

Act 100, S. 143
2013
REVISIONS TO PROBATE AND TRUST CODES
REVISED SHORT SUMMARY
June 20, 2013

Act 100, S. 143- Contains changes to Articles 1,2,3,4,6,and 7, but not Article 5.

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

Sections 62-1-100 through 62-1-111

Most of the provisions in Part 1 are not changed. Changes include clarification of provisions related to the effect of fraud, as well as clarification that the SC Rules of Evidence apply in probate court, unless specifically excluded by Probate or Trust Code provision. Also clarifies that the provision in the Trust Code about a probate court's authority to award attorneys fees and costs applies to Probate Code as well.

Section 62-1-201

Adds definitions for Fair Market Value and Probate Estate. Deletes definition of stepchild, because stepchildren are no longer included as heirs to intestate estates.

Sections 62-1-301 through 62-1-309

Several provisions in Part 3 are changed by this act. Clarifies that the probate court, and not family court, has jurisdiction over property in which a decedent's estate or a protected person has an interest, and would clarify that the Probate court does not have jurisdiction over the care, custody, or control of minors. However, new provisions clarify that, for pending actions to partition property or to quiet title, a circuit court has jurisdiction and duplicative proceedings are not required to be filed in the probate court. Additionally, the act adds provisions to clarify the procedures to follow when a probate judge is disqualified or recused and procedures to follow when there is a transfer of venue. When venue of a proceeding or file is transferred to another county, subsequent matters concerning that proceeding or file, including appeals, are retained by the county to which venue was transferred. If a special probate judge is appointed because a probate judge is disqualified and 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. The provisions concerning appeals clarify and provide more detail for the appeals process from the probate court, and retain the ability of a litigant to appeal to circuit court from probate court.

Sections 62-1-401 through 62-1-403

Part 4 is not changed by the 2013 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 were classified as "formal" and which ones were classified as "informal."

Sections 62-1-500 through 62-1-508

The provisions of Part 5 are substantially changed by this act. 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 current intestacy rule 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 escheated estate. Another exception occurs where a decedent is considered to survive 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, currently dealing with a murder-suicide.

ARTICLE II. INTESTATE SUCCESSION AND WILLS (9 PARTS)

Sections 62-2-100 through 62-2-114

Most of the provisions in Part 1 are not changed. Stepchildren are eliminated as intestate heirs. Other provisions clarify the 120 hour survival requirement for intestate succession, homestead allowance, and exempt property.

Sections 62-2-201 through 62-2-207

This act substantially changes the method of calculating the elective share. Nonprobate transfers to a surviving spouse are included in a calculation of an elective share. The provisions also clarify some other issues related to elective shares, such as illusory revocable trusts, and allowance of conversion of a trust to a unitrust. The time limits for presenting a petition for an elective share are changed 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.

Sections 62-2-301 through 62-2-302

The only changes in this Part extend the time for an omitted spouse or an omitted child to make a claim against an estate to parallel the time lines for a surviving spouse to claim an elective share.

Sections 62-2-401 through 62-2-403

The maximum value of property exempt from creditors is increased from \$5,000 to \$25,000. Also, veterans' benefit payments are exempted for deceased veterans of any period of war as defined by Federal Law, and not just specific wars up to WWII.

Sections 62-2-501 through 62-2-512

Now, a subsequent will completely revokes a previous will by inconsistency, if the testator intends the subsequent will to revoke a prior will. The provision clarifies what presumptions (a presumption of revocation of a prior will or a presumption to supplement a prior will) are rebuttable and codifies that the rebuttal requires clear and convincing evidence. This section is also expanded to nullify life insurance and retirement plan beneficiary designations, transfer on death accounts, and other revocable dispositions to the former spouse after a divorce or annulment.

Sections 62-2-601 through 62-2-611

Most of the sections concerning the rules of construction of wills are not substantially changed. A probate judge now has express authority to reform the terms of a will if a testator's actual intention is proven by clear and convincing evidence. A provision clarifies that property acquired after a 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 62-2-701

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

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.

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 allow the individual to deliver a will to a named PR who then has a duty to deliver the will to a judge. The criminal penalties of a \$500 fine or 1 year in jail for intentional or fraudulent suppression or destruction is removed, and replaced by provisions that provide for contempt of court and actions for the total amount damages sustained by the wronged individual.

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

Sections 62-3-102 through 62-3-108

Existing law is clarified so that a will found valid in another state is valid to transfer property in South Carolina. Also clarifies that a creditor's claim is filed after a personal representative (PR) is appointed, but creates an exception for creditors who apply to be the PR, and in those cases, the creditor has to attach its claim to the application for appointment as a PR.

Sections 62-3-201 through 62-3-204

These provisions continue to establish venue for formal and informal probates of estates, and clarifies that provisions regarding venue and recusal of a judge are included. Probate judges are now able to act as a PR for a family member's estate, with certain restrictions. Probate judges also now have more flexibility on some PR appointments and also requires, under certain circumstances, for the PR to give copies of all filings to persons requesting them.

Sections 62-3-301 through 62-3-310

For certain types of estates, a will may now be probated without a PR being appointed. Also, applicants seeking to be appointed informally are required to give notice only to individuals with an equal right to appointment.

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 substantively and stylistically. Wills that are notarized, but not self-proved, are presumed to satisfy the execution requirements. Also, wills from a state or country that does not provide for the probating of an estate are eligible for probate in South Carolina, but only if they are not ineligible for probate in that state or country. This is a change from current law, requiring that they are effective in that other location. The deadline on after-discovered wills is subject to the provisions for modification, as well as the provisions for the vacating of the wills.

Sections 62-3-501 through 62-3-505

The act makes only a small technical change to this Part 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.

Sections 62-3-601 through 62-3-621

A probate court now has the discretion to dispense with a bond. The value of a putative interest of an interested person to demand a bond is increased from \$1,000 to \$5,000. An order closing an estate relieves a PR's attorney from further duties to the court. A special administrator may be appointed informally more often. The other changes to the provisions are for clarity and stylistic changes.

Sections 62-3-701 through 62-3-721

A named PR is allowed to protect a decedent's estate before a PR is appointed by a court. A PR failing to do right is subject to the contempt power of the court. Inventories now include only probate property and copies are given only to persons requesting them. A PR can sell real property under certain circumstances and personal property worth less than \$10,000 without first obtaining court approval. A PR also now has access to a decedent's electronic files, user names, and passwords.

Sections 62-3-801 through 62-3-807

A PR does not have to publish or deliver notice if a decedent has been dead for a year or more. A filing of a claim in court satisfies the time period to present a claim and creditors continue to be required to present claims in a timely manner. This section also requires a creditor who seeks appointment as a PR to attach its application to the creditor's claim. A PR may allow or disallow claims within the later of 60 days from the claim or 14 months after the decedent's death.

Sections 62-3-901 through 62-3-916

Many provisions are changed simply for clarity. The method for partitioning property is changed to a process more akin to partition in the circuit court pursuant to Chapter 61 of Title 15. Also, an unclaimed devise or intestate share of less than \$5,000, instead of less than \$100, is transferred to the State Treasurer. There are also changes to clarify the current use of revocable trusts in estate planning, and provide specific language coordinating tax apportionment language in wills and trusts.

Sections 62-3-1001 through 62-3-1008

The PR may avoid certain filings if all interested parties waive the requirement.

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.

Sections 62-3-1201 through 62-3-1204

The provisions now allow an increase in the maximum value of the probate estate from \$10,000 to \$25,000 in order to qualify for small estate administration.

Sections 62-3-1302 through 62-3-1310

Part 13 clarifies the process for obtaining court approval for estate sales of real estate, including who is served and what procedures are used regarding notice to guardians ad litem for minors regarding sales of real property. The procedures for sale of real property are in the same manner as a civil lawsuit, instead of the current 30 days in the provision. The courts also have discretion as to when to require a bond.

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

Section 62-4-101; Sections 62-4-201 through 62-4-207; Sections 62-4-301 through 62-4-303; Section 62-4-401

Only minor changes are made in this article that concerns the coordination of administration of nonresident decedents' estates when those estates have interests in the state.

ARTICLE VI. NONPROBATE TRANSFERS (3 PARTS)

Sections 62-6-101 through 62-6-106; Sections 62-6-201 through 62-6-205; Sections 62-6-301 through 62-6-307

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 2010 Uniform Probate Code provisions. The first part concerns the types of accounts governed by nonprobate assets and the formats of single and multiple party accounts with financial institutions that involve nonprobate transfers of assets of a decedent. The second part repeats some of the existing provisions in order to address issues that relate to ownership of these accounts, the rights and limitations of beneficiaries, and how the death of a party affects the rights of a party, beneficiary, or agent. The third part concerns financial institutions, their authority, and their responsibilities for payments and the protections accorded to them.

ARTICLE VII UNIFORM TRUST CODE (11 PARTS)

Overview for Article 7: In this act, few changes were made to the substantive provisions of the Trust Code. Many of the 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 the comments so they more accurately apply South Carolina. One major addition to the Trust Code is the inclusion of "Unitrust" provisions.

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

Several definitions added for these terms: "Permissible Distributee," "Trust Investment Advisor," and "Trust Protector."

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

Probate court proceedings concerning the internal affairs of trusts are formal proceedings unless a consent petition is offered. Provisions are added to clarify what procedures apply 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 continue in the original county when a probate judge is disqualified or recused.

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 and the provisions continue to maintain the relevant probate code language where applicable.

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

A settlor may sign a trust instrument or have someone sign it by a settlor's direction in a settlor's presence. Otherwise, the section remains the same and continues to address the requirements for a trust.

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

These provisions, concerning a creditor's claim against a settlor, contain stylistic changes and state that a contribution to an inter vivos marital deduction trust as described in section 2523(e) of the federal IRC, after the death of a settlor's spouse, is considered to be a contribution by the spouse rather than the settlor.

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

These provisions, concerning the revocation or amendment of a revocable trust, give an agent acting under a power of attorney certain powers for both revocable and irrevocable trusts, but only to the extent expressly authorized. Other provisions contain mostly stylistic changes.

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

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

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

The majority of provisions under Part 8 are not changed. The provision 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, and it adds requirements for notifications and distributions. Another new provision gives a trustee discretionary 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 many requirements. One additional provision allows greater flexibility with regard to notices and sending documents, in case of unforeseen circumstances or drafting error. There are also provisions concerning the powers and decisions of a Trust Protector and a Trust Investment Advisor (TIA).

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. Provisions concerning a trustee’s power to adjust now recognize a trustee’s power to convert a trust into a unitrust, so long as an extensive list of requirements are met. In addition, 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.

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

The general comment updates the code sections. New provisions allow a trustee to follow the direction of a trust protector or a Trust Investment Advisor (TIA), pursuant to certain restrictions, and generally protects the trustee from liability as a result of the reliance.

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 this act, the provisions become effective January 1, 2014.