for *in rem* proceedings, such as foreclosure actions, unless these include deficiency actions. Section 62-3-805, concerning priority of claims, moves federal claims up in the order of payment priority and clarifies that one who pays a claim on behalf of the estate is subrogated to that claimant's priority. Section 62-3-806 requires the PR to allow or disallow claims within the later of 60 days from the claim or 14 months after the decedent's death and clarifies that allowance of a claim does not necessarily mean that the estate has assets to pay it.

## PART 9. SPECIAL PROVISIONS RELATING TO DISTRIBUTION

### **Sections 62-3-901 through 62-3-916**

Section 62-3-901 clarifies that successors take title subject to the elective share, in addition to the currently available rights of others. Section 62-3-902 clarifies that the elective share provisions are an exception to the abatement rules. Section 62-3-906 requires that notice given to interested parties by a PR informs the interested persons of their right to object. Section 62-3-907 clarifies that a deed of distribution is required for distributions of real estate and that an appropriate instrument of conveyance is required for other types of property. Section 62-3-910 updates the reference to documentary or deed stamps as evidence of value to the current appropriate terminology, for example, a deed recording fee pursuant to Chapter 24, Title 12.

Section 62-3-911 updates the method for partitioning property to a process more akin to partition in the circuit court pursuant to Chapter 61, Title 15. First, the court attempts to fairly and equitably partition the property, but if that is impossible, the court proceeds to sell the

property. Non-petitioning interested heirs and devisees have the first opportunity to purchase the property. If an agreement as to price is not reached, the court approves and appoints at least one appraiser who has 30 days to submit a written report. If an interested heir or devisee objects to the valuation, then the court conducts a hearing to determine the value of the property. The interested heir or devisee may then purchase the property within 45 days. If the heir or devisee fails to pay, then the court follows the traditional practices of circuit courts in partition sales.

Section 62-3-914 is changed to allow an unclaimed devise or intestate share of less than \$5,000 to be transferred to the State Treasurer. Currently, the property must be worth less than \$100.

Section 62-3-916 is substantively changed to make the section comparable to the most recent version of the Uniform Probate Code. Subsection (b) is changed to have three sub-subsections. The first provides that an express and unambiguous tax apportionment in a will does have to be followed. The second provides that if sub-subsection (1) does not apply, then the taxes have to be apportioned in accordance with a revocable trust created by the decedent. If neither (1) nor (2) applies, then the taxes are apportioned based on each person's proportion of the estate, as with the current version. Thus, the provision changes effectively recognize the current use of revocable trusts in estate planning, which often contain language regarding tax apportionment, and provide specific language coordinating tax apportionment language in wills and trusts.

#### PART 10. CLOSING ESTATES

##### **Sections 62-3-1001 through 62-3-1008**

Section 62-3-1001 allows the PR to avoid the requirements of this section if all interested parties waive the filings under this section. The comments from § 62-3-1003 are substantially changed to include only the comments applicable to the version of this section adopted by South Carolina. Section 62-3-1005 requires that the proceedings of successors and creditors are filed within 6 months after the filing of the application for settlement of the estate under § 62-3-1001.

#### PART 11. COMPROMISE OF CONTROVERSIES

##### **Sections 62-3-1101 through 62-3-1102**

The sections governing the effect of court approval of a compromise and the procedure to obtain court approval are not changed.

#### PART 12. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

##### **Sections 62-3-1201 through 62-3-1204**

Section 62-3-1201 allows the use of this section if the value of the estate is less than \$25,000. Currently, the statute requires it to be less than \$10,000. The act also expressly includes a person who remits payment for reasonable funeral expenses as a claiming successor. Instead of requiring a signature from a judge in the decedent's resident county, the judge has to be in the county of the decedent's domicile. Section 62-3-1202 places a duty on the person receiving the affidavit to comply with the affidavit, provided that the affidavit specifically states that no person acting in reliance of the affidavit incurs liability to the estate for doing so.

Section 62-3-1203 allows an increase in the maximum value of the probate estate from \$10,000 to \$25,000 in order to qualify for small estate administration. Additionally, the act clarifies that, after publishing notice to creditors, a PR of an independent estate administration does not have to give creditors any additional notice before distributing the estate. Also, under

subsection (b), the PR may be the sole devisee individually, or in the capacity of a fiduciary, such as a trustee, and may qualify for independent administration.

Section 62-3-1204 clarifies that the PR has to file an inventory with the court and pay court fees before closing a small estate, and recognizes the change, by which the maximum value of a small estate is raised from \$10,000 to \$25,000.

#### PART 13. SALE OF REAL ESTATE BY PROBATE COURT

##### **Sections 62-3-1302 through 62-3-1310**

Part 13 clarifies the process for obtaining court approval for estate sales of real estate. Section 62-3-1302 changes the term “real estate” to “real property.” Section 62-3-1303 changes the wording of the statute and adds the following to the list of people to whom a summons is issued: the heirs at law of the decedent, the devisees under the decedent’s will, any person who properly presents a claim against the estate which remains unresolved, or any interested person affected by the proceeding. Section 62-3-1305 adds the same people as those added in § 62-3-1303 to the list of those who have to be served with summons. It also clarifies the procedure, with regard to sales of real property, for notice to guardians ad litem of minors.

Section 62-3-1309 provides that the procedures for sale of real property proceed in the same manner as a civil lawsuit, instead of the current 30 days in the provision. Accordingly, if response times change for civil suits, then the response time here may change without requiring changes to the provision. Similarly, the court is given authority to hear motions and accept pleadings as in civil lawsuits. Also, the act requires notice of hearings to be provided according to § 62-1-401. Section 62-3-1310 gives the court discretion as to whether a bond is required, rather than requiring a bond in all cases.

#### **ARTICLE IV. LOCAL AND FOREIGN PERSONAL REPRESENTATIVES; ANCILLARY ADMINISTRATION (4 PARTS)**

This article concerns the coordination of administration of nonresident decedents’ estates when those estates have interests in the state.

##### PART 1. DEFINITIONS

##### **Section 62-4-101**

The definitions in Part 1 are not changed.

##### PART 2. POWERS OF FOREIGN PERSONAL REPRESENTATIVES

##### **Sections 62-4-201 through 62-4-207**

Section 62-4-204 removes bond from the title and states that a bond is not required unless a court orders it. The changes to existing § 62-4-207 clarifies that, for a nonresident decedent, a proceeding under Article 3 to probate a will may be an alternative to the procedures under Part 2.

##### PART 3. JURISDICTION OVER FOREIGN PERSONAL REPRESENTATIVES

##### **Sections 62-4-301 through 62-4-303**

The sections governing when courts have jurisdiction over foreign PRs and the methods of service are not changed.

##### PART 4. JUDGMENTS AND PERSONAL REPRESENTATIVES

##### **Section 62-4-401**

The section concerning judgments in favor of or against foreign PRs are not changed.

## **ARTICLE VI.      NONPROBATE TRANSFERS      (3 PARTS)**

Article VI, concerned with transfers of a decedent's assets outside of a probate estate, is now split into 3 separate parts, instead of the currently existing 2 parts. The changes to this article contain language suggested by the Uniform Law Commission's 2010 Uniform Probate Code provisions. The first part is concerned with the types of accounts governed by these provisions and the formats of single and multiple party accounts with financial institutions that involve transfers of assets of a decedent. The second part repeats some of the existing provisions to address issues that relate to ownership of these accounts, the rights and limitations on beneficiaries, and how the death of a party affects the rights of a party, beneficiary, or agent. The third part is concerned with financial institutions, their authority, and their responsibilities for payments and the protections accorded to them.

### **PART 1. MULTIPLE PARTY ACCOUNTS**

#### **Sections 62-6-101 through 62-6-106**

Section 62-6-101 (Definitions) now corresponds better to multiple party accounts issues, and so most of the existing definitions are changed to reflect this change. The term "multiple-party account" replaces "joint accounts" in the definitions. Section 62-6-102 limits the scope of the provisions of Article VI, Part 1 so that they do not apply to certain types of business transactions. Section 62-6-103 explains that an account may be for either single or multiple parties and establishes that the Probate Code now allows for accounts to have or not have rights of survivorship, POD (payable on death) designations, or agency designations. Section 62-6-104 provides forms for single and multiple party accounts and provides that financial institutions are protected if the language in these statutory forms are essentially the same as those used by the financial institution. Section 62-6-105 allows agency designations on accounts, but those agents have no beneficial interests in the accounts.

### **PART 2. OWNERSHIP AS BETWEEN PARTIES AND OTHERS**

#### **Sections 62-6-201 through 62-6-205**

Section 62-6-201 establishes that beneficiaries and agents have no rights to an account during the lifetime of a party. Section 62-6-202 substantially changes existing law so that accounts with multiple parties or beneficiaries automatically contain a right of survivorship arrangement unless the account specifically provides otherwise, such as the designation of an account as a tenancy in common. Section 62-6-203 provides what rights exist to parties and beneficiaries at the time of death, what is necessary from a party or other individual to alter the terms of an account with a financial institution, through notice or express terms in a will, and that the standard of proof is clear and convincing evidence. This section also provides that a multiple party account of husband and wife is presumed to be a joint account with the right of survivorship unless shown otherwise by clear and convincing evidence. Section 62-6-204 is changed to clarify that these accounts are non-testamentary and therefore may not be determined by provisions of a will. Section 62-6-205 repeats the provisions of former § 62-6-107, dealing with creditors' rights. As with existing law, this section provides that a decedent's estate has limited beneficial ownership to the funds in a multiple party account for the payment of debts, taxes, and estate administration, but only if the decedent's estate is insufficient to meet those requirements. The

statute of limitations for creditors is changed to 1 year following the death of the decedent, to be consistent with the statute of limitations for creditors to a probate estate.

### PART 3. FINANCIAL INSTITUTIONS

#### **Sections 62-6-301 through 62-6-307**

Part 3 specifies in more detail than existed in prior law the rights and obligations of financial institutions to parties and PRs. Section 62-6-301 provides for the same authority for financial institutions to enter into single or multiple party accounts as did former § 62-6-108, but now includes additional references to POD and agency designations. Section 62-6-302 expands on the provisions of former § 62-6-108 and authorizes payments from multiple party accounts to a party or parties, to a PR, or by a court order. Section 62-6-303 repeats the provisions of former § 62-6-110 so that a financial institution is authorized, within certain restrictions, to pay out funds in an account with a POD designation to one or more of the parties, the beneficiaries, a PR, or pursuant to a court order. Section 62-6-304 is a new provision to deal with accounts with an “agency” designation. It is similar to former § 62-6-111 dealing with trusts and trustees, but is much broader in terms. Section 62-6-305 is a new provision to allow payments by financial institutions directly to minors pursuant to the provisions of § 62-5-103 or a court order. Section 62-6-306 continues to provide protection to financial institutions as did former § 62-6-112, so long as the payments are made pursuant to the terms of the account. The provision continues to curtail the protection of a financial institution receiving written notice from certain parties that payments are not to be made, but also continues to protect the financial institution for refusal to make payments based on the notice received. Section 62-6-307 continues the provisions of former § 62-6-113, allowing a financial institution to set-off in its own favor an amount from a multiple-party account to cover the indebtedness of the party, but only to the amount to which the party is beneficially entitled.

## **ARTICLE VII UNIFORM TRUST CODE (11 PARTS)**

In this act, few changes are made to the substantive provisions of the Trust Code. Many of the Reporter’s Comments to the various parts are substantially changed and updated, removing former incorrect or inaccurate references and discussions about the Uniform Trust Code. Changes to and reorganization of the comments clarify and make the comments more accurate as applicable to South Carolina. One major addition to the Trust Code is the inclusion of “Unitrust” provisions in Part 9 of Article 7.

### PART 1. GENERAL PROVISIONS AND DEFINITIONS

#### **Sections 62-7-101 through 62-7-112.**

Only § 62-7-103 is changed to add the definitions of “Permissible Distributee,” “Trust Investment Advisor,” and “Trust Protector.”

### PART 2. JUDICIAL PROCEEDINGS

#### **Sections 62-7-201 through 62-7-204.**

Only § 62-7-201 is changed in order to clarify that the probate court proceedings concerning the internal affairs of trusts are formal proceedings unless a consent petition is offered. The sections continue to grant the probate court exclusive jurisdiction over trusts and allow proceedings to be maintained for various issues in trusts. The act also clarifies what occurs to proceedings that affect trusts when a transfer of venue or recusal of a probate judge is ordered.

As with probate matters, a transfer of venue order requires subsequent proceedings affecting a trust to be held in the new county, while subsequent proceedings of a trust continues in the original county when a probate judge is disqualified or recused.

### PART 3. REPRESENTATION

#### **Sections 62-7-301 through 62-7-305.**

There are no changes to the provisions concerning representations of beneficiaries, trustees, and virtual representation for those issues concerning trusts.

### PART 4. CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS

#### **Sections 62-7-401 through 62-7-418.**

Section 62-7-401 clarifies that a trust of real property must be proved by a writing, while trusts arising from operation of law do not. Section 62-7-402 allows a settlor to sign the trust instrument or have someone sign it by a settlor's direction in a settlor's presence. Otherwise, Part 4 of Article 7 remains the same and continues to address the requirements for a trust.

### PART 5. CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

#### **Sections 62-7-501 through 62-7-507.**

Section 62-7-505, concerning a creditor's claim against a settlor, contains stylistic changes and states that a contribution to an inter vivos marital deduction trust as described in section 2523(e) of the IRC, after the death of a settlor's spouse, is considered to be a contribution by the spouse rather than the settlor.

### PART 6. REVOCABLE TRUSTS

#### **Sections 62-7-601 through 62-7-607.**

Section 62-7-602, concerning the revocation or amendment of a revocable trust deletes former subsection (e), which currently states that the settlor's power of attorney may only be exercised by the settlor's agent as expressly stated in the instrument and that the power of attorney does not alter beneficiaries under existing estate plans. The new § 62-7-602A now includes the provisions of former § 62-7-602(e). However, it also conveys to the agent acting under a power of attorney the following powers for both revocable and irrevocable trusts, but only to the extent expressly authorized in the trust or power of attorney: revocation of the trust; amendment of the trust; additions to the trust; direction to dispose of the trust; and creation of a trust, under certain limited circumstances. Lastly, the provision states that the exercise of an agent's powers does not alter the amount of property that beneficiaries receive under an existing will or intestacy. The Reporter's Comment summarizes the changes between § 62-7-602(e) and § 602A.

Section 62-7-607, concerning the effect of a divorce or annulment on a spouse's disposition in a revocable trust, contains stylistic changes, but the provision continues to remove the former spouse from being a beneficiary of a trust, unless expressly provided for otherwise in the trust.

### PART 7. OFFICE OF TRUSTEE

#### **Sections 62-7-701 through 62-7-709.**

No provisions in Part 7, concerning the office of trustee, are changed.

## PART 8. DUTIES AND POWERS OF TRUSTEE

### Sections 62-7-801 through 62-7-819.

The majority of sections under Part 8 is not changed. Section 62-7-813, concerning the duty of a trustee to report, makes the duties under this section owed only to the settlor rather than to qualified beneficiaries for revocable trusts; however, this may be overridden by the terms of the trust. Subsection (b)(1) requires the trustee to notify the qualified beneficiaries of the existence of the trust, the identity of the settlor(s), the trustee's contact information, the right to request a copy of the trust instrument, and the right to request a copy of any trustee's report. Subsection (b)(2) requires the trustee to keep the distributees reasonably informed about the administration of the trust. Subsection (b)(3) requires the trustee to provide a non-qualified beneficiary with a copy of the trust instrument upon the beneficiary's request, redacted to show only that beneficiary's interests, and to respond to the non-qualified beneficiary's request for information about the administration of the trust. Subsection (b)(4) requires the trustee to notify the distributees in advance of any change in method or rate of compensation for the trustee. Subsection (c)(1) requires the trustee to keep distributees and other qualified beneficiaries who request information reasonably informed as to the administration of the trust, send annual written reports, and send a written report at the termination of the trust. Subsection (c)(2) requires the trustee to send a final report as in (c)(1) if the trustee resigned. Subsection (d) allows the trustee to satisfy (b) and (c) by following the guidelines in 67-7-302 through 67-7-305. Subsection (e) allows distributees to waive their rights to reports under this section. The comments to this section are completely redrafted. The comments acknowledge that this section is completely redrafted and provide a brief examination of subsections (b) and (c).

Section 62-7-816A, relating to the trustee's authority to appoint to another trust, is added to grant a trustee discretionary power authority to appoint the trust property in favor of another trust for the benefit of one or more of the beneficiaries – what is called a decanting power. The trustee is able to create this second trust regardless of any need to distribute principal or income. The second trust may be created under the same trust instrument as the original or under a new instrument and the trustee may be the same as the original or a new trustee. The second trust is subject to the following requirements: the beneficiaries of the second trust are the beneficiaries of the original; future interests in the original may not be accelerated to present interests; the second trust may not contain any provision that disqualifies any assets of a tax deduction; if contributions are excluded from the gift tax in the original, then the interest has to vest and become distributable on the same date as the original; if a beneficiary has the power to withdraw in the original, the beneficiary has to have it in the second or there has to remain sufficient property in the original so the beneficiary may withdraw; the second trust has to contain the same ascertainable standard as in the original if there were one; and the trustee may confer a power of appointment upon a beneficiary of the original and the beneficiary's permissible appointees does not have to be beneficiaries of the original or second trust. The section also prevents the trustee from exercising the power to appoint principal or income, if the trustee is a beneficiary of the original trust, but the remaining co-trustee may then act for the trust.

The power of appointment is considered a power to appoint people other than the trustee, the trustee's creditors, the trustee's estate, or creditors of the trustee's estate. To exercise the power, the section requires a writing signed by a trustee that is recorded within the records of the original trust; the trustee does have to give written notice to the qualified beneficiaries 90 days prior to the exercise of the power; but if the notice period is waived, the trustee may exercise the power on the date of the waiver. The section states that no duty of the trustee is created to

distribute principal or income and that the terms of the trust may modify this section. In addition, a trustee or beneficiary is able to commence an action to approve or disapprove an exercise of the power of appointment. Lastly, § 62-7-109 applies to this section with regard to notices and sending documents. The comments to this section states that this section allows greater flexibility in the case of unforeseen circumstances or drafting error. The section basically allows modification of irrevocable trusts for the benefit of the beneficiaries. The SC version of this section does not require absolute discretion over distribution in order to maximize flexibility, and the comments explain many of the subsections in detail.

Section 62-7-818, concerning the powers and discretions of a trust protector, grants the Trust Protector power as set out in the trust instrument. Its decisions are be binding on all other persons. These powers include: modifying the trust instrument for tax benefits; increasing or decreasing interests of any beneficiaries; modifying the terms of any power of appointment; removing or appointing a trustee, advisor, committee member; terminating the trust, vetoing or directing distributions; changing situs or governing law; appointing its successor; interpreting the terms of the trust; advising the trustee; and amending or modifying the trust to take advantage of certain laws. The comments to this section state that there is no common law counterpart to this section.

Section 62-7-819, concerning the discretion of a trust investment advisor, states that the trustee has no duty to monitor the conduct of the Trust Investment Advisory (TIA), advise the TIA, or communicate with the beneficiaries concerning any instance where the trustee has acted differently from the TIA. The section also states that actions by the trustee with regard to matters within the TIA's scope of authority are presumed to be administrative only. Lastly, the section defines "investment decision." The Comments explain that no common law counterpart to this section currently exists.

## **PART 9. SOUTH CAROLINA UNIFORM PRINCIPAL AND INCOME ACT; SOUTH CAROLINA UNIFORM PRUDENT INVESTOR ACT**

### **Sections 62-7-901 through 62-7-933**

A prefatory note is added to give a brief history of the act and to inform the reader of a few section number changes. When the General Assembly enacted South Carolina's versions of the Uniform Principal and Income Act and the Uniform Prudent Investor Act, both of which are contained in Part 9, no comments were included. Appropriate comments to the various sections are now added throughout.

Section 62-7-903, concerning fiduciary duties, changes every reference to "this part" to the phrase "the South Carolina Uniform Principal and Income Act." The section also expands subsection (B) to include actions under § 62-7-904(A), a discretionary power under §§ 62-7-904B through 62-7-904P, and discretionary power of administration within the scope of the South Carolina Uniform Principal and Income Act.

Section 62-7-904, concerning a trustee's power to adjust, now recognizes the trustee's power to convert a trust into a Unitrust according to §§ 62-7-904A through 62-7-904P. Another requirement is added to prevent the trustee from making an adjustment that makes an individual the owner of the trust for income and transfer tax purposes, but only if the person is not considered the owner for income and transfer tax purposes prior to the adjustment. Adjustments are prevented only if the estate of the individual does not include the assets if the trustee does not possess the power to adjust. A trustee is allowed to make an adjustment that benefits a beneficiary even if the trustee earns compensation as a percentage of the trust's income, and a

new subsection is added to prevent the trustee from exercising the adjustment power if the trust is converted to a Unitrust.

Section 62-7-904A prevents a court from ordering a fiduciary to change its decision unless the court determines that it is an abuse of discretion. The remaining changes clarify the section. Section 62-7-904B is added to provide definitions for §§ 62-7-904.A through 62-7-904.P. The section defines the following terms: Code, Disinterested Person, Income Trust, Interested Distribute, Interested Trustee, Legal Disability, Qualified Beneficiary, Related or subordinate party, Representative, Settlor, Total Return Unitrust, Treasury Regulations, Trustee, and Unitrust amount. Section 62-7-904C is added to allow non-interested trustees to convert, without a court order, an income trust to a total return unitrust, reconvert a Unitrust to an income trust, or to change the percentage used to calculate the unitrust amount or the method used to calculate the fair market value of the trust. However, the trustee may only do either of these if: the trustee adopted a written policy for the trust; the trustee gave written notice to certain persons of its intention to take action; there is at least one qualified beneficiary under § 62-7-103(12)(A) or (B) and one under § 62-7-103(12)(C) who is not under a legal disability or a representative of a qualified beneficiary; and no person objects within 90 days. Similarly, the section allows an interested trustee, if there is no non-interested trustee, to do the same actions with the same requirements except the trustee is required to appoint a disinterested person to conduct the actions. Next, the section has the following requirements if the trust is a charitable trust for which a federal or state deduction is taken: instead of notice to persons as above, notice has to be given to the charitable organization; and the trustee is required to distribute the greater of the unitrust amount or the amount required by the IRC. Section 62-7-109, regarding notices and sending documents, applies to this section.

Section 62-7-904D allows a trustee to petition the court to take an action under § 62-7-904C when the trustee may not do the action itself under that section. The section allows a beneficiary to request that the trustee take such action and petition the court to do so if the trustee refuses. Section 62-7-904E is added to require a determination of the fair market value of the trust assets at least annually using a method selected by the trustee. The trustee may use the fair market value on the same date for the current fiscal year and the preceding fiscal years. The section requires the trustee to determine the unitrust amount by using a reasonable return from the trust that is not less than 3% and not more than 5%. If an income trust is converted to a Unitrust, the trustee has to consider the unitrust amount as paid from net accounting income as if the trust is not a Unitrust and to consider the unitrust amount as paid from an ordinary income not allocable to net accounting income. The trustee may consider the unitrust amount as paid from net short-term gain and then from net long-term capital gain; and then consider the unitrust amount as coming from the principal of the trust. Section 62-7-904F allows the trustee to determine: the effective date of the conversion; the timing of distributions; whether the payments are to be in cash; the effective date of the reconversion to an income trust; and any other administrative issues as appropriate under §§ 62-7-904A through 62-7-904P. Section 62-7-904G provides that a conversion to a total return unitrust does not affect other provisions of the terms of the trust regarding distributions of principal. Section 62-7-904H states that the trustee or disinterested person acting in good faith is not liable for failing to take action or for taking action under §§ 62-7-904B through 62-7-904P. Section 62-7-904I provides that, for all trusts in existence or created after the effective date of this act, §§ 62-7-904B through 62-7-904P apply, with 3 exceptions. Those 3 exceptions are: (1) a governing instrument that contains a provision indicating that a settlor wanted the beneficiaries to receive an amount other than a reasonable

return; (2) the trust is one described in Section 170(f)(2)(B), 664(d), 2702(a)(3) or 2702(b) of the IRC; or (3) a trust containing provisions setting aside amounts for charitable purposes, unless it is set up as a charitable trust.

Sections 62-7-904J, 62-7-904K, and 62-7-904L are marked as Reserved.

Section 62-7-904M states that the unitrust amount to be distributed by an express total return unitrust may be determined by the terms of the unitrust instrument by reference to the net fair market value of the trust's assets. The section allows the unitrust instrument to use valuation methods that the trustee considers reasonable and appropriate for assets where a fair market value may not be readily ascertained and the instrument allows the trustee to exclude the fair market value of any real or personal property in computing the unitrust amount. Section 62-7-904N provides that a return from a unitrust ranging from 3% to 5% is a reasonable apportionment between income and principal beneficiaries. Section 62-7-904O allows the express total unitrust instrument to grant the powers in § 62-7-904C. However, if the instrument does not reference these powers, then the trustee does not have that power. Section 62-7-904P requires the trustee to consider the express total return unitrust amount as paid from net accounting income as if the trust is not a Unitrust and to consider the unitrust amount as paid from an ordinary income not allocable to net accounting income. The trustee may consider the unitrust amount as paid from net short-term gain and then from net long-term capital gain; and then consider the unitrust amount as coming from the principal of the trust. The comments following § 62-7-904P explains the background, and the scope and purposes behind the unitrust provisions. The provisions of §§ 62-7-905 through 62-7-932 are not changed in the act, but the comments are edited to conform the comments to South Carolina laws.

Section 62-7-933, the SC Uniform Prudent Investor Act, has a prefatory note and comment added, and the section adds labels to the subsections to make the section easier to navigate. The section continues to provide for the Prudent Investor Rule, the standard of care, portfolio strategy, and other investor guidelines. This act also includes all of the provisions that were enacted in 2012, as part of Act 204, S. 429, that assists surviving spouses to better manage tax considerations for trust assets.

## PART 10. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

### **Sections 62-7-1001 through 62-7-1013.**

The general comment updates the changes to the code provisions.

Section 62-7-1005A allows the trustee to follow the direction of a trust protector if the governing instrument requires it and is generally protected from liability. The trustee also is protected from liability if the trust protector is required to give consent or permission for an act and the trustee did not obtain consent. If the trust protector is unable or unwilling to serve, then the trustee may petition the court to appoint one unless the governing instrument provides for a successor. The section requires that the trust protector perform its duties in good faith and in accordance with the trust. Lastly, it excludes a trust protector from being a fiduciary with respect to powers reserved exclusively to other trustees, trust advisors or trust protectors.

Section 62-7-1005B allows the trustee to follow the direction of a Trust Investment Advisor (TIA) if the governing instrument requires it and the trustee is generally protected from liability. The trustee is also protected from liability if the TIA is required to give consent or permission for an act and the trustee is unable to obtain consent. If the TIA is unable or unwilling to serve, then the trustee is able to petition the court to appoint one unless the governing instrument provides

for a successor. The section requires that the TIA perform its duties in good faith and in accordance with the trust. Lastly, it excludes a TIA from being a fiduciary with respect to powers reserved exclusively to other trustees, trust advisors or trust protectors.

#### **PART 11. MISCELLANEOUS PROVISIONS**

##### **Sections 62-7-1101 through 62-7-1106.**

The only changes to these sections are stylistic.

#### **EFFECTIVE DATE LANGUAGE**

The effective date language mirrors the language used previously in adopting the first Uniform Probate Code in 1987 and the Uniform Trust Code in 2004. The changes made do not affect existing documents where rights have already vested. For S. 143, the provisions become effective January 1, 2014.