

7<sup>th</sup> Annual Horry County Probate Court  
Continuing Legal Education Program

November 1, 2013

**SOUTH CAROLINA PROBATE CODE CHANGES:  
ARTICLE 1 AND ARTICLE 4**

Melody J. E. Breeden, Esquire  
Breeden Law Firm, PA  
4420 Oleander Drive, Suite 202  
Myrtle Beach, SC 29577  
843-839-0611  
[MBreeden@Breeden-Law.com](mailto:MBreeden@Breeden-Law.com)

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

**A. 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.

1. 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.
2. 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.
3. 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.
4. 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.

**B. PART 2. DEFINITIONS. Section 62-1-201.** Most of the definitions in Part 2 are not changed.

1. 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.
2. The terms "Fair Market Value" and "Probate Estate" are defined.
3. 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to the language, but there is still a differentiation from a guardian ad litem, and the term statutory guardian, which is obsolete, is now deleted.
4. The term "Stepchild" is also deleted because the intestacy statutes no longer list

stepchildren as intestate heirs.

C. **PART 3. SCOPE, JURISDICTION, AND COURTS Sections 62-1-301 through 62-1-309.** Several provisions in Part 3 are changed by this act.

1. 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.
2. 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.
3. 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.
4. 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.

D. **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."

E. **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.

1. Definitions for "co-owners with rights of survivorship," "governing instrument," and "payor" are added.
2. 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.

## **II. REDLINED VERSION OF CHANGES TO ARTICLE I**

### **Article 1**

#### **General Provisions, Definitions, and Probate Jurisdiction Of Court**

##### **Part 1**

###### **Short Title, Construction, General Provisions**

###### **Section 62-1-100.**

- (a) Except as otherwise provided, this Code takes effect July 1, 1987.
- (b) Except as provided elsewhere in this Code, on the effective date of this Code:
  - (1) the Code applies to any estates of decedents dying thereafter;
  - (2) the procedural provisions of the Code apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;
  - (3) every personal representative, including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;
  - (4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. Unless otherwise provided in the Code, a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right;
  - (5) a rule of construction or presumption provided in this code applies to multiple-party

accounts opened before the effective date unless there is a clear indication of a contrary intent.

(c) Section 62-2-502 is effective for all wills executed after June 27, 1984, whether the testator dies before or after July 1, 1987.

**Section 62-1-101.** Sections 62-1-101 et seq. shall be known and may be cited as the South Carolina Probate Code. References in Sections 62-1-101 et seq. to the term ‘Code’, unless the context clearly indicates otherwise, shall mean the South Carolina Probate Code.

**Section 62-1-102.**

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(2) to discover and make effective the intent of a decedent in the distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

**Section 62-1-103.** Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

**Section 62-1-104.** If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application and to this end the provisions of this Code are declared to be severable.

**Section 62-1-105.** This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

**Section 62-1-106.** Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may: (i) obtain appropriate relief against the perpetrator of the fraud ~~or~~ (ii) restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

**REPORTER’S COMMENT**

By virtue of this section, the six-year period of limitation provided by Section 15-3-530(7) of

the 1976 Code for actions for relief on the ground of fraud is reduced, with respect to fraud perpetrated in connection with proceedings and statements filed under this Code, or to circumvent its provisions or purposes. Under this section, actions for relief on the ground of fraud must be brought within two years after discovery of the fraud. In no event, however, may an action be brought against one not the perpetrator of the fraud (such as an innocent party benefiting from the fraud) later than five years after the commission of the fraud.

The last sentence of this section, however, excepts from this section actions 'relating to fraud practiced on a decedent during his lifetime which affect the succession of his estate' such as fraud inducing the execution or revocation of a will. There is some general authority for the proposition that one who is damaged by fraud which interferes with the making of a will may maintain an action for damages against the person who commits the fraud, 79 Am. Jur. 2d, Wills Section 414. In cases involving direct contest of wills which are allegedly the result of fraud, however, the provisions of Section 62-3-108 would be applicable and a formal probate proceeding would have to be commenced within the later of twelve months from the informal probate or three years from the decedent's death, at which time the allegations of fraud would be considered.

The 2013 amendment clarified that any person injured by the effects of fraud may (i) obtain relief against the perpetrator of the fraud and (ii) restitution from any other person (other than a bona fide purchaser) benefitting from the fraud.

**Section 62-1-107.** In proceedings under this Code the South Carolina Rules of Evidence in courts of general jurisdiction, ~~including any relating to simultaneous deaths,~~ are applicable unless specifically displaced by the Code. ~~In addition, the following rules relating to determination of death and status are applicable:~~

~~(1) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death, and the identity of the decedent.~~

~~(2) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.~~

~~(3) A person who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.~~

#### REPORTER'S COMMENT

This section states that the rules of evidence that apply in circuit court also apply in probate court proceedings unless specifically displaced by provisions of the South Carolina Probate Code. The 2011 Amendment removed those sections related to evidence as to the status of death, and these provisions have been incorporated into §62-1-507 of the Uniform Simultaneous Death Act. See §§62-1-500 to 62-1-510 for the Uniform Simultaneous Death Act.

**Section 62-1-108.** For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a

presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. The term ‘presently exercisable general power of appointment’ includes a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder’s last will and testament, and the inclusion of a provision in the will sufficient to exercise this power.

#### REPORTER’S COMMENT

This section allows one who is the holder of a presently exercisable ‘general power of appointment’ (which, in this context, means one having the power to take absolute ownership of property to himself, either by appointment, by amendment, or by revocation) to agree to actions taken by a personal representative or by a trustee, to consent to the modification or termination of a trust or a deviation from its terms, and, thereby, to bind the beneficiaries whose interests are subject to the power.

**Section 62-1-109.** Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

#### REPORTER’S COMMENTS

This section was enacted and intended to clarify to whom an attorney representing a fiduciary owes a duty: unless a written employment agreement expressly provides otherwise, the attorney for a fiduciary owes a duty only to the fiduciary and not to any other person. Thus, this section confirms that an attorney for the fiduciary does not owe any duty or obligation to a beneficiary of the estate for which the fiduciary serves; there is no direct or vicarious duty owed by the attorney to a beneficiary without an express written agreement to the contrary. Moreover, the attorney for the fiduciary owes no duty to the fiduciary estate or property. The attorney effectively represents the fiduciary and not the fiduciary estate. The rule of this section applies even if the fiduciary pays the attorney from the estate for which the fiduciary serves. The section is expressly declarative of the common law and applies to attorney-client relationships existing before and after the enactment of this section.

**Section 62-1-110.** Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

#### REPORTER’S COMMENT

This section was enacted and intended to: (i) expressly reject the concept of a ‘fiduciary

exception' to any attorney-client privilege; (ii) encourage full disclosure by the fiduciary to the lawyer to further the administration of justice; and (iii) foster confidence between a fiduciary and his lawyer that will lead to a trusting and open attorney-client dialogue. See Estate of Kofsky, 487 Pa. 473 (1979). This section also expressly rejects the holding set forth in the case of Riggs Natl. Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)(trustee's invocation of the attorney-client privilege does not shield document from disclosure to trust beneficiaries) as applied by the Court in Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).

**Section 62-1-111.** In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

#### REPORTER'S COMMENT

This section was enacted to clarify the probate court's authority to award costs and expenses. See §62-7-1004 for a similar provision in the South Carolina Trust Code.

### Part 2

#### Definitions

**Section 62-1-201.** Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in this Code:

(1) 'Application' means a written request to the probate court for an order. An application does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court.

(2) 'Beneficiary', as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) 'Child' includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) 'Claims', in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) 'Court' means the court or branch having jurisdiction in matters as provided in this Code.

(6) 'Conservator' means a person who is appointed by a court to manage the estate of a protected person.

(7) 'Devise', when used as a noun, means a testamentary disposition of real or personal property, including both devise and bequest as formerly used, and when used as a verb, means to dispose of real or personal property by will.

(8) 'Devisee' means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee

is the devisee and the beneficiaries are not devisees.

(9) 'Disability' means cause for a protective order as described by Section 62-5-401.

(10) 'Distributee' means any person who has received property of a decedent from his personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, 'testamentary trustee' includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(11) 'Estate' includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(12) 'Exempt property' means that property of a decedent's estate which is described in Section 62-2-401.

~~(12A)~~(13) 'Expense of administration' includes commissions of personal representatives, fees and disbursements of attorneys, fees of appraisers, and such other expenses that are reasonably incurred in the administration of the estate.

(14) 'Fair market value' is the price that property would sell for on the open market that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.

~~(13)~~(15) 'Fiduciary' includes personal representative, guardian, conservator, and trustee.

~~(14)~~(16) 'Foreign personal representative' means a personal representative of another jurisdiction.

~~(15)~~(17) 'Formal proceedings' means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons. Formal proceedings are governed by and subject to the rules of civil procedure adopted for ~~the circuit court~~ courts and other rules of procedure in this title.

~~(16)~~(18) 'Guardian' means a person appointed by the court as guardian who has qualified as a guardian of an incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem ~~or a statutory guardian~~.

~~(16A)~~(19) 'General power of appointment' means any power that would cause income to be taxed to the fiduciary in his individual capacity under Section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under Section 2041(a)(2) or 2514(c) of the Internal Revenue Code.

~~(17)~~(20) 'Heirs' means those persons, including the surviving spouse, who are entitled under the statute of intestate succession to the property of a decedent.

~~(18)~~(21) 'Incapacitated person' is as defined in Section 62-5-101.

~~(19)~~(22) 'Informal proceedings' means those commenced by application and conducted without notice to interested persons by the court for probate of a will or appointment of a personal representative. Informal proceedings are not governed by or subject to the rules of civil procedure adopted for the circuit court.

~~(20)~~(23) 'Interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from

time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

~~(21)~~(24) 'Issue' of a person means all his lineal descendants whether natural or adoptive of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.

~~(22)~~(25) 'Lease' includes an oil, gas, or other mineral lease.

~~(23)~~(26) 'Letters' includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

~~(24)~~(27) 'Minor' means a person who is under eighteen years of age, excluding a person under the age of eighteen who is married or emancipated as decreed by the family court.

~~(25)~~(28) 'Mortgage' means any conveyance, agreement, or arrangement in which real property is used as security.

~~(26)~~(29) 'Nonresident decedent' means a decedent who was domiciled in another jurisdiction at the time of his death.

~~(27)~~(30) 'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

~~(28)~~(31) 'Parent' includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

~~(29)~~(32) 'Person' means an individual, a corporation, ~~an organization, or other legal entity~~ business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

~~(30)~~(33) 'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. 'General personal representative' excludes special administrator.

~~(31)~~(34) 'Petition' means a complaint as defined in the rules of civil procedure adopted for the circuit court. A petition requires a summons and is governed by and subject to the rules of civil procedure adopted for the circuit court and other rules of procedure in this title.

(35) 'Probate estate' means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy.

~~(32)~~(36) 'Proceeding' includes action at law and suit in equity.

~~(33)~~(37) 'Property' includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

~~(34)~~(38) 'Protected person' is as defined in Section 62-5-101.

~~(35)~~(39) 'Protective proceeding' is as defined in Section 62-5-101.

(40) 'SCACR' means the South Carolina Appellate Court Rules.

~~(36)~~(41) 'Security' includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the

foregoing.

~~(36A)~~(42) ‘Security interest’ means any conveyance, agreement, or arrangement in which personal property is used as security.

~~(37)~~(43) ‘Settlement’ in reference to a decedent’s estate includes the full process of administration, distribution, and closing.

~~(38)~~(44) ‘Special administrator’ means a personal representative as described by Sections 62-3-614 through 62-3-618.

~~(39)~~(45) ‘State’ ~~includes any~~ means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or ~~and~~ any territory or insular possession subject to the ~~legislative authority jurisdiction~~ of the United States.

~~(40)~~ ‘Stepchild’ ~~with reference to any person means one who is the child, natural or adopted, of such person’s spouse but who is not the child, natural or adopted, of such person.~~

~~(41)~~(46) ‘Successor personal representative’ means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

~~(42)~~(47) ‘Successors’ means those persons, other than creditors, who are entitled to property of a decedent under his will or this Code.

~~(43)~~(48) ‘Testacy proceeding’ means a formal proceeding to establish a will or determine intestacy.

~~(44)~~(49) ‘Trust’ includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. ‘Trust’ excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101 et seq.), custodial arrangements pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

~~(45)~~(50) ‘Trustee’ includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

~~(46)~~(51) ‘Ward’ is as defined in Section 62-5-101.

~~(47)~~(52) ‘Will’ includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

#### REPORTER’S COMMENT

The definitions set out in this section are applicable throughout this Code. Of interest is the definition of ‘claims’ in item (4) which includes claims arising out of tort. Also see Sections 62-4-101, 62-5-101, and 62-6-101 for additional definitions for Articles 4, 5, and 6.

The 2010 amendment revised certain definitions in Section 62-1-201, i.e., ‘application’ in item (1), ‘formal proceedings’ in item (17), ‘informal proceedings’ in item (22), ‘petition’ in item (34), and ‘testacy proceeding’ in item (48), as well as other relevant sections throughout the Probate Code, to clarify that the law requires a summons in formal proceedings and the rules of civil procedure adopted for the circuit court and other rules of procedure in this title apply to and

govern formal proceedings in probate court. See S.C. Code §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; also see, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

Prior to the 2010 amendments, certain confusion existed regarding the requirement of a summons in a formal proceeding and how the South Carolina Rules of Civil Procedure apply to formal proceedings in the probate court. The 2010 amendments in this section and throughout other portions of the Probate Code are intended to minimize such confusion and to expressly clarify that a 'formal proceeding' is commenced by a summons and petition and governed by the rules of civil procedure adopted for the circuit court and other rules of procedure in this title, and that an 'application' does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court. Where applicable and appropriate, the 2010 amendments expand the matters in which an application may be utilized.

The 2013 amendment added definitions for 'Fair Market Value' and 'Probate Estate'. The 2013 amendment also made changes to the definitions of 'Guardian', 'Person', and 'State'. The definition of 'Stepchild' has been removed as a result of changes to Section 62-2-103(6).

### Part 3

#### Scope, Jurisdiction, and Courts

**Section 62-1-301.** Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

#### REPORTER'S COMMENT

This section merely states that this Code applies to matters having a connection to this State by reason of a person's domicile or the situs of property.

#### **Section 62-1-302.**

(a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:

(1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court;

(2) ~~protection of minors, except that jurisdiction over the care, custody, and control of the persons of minors is governed by Section 62-5-201 and incapacitated persons, including the mortgage and sale of personal and real property owned by minors or incapacitated persons~~

as well as gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, except that jurisdiction for approval of settlement of claims in favor of or against minors or incapacitated persons is governed by Section 62-5-433 subject to Part 7, Article 5, and excluding jurisdiction over the care, custody, and control of a person or minor:

(i) protective proceedings and guardianship proceedings under Article 5;

(ii) gifts made pursuant to the South Carolina Uniform Gifts to Minors Act under Article 5, Chapter 5, Title 63;

(3) trusts, inter vivos or testamentary, including the appointment of successor trustees;

(4) the issuance of marriage licenses, in form as provided by the Bureau of Vital Statistics of the Department of Health and Environmental Control; record, index, and dispose of copies of marriage certificates; and issue certified copies of the licenses and certificates;

(5) the performance of the duties of the clerk of the circuit and family courts of the county in which the probate court is held when there is a vacancy in the office of clerk of court and in proceedings in eminent domain for the acquisition of rights-of-way by railway companies, canal companies, governmental entities, or public utilities when the clerk is disqualified by reason of ownership of or interest in lands over which it is sought to obtain the rights-of-way; and

(6) the involuntary commitment of persons suffering from mental illness, mental retardation, alcoholism, drug addiction, and active pulmonary tuberculosis.

(b) The court's jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.

(c) The probate court has jurisdiction to hear and determine issues relating to paternity, common-law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court, pursuant to Section 63-3-530.

(d) Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

(1) formal proceedings for the probate of wills and for the appointment of general personal representatives;

(2) construction of wills;

(3) actions to try title concerning property in which the estate of a decedent or protected person asserts an interest;

(4) ~~trusts~~ matters involving the internal or external affairs of trusts as provided in Section 62-7-201, excluding matters involving the establishment of a 'special needs trust' as described in Article 5;

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value; and

(6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63.

(e) The removal to the circuit court of an action or proceeding within the exclusive

jurisdiction of the probate court applies only to the particular action or proceeding removed, and the probate court otherwise retains continuing exclusive jurisdiction.

(f) Notwithstanding the exclusive jurisdiction of the probate court over the matters set forth in subsections (a) through (c), if an action described in subsection (d) is removed to the circuit court by motion of a party, or by the probate court on its own motion, the probate court may, in its discretion, remove any other related matter or matters which are before the probate court to the circuit court if the probate court finds that the removal of such related matter or matters would be in the best interest of the estate or in the interest of judicial economy. For any matter removed by the probate court to the circuit court pursuant to this subsection, the circuit court shall proceed upon the matter de novo.

#### REPORTER'S COMMENT

This section clearly states the subject matter jurisdiction of the probate court. It should be noted that the probate court has 'exclusive original jurisdiction' over the matters enumerated in this section. This means, when read with other Code provisions (such as subsection (c) of this section and Section 62-3-105), that matters within the original jurisdiction of the probate court must be brought in that court, subject to certain provisions made for removal to the circuit court by the probate court or on motion of any party.

The language of this section is similar to Section 14-23-1150 of the 1976 Code, which, in item (a), provides that probate judges are to have jurisdiction as provided in Sections 62-1-301 and 62-1-302, and other applicable sections of this South Carolina Probate Code.

The 2013 amendments added 'determination of property in which the estate of a decedent or protected person has an interest' to subsection (a)(1), substantially rewrote subsections (a)(2), (d)(3), and (d)(4), and added subsection (f), which allows the probate court to remove any pending matter to circuit court in the event a party or the court removes a related matter pursuant to subsection (d), even if that pending matter is not otherwise covered by the removal provisions of (d).

#### **Section 62-1-303.**

(a) Subject to the provisions of Section 62-3-201, where a proceeding under this Code could be maintained in more than one place in South Carolina, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected persons, ward, or trust are commenced in more than one court of South Carolina, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and, if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that, in the interest of justice, a proceeding or a file should be located in another court of probate in South Carolina, the court making the finding may transfer the proceeding or file to the other court.

(d) If a court transfers venue of a proceeding or file to a court in another county, venue for that proceeding or file, and any subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which the venue has been transferred.

(e) If a probate court judge is disqualified from matters concerning a proceeding or a file, and venue has not been transferred to another county, a special probate court judge appointed for that proceeding or file has all of the powers and duties appertaining to the probate court judge of

the county where the proceeding or file commenced, and venue for any subsequent matters concerning that proceeding or file, including appeals, remains with the county where that proceeding or file commenced.

#### REPORTER'S COMMENTS

This section provides that, where a proceeding could be held in more than one county under Section 62-3-201, the probate court in which the proceeding is first commenced has the exclusive right to proceed. If proceedings are commenced in more than one probate court, the court in which the proceeding was first commenced must continue to hear the matter unless it decides that venue is properly in another county, in which event it is to transfer the matter to that other county. Section 62-3-201 relates to testacy or appointment proceedings after death and grants venue to the county of the decedent's domicile or, if the decedent was not domiciled in this State, to any county in which his property was located.

This section also provides that venue with respect to a nonresident's estate could be in any county where he owned property. The 2013 amendment clarified that, when venue of a proceeding or file is transferred to another county, subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which venue has been 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.

**Section 62-1-304.** The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title. A formal proceeding is a 'civil action' as defined in Rule 2, SCRCP, and must be commenced as provided in Rule 3, SCRCP.

#### REPORTER'S COMMENT

The 2010 amendment revised and essentially rewrote Section 62-1-304 in order to clarify that 'formal proceedings' are governed by and subject to the rules of civil procedure adopted for the circuit court [SCRCP] and other rules of procedure in this title and that the SCRCP also govern formal proceedings and commencement of same. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; see also, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

**Section 62-1-305.** The court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this Code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the probate court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to letters must show the date of appointment.

#### REPORTER'S COMMENT

This section requires that the probate court keep a record of all matters filed with the court and that records be so indexed and filed as to make them useful to those examining them. Further, the court is required to issue certified copies of documents on file.

This section does not go into the detail of Sections 14-23-1100 and 14-23-1130 of the 1976 Code which list in some detail the records which must be kept by the probate court. These sections are not incompatible with Section 62-1-305. Probate Court Rule 1, pertaining to a calendar and to books denoting titles of all cases and transactions therein, is not disturbed by this section.

#### **Section 62-1-306.**

(a) If duly demanded, a party is entitled to trial by jury in any proceeding involving an issue of fact in an action for the recovery of money only or of specific real or personal property, unless waived as provided in the rules of civil procedure for the courts of this State. The right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will.

(b) If there is no right to trial by jury under subsection (a) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

(c) The method of drawing, summoning, and compensating jurors under this section shall be within the province of the county jury commission and shall be governed by Chapter 7 of Title 14 of the 1976 Code relating to juries in circuit courts.

#### REPORTER'S COMMENT

This section confers a right to trial by jury in the probate court in the same kinds of proceedings in which the right to jury trial exists in the circuit court, namely, proceedings involving an issue of fact in an action for the recovery of money only or of specific real or personal property, Section 15-23-60 of the 1976 Code. If no right to trial by jury exists, the court may impanel a jury to decide any issue or fact on an advisory basis.

Chapter 7, Title 14 of the 1976 Code, relating to juries in the circuit court, governs the method of drawing, summoning, and compensating jurors.

**Section 62-1-307.** The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court.

**Section 62-1-308.** Except as provided in subsection ~~(g)~~(1), appeals from the probate court must be to the circuit court and are governed by the following rules:

(a) A person interested in a final order, sentence, or decree of a probate court ~~and considering himself injured by it~~ may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court. ~~The grounds of appeal must be filed in the office of the~~

~~probate court and a copy served on all parties within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court.~~

~~(b) Within thirty days after the grounds of appeal has been filed in the office of the probate court, as provided in subsection (a), the probate court shall make a return to the appellate court of the testimony, proceedings, and judgment and file it in the appellate court. Upon final disposition of the appeal, all papers included in the return must be forwarded to the probate court forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal (in a format described in Rule 208(b)(1)(B), SCACR) with proof of service and a copy served on all parties.~~

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

~~(d) Within thirty days after service of the Statement of Issues on Appeal, all parties to the appeal shall serve on all other parties to the appeal a Designation of Matter to be Included in the Record on Appeal (in a format described in Rule 209, SCACR) and file with the clerk of the circuit court one copy of the Designation of Matter to be Included in the Record on Appeal with proof of service.~~

~~(e) At the same time appellant serves his Designation of Matter to be Included in the Record on Appeal, the appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The appellant's brief shall be in a format described in Rule 208(b)(1), SCACR. Within thirty days after service of the appellant's brief, respondent shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The respondent's brief shall be in a format described in Rule 208(b)(2), SCACR. Appellant may file and serve a brief in reply to the brief of respondent. If a reply brief is prepared, appellant shall, within ten days after service of respondent's brief, serve one copy of the reply brief on all parties to the appeal and file with the clerk of circuit court one copy of the reply brief with proof of service. The appellant's reply brief shall be in a format described in Rule 208(b)(3), SCACR.~~

~~(f) Within thirty days after service of the respondent's brief, the appellant shall serve a copy of the Record on Appeal (in a format described in subsections (c), (e), (f) and (g) of Rule 210, SCACR, except that the Record of Appeal need not comply with the requirements of Rule 267, SCACR) on each party who has served a brief and file with the clerk of the circuit court one copy of the Record on Appeal with proof of service.~~

~~(g) Except as provided in this section, no party is required to comply with any other requirements of the South Carolina Appellate Court Rules. Upon final disposition of the appeal, all exhibits filed separately (as described in Rule 210(f), SCACR), but not included in the Record on Appeal, must be forwarded to the probate court.~~

~~(h) When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had~~

in the probate court as if no appeal had been taken.

(di) ~~When the return has been filed in~~ The circuit court, ~~as provided in subsection (b), the court of appeals, or Supreme Court~~ shall hear and determine the appeal according to the rules of law. The hearing must be strictly on appeal and no new evidence may be presented.

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

(fk) A judge of a probate court must not be admitted to have any voice in judging or determining an appeal from his decision or be permitted to act as attorney or counsel.

(gl) If the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court, and the procedure for the appeal must be governed by the South Carolina Appellate Court Rules.

#### REPORTER'S COMMENTS

This section provides that appeals from the probate court are to the circuit court. Under Section 62-1-308(i), any appeal from the probate court is strictly on the record.

The 2013 amendments to this section were intended to clarify the process for appeals from the probate court. With these changes, (i) the form for the Statement of Issues on Appeal follows that form set forth in Rule 208(b)(1)(B); (ii) the use of briefs is specifically contemplated and the form of the briefs follows that set forth in Rule 208, SCACR; (iii) the appellant bears the burden of preparing the record on appeal; and (iv) the prevailing party bears the burden of providing the probate court with a copy of the final decision and judgment from the circuit court, court of appeals, or Supreme Court. While the 2013 amendments do incorporate certain provisions of the SCACR, paragraph (g) clarifies that not all provisions of the SCACR apply to appeals from probate court to circuit court.

**Section 62-1-309.** The judges of the probate court shall be elected by the qualified electors of the respective counties for the term of four years in the manner specified by Section 14-23-1020.

#### REPORTER'S COMMENT

This section does not disturb Section 14-23-1040 of the 1976 Code which requires that a probate judge or an associate judge must be a qualified elector of the county in which he is to be a judge.

## 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

**Section 62-1-500.** This part may be cited as the ‘Uniform Simultaneous Death Act’.

#### REPORTER’S COMMENT

The 2013 amendment made significant changes to Part 5. Prior to the 2013 amendment, Part 5 did not include a 120 hour survival requirement similar to §62-2-104. The revisions to Part 5 now incorporate a default 120 hour survival requirement for testate and intestate decedents as well as for nonprobate transfers, subject to the exceptions set forth in §62-1-506.

**Section 62-1-501.** ~~This part may be cited as the ‘Uniform Simultaneous Death Act’.~~ For purposes of this part:

(1) ‘Co-owners with right of survivorship’ includes joint tenants in a joint tenancy with right of survivorship, joint tenants in a tenancy in common with right of survivorship, tenants by the entirety, and other co-owners of property or accounts held under circumstances that entitle one or more to the whole of the property or account on the death of the other or others.

(2) ‘Governing instrument’ means a deed, will, trust, insurance or annuity policy, account with POD designation, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(3) ‘Payor’ means a trustee, insurer, business entity, employer, government, governmental agency, subdivision, or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments.

**Section 62-1-502.** ~~When the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously the property of each person shall be disposed of as if he had survived, except as provided otherwise in this part [Sections 62-1-501 et seq.].~~

(a) Except as otherwise provided by this Code, where the title to property, the devolution of property, the right to elect an interest in property, or any other right or benefit depends upon an individual’s survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by at least one hundred twenty hours is deemed to have predeceased the other individual.

(b) If the language of the governing instrument disposes of property in such a way that two

or more beneficiaries are designated to take alternatively by reason of surviving each other and it is not established by clear and convincing evidence that any such beneficiary has survived any other beneficiary by at least one hundred twenty hours, the property shall be divided into as many equal shares as there are alternative beneficiaries, and these shares shall be distributed respectively to each such beneficiary's estate.

(c) If the language of the governing instrument disposes of property in such a way that it is to be distributed to the member or members of a class who survived an individual, each member of the class will be deemed to have survived that individual by at least one hundred twenty hours unless it is established by clear and convincing evidence that the individual survived the class member or members by at least one hundred twenty hours.

**Section 62-1-503.** ~~When two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived. Except as otherwise provided by this Code, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by at least one hundred twenty hours is deemed to have predeceased the event.~~

**Section 62-1-504.** ~~When there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property so held shall be distributed one half as if one had survived and one half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property shall be so distributed in the proportion that one bears to the whole number of joint tenants. Except as otherwise provided by this Code, if:~~

(a) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by at least one hundred twenty hours, one-half of the property passes as if one had survived by at least one hundred twenty hours and one-half as if the other had survived by at least one hundred twenty hours;

(b) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by at least one hundred twenty hours, the property passes to the estates of each of the co-owners in the proportion that one bears to the whole number of co-owners.

#### REPORTER'S COMMENT

This section applies to property or accounts held by co-owners with right of survivorship. As defined in §62-1-501, the term 'co-owners with right of survivorship' includes multiple-party accounts with right of survivorship.

**Section 62-1-505.** ~~When the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. Notwithstanding any other provisions of the Code, solely for the purpose of~~

determining whether a decedent is entitled to any right or benefit that depends on surviving the death of a decedent's killer under Section 62-2-803, the killer is deemed to have predeceased the decedent, and the decedent is deemed to have survived the killer by at least one hundred twenty hours, or any greater survival period required of the decedent under the killer's will or other governing instrument, unless it is established by clear and convincing evidence that the killer survived the victim by at least one hundred twenty hours.

**Section 62-1-506.** ~~This part shall not apply to the distribution of the property of a person who died prior to April 3, 1948.~~ Survival by one hundred twenty hours is not required if any of the following apply:

- (1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
- (2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;
- (3) the imposition of a one hundred twenty hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under other provisions of the Code; but survival must be established by clear and convincing evidence;
- (4) the application of a one hundred and twenty hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence;
- (5) the application of a one hundred twenty hour requirement of survival would deprive an individual or the estate of an individual of an otherwise available tax exemption, deduction, exclusion, or credit, expressly including the marital deduction, resulting in the imposition of a tax upon a donor or a decedent's estate, other person, or their estate, as the transferor of any property. 'Tax' includes any federal or state gift, estate or inheritance tax;
- (6) the application of a one hundred twenty hour requirement of survival would result in an escheat.

#### REPORTER'S COMMENT

The 2013 amendment rewrote this section.

Subsection (1). Subsection (1) provides that the 120-hour requirement of survival is inapplicable if the governing instrument 'contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case.' The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that 'in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first,' my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under this section, G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or

under circumstances as to make it doubtful who died first.

Subsection (2). Subsection (2) provides that the 120-hour requirement of survival is inapplicable if ‘the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a stated period.’

Mere words of survivorship in a governing instrument do not expressly indicate that an individual is not required to survive an event by any specified period. If, for example, a trust provides that the net income is to be paid to A for life, remainder in corpus to B if B survives A, the 120-hour requirement of survival would still apply. B would have to survive A by 120 hours. If, however, the trust expressly stated that B need not survive A by any specified period, that language would negate the 120-hour requirement of survival.

Language in a governing instrument requiring an individual to survive by a specified period also renders the 120-hour requirement of survival inapplicable. Thus, if a will devises property ‘to A if A survives me by 30 days,’ the express 30-day requirement of survival overrides the 120-hour survival period provided by this Act.

Subsection (4). Subsection (4) provides that the 120-hour requirement of survival is inapplicable if ‘the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition.’ The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a \$50,000 charitable devise would be made on the death of the survivor. To that end, H’s will devised \$50,000 to the charity if W predeceased him. W’s will devised \$50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (4), not only would the charitable devise in W’s will be effective, because H in fact predeceased W, but the charitable devise in H’s will would also be effective, because W’s failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the \$50,000 devise, subsection (4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the \$50,000 charitable devise in W’s will is effective.

Subsection (4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended \$50,000 devise from H’s estate and half from W’s estate.

Under subsection (5), if the application of the 120-hour survival requirement would cause the loss of an available tax exemption, deduction, exclusion, or credit, creating a federal or State gift, estate or inheritance tax, the 120-hour survival requirement will not be applied. Additionally, under subsection (6), the 120-hour survival requirement is not applicable if it would cause an escheat.

**Section 62-1-507.** ~~This part [Sections 62-1-501 et seq.] shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the distribution that would otherwise be made under the provisions of this part [Sections 62-1-501 et seq.].~~ In addition to the South Carolina Rules of Evidence, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual is determined to be dead under the Uniform Determination of Death Act, Section 44-43-460.

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death, and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under subsection (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) A person whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stated on a document described in subsection (2) or (3), a document described in subsection (2) or (3) that states a time of death one hundred twenty hours or more after the time of death of another person, however the time of death of the other person is determined, establishes by clear and convincing evidence that the person survived the other person by one hundred twenty hours.

#### REPORTER'S COMMENT

The 2013 amendment rewrote this section. This section incorporates the provisions of former Section 62-1-107.

**Section 62-1-508.** ~~This part [Sections 62-1-501 et seq.] shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact substantially identical laws.~~

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a person designated in a governing instrument who, under this part, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this part. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this part.

(2) Written notice of a claimed lack of entitlement under subsection (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this part, a payor or other third party may pay any amount owed or transfer or deposit any item of property, other than tangible personal property, held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this part, shall order disbursement in

accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(3) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is not obligated under this part to return the payment, item of property, or benefit, and is not liable under this part for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this part is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this part.

**Section 62-1-509.** This part [Sections 62-1-501 et seq.] shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact substantially identical laws.

#### REPORTER'S COMMENT

Prior to the 2013 amendment this section was previously Section 62-1-508.

### III. SUMMARY OF CHANGES TO ARTICLE IV

- A. Section 62-4-204 has been amended so that a foreign domiciliary personal representative is not required to post bond unless ordered by the court.
- B. Section 62-4-207 has been amended to add a section stating that this section is an alternative to the provisions already available to a foreign personal representative.

### IV. REDLINED VERSION OF CHANGES TO ARTICLE IV

#### Article 4

#### Local and Foreign Personal Representatives; Ancillary Administration

#### Part 1

#### Definitions

**Section 62-4-101.** In this article [Sections 62-4-101 et seq.]:

(1) 'Local administration' means administration by a personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.].

(2) 'Local personal representative' includes any personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.] and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 62-4-205.

(3) 'Resident creditor' means a person domiciled in, or doing business in, this State who is,

or could be, a claimant against an estate of a nonresident decedent.

#### REPORTER'S COMMENT

Section 62-4-101 defines 'local administration' and 'local personal representative' in order to distinguish 'local' matters from that matter covered by Article 4, the 'foreign personal representative' and his administrative acts in South Carolina undertaken on the strength of his 'foreign administration,' without his appointment in South Carolina pursuant to Article 3 of this Code. Section 62-1-201 includes definitions of 'foreign personal representative', 'personal representative', and 'non-resident decedent'.

## Part 2

### Powers of Foreign Personal Representatives

**Section 62-4-201.** At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

- (1) the date of the death of the nonresident decedent;
- (2) that no local administration, or application or petition therefor, is pending in this State;
- (3) that the domiciliary foreign personal representative is entitled to payment or delivery.

#### REPORTER'S COMMENT

Sections 62-4-201, 62-4-202, and 62-4-203 must be read, together with Section 62-4-206, as providing a means, less cumbersome than those provided by Sections 62-4-204 and 62-4-205 and by Section 62-4-207, for the unification and simplification of the administration of multi-state estates in the hands of the domiciliary foreign personal representatives of nonresident decedents. These sections allow the domiciliary foreign personal representative to collect estate assets in South Carolina without requiring local appointment (Section 62-4-201), while protecting debtors of the estate against double payment (Section 62-4-202) and also protecting resident creditors of the estate from nonpayment (Section 62-4-203). See Section 62-5-431 for a provision similarly allowing the collection of the assets of a nonresident protected person by his domiciliary foreign conservator.

Sections 62-4-201 and 62-4-202 preserve the domiciliary foreign personal representative's power to collect estate assets in South Carolina from debtors willing to make voluntary payment on the strength of his foreign appointment, and also preserve the corresponding effect, the full discharge of the debtor, resulting from the payment.

These sections by their terms apply only to estates of nonresident decedents and allow for payment only to the domiciliary, not to any ancillary, foreign personal representative. Presumably, an ancillary personal representative is empowered to collect assets only in the state of his appointment. The debtor's good faith reliance on the foreign personal representative's proof of appointment and affidavit, inaccurately showing that the decedent was a nonresident of

South Carolina and that the personal representative was appointed as a domiciliary personal representative, should protect the debtor under Section 62-4-202. These sections apply even if local administration is actually pending or applied for, as long as the foreign personal representative supplies the documentation detailed in Section 62-4-201 and the debtor has no actual notice of the pending local administration. Section 62-4-202 requires only good faith of the debtor who receives that documentation; his release then depends solely on his making payment to the foreign personal representative. See Section 62-4-206.

These sections apply even though interested persons, including estate creditors, are domiciled in, or doing business in, South Carolina. Such creditors are protected under Section 62-4-203. These sections apply to the collection of all debts owed to and tangible and intangible personal property owned by the estate. Section 62-3-201(d) refers to the location of tangible personal property and intangible personal property which may be evidenced by an instrument. Transfers of securities are covered by these sections as well as by Sections 35-7-10, et seq. the Uniform Act for Simplification of Fiduciary Security Transfers.

Section 62-4-201 provides for a waiting period of sixty days from the death of the decedent before payment can be made with the expectation of an immediate discharge of the debtor. Presumably, having made payment before the expiration of the period, a debtor will be discharged at the expiration of the period if he would have been discharged had he then paid, but, for example, not if, in the meantime, a local administration has come to the attention of the debtor.

See Section 12-16-1150 for estate tax duties and liabilities imposed on personal representatives.

**Section 62-4-202.** Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action to the same extent as if payment or delivery had been made to a local personal representative.

#### REPORTER'S COMMENT

See Comment to Section 62-4-201.

**Section 62-4-203.** Payment or delivery under Section 62-4-201 may not be made if a resident creditor of the nonresident decedent has given written notice to the debtor of the nonresident decedent or the person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

#### REPORTER'S COMMENT

For the context of Section 62-4-203, see comment to Section 62-4-201. Section 62-4-203 provides a means by which a resident creditor of the decedent can attempt to protect himself from nonpayment of his debt, resulting from assets of the estate being removed from South Carolina by a domiciliary foreign personal representative. The creditor simply notifies the debtors of the decedent not to pay their debts under Sections 62-4-201 and 62-4-202. The notice must be in writing, thereby excluding constructive notice. Section 62-4-203 provides for a mechanism protective of resident creditors, while Section 62-4-202 deprives of such protection

resident creditors who fail to give notice under Section 62-4-203.

**Section 62-4-204.** If no local administration or application or petition therefor is pending in this State, a domiciliary foreign personal representative may file with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment; and of the will, if any, and of any official bond he has given, which bond shall name the court in this State as co-obligee on such bond. The filing of a bond shall not be required unless the court in its discretion orders it.

#### REPORTER'S COMMENT

Sections 62-4-204 and 62-4-205 must be read, together with Section 62-4-206, as providing a means, additional to those of Sections 62-4-201 through 62-4-203 and of Section 62-4-207, for the unification and simplification of the administration of multi-state estates, without requiring the local appointment of a personal representative. Predicated on no local administration having been instituted, the domiciliary foreign personal representative, who files with the court the documents required by Section 62-4-204, obtains under Section 62-4-205 all of the powers of a local personal representative. See Article 3 for the powers of local personal representatives.

**Section 62-4-205.** A domiciliary foreign personal representative who has complied with Section 62-4-204 may exercise as to assets (including real and personal property) in this State all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

#### REPORTER'S COMMENT

See comment to Section 62-4-204.

**Section 62-4-206.** The power of a domiciliary foreign personal representative under Section 62-4-201 or 62-4-205 shall be exercised only if there is no administration or application therefor pending in this State. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 62-4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this State.

#### REPORTER'S COMMENT

Section 62-4-206 limits the powers of foreign personal representatives, under both Sections 62-4-201, et seq., and 62-4-204, et seq., to cases in which no local administration is pending, with provision, however, for court approved exercise of limited powers to preserve the estate, for protection of any person acting in reliance upon these sections and without actual notice of a pending local administration, and for subjection of the local personal representative to the obligations accrued by the foreign personal representative under these sections. See Article 3 for provisions concerning local administration.

**Section 62-4-207.** In respect to a nonresident decedent, the provisions of Article 3 [Sections 62-3-101 et seq.] govern (1) proceedings, if any, in a court of this State for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration. The initiation of a proceeding under Article 3 (Sections 62-3-101 et seq.) is the appropriate procedure for an ancillary administration relating to the real property of a nonresident decedent located in this State and is an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

#### REPORTER'S COMMENT

The purpose of this section is to direct attention to Article 3 for sections controlling ancillary, i.e., local administration of estates of nonresident decedents. See in particular Sections 62-3-101, 62-3-201, 62-3-202, 62-3-203, 62-3-307(a), 62-3-308, 62-3-611(b), 62-3-803(a), 62-3-815, and 62-3-816. Section 62-4-207 and Article 3 must be read as providing an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

### Part 3

#### Jurisdiction Over Foreign Personal Representatives

**Section 62-4-301.** A foreign personal representative submits personally to the jurisdiction of the courts of this State in any proceeding relating to the estate by (1) filing authenticated copies of his appointment as provided in Section 62-4-204, (2) receiving payment of money or taking delivery of personal property under Section 62-4-201, or (3) doing any act as a personal representative in this State which would have given the State jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

#### REPORTER'S COMMENT

Sections 62-4-301 and 62-4-302 assert the South Carolina courts' jurisdiction over foreign personal representatives, not appointed in South Carolina pursuant to Article 3. Jurisdiction is asserted in the circumstances, under Section 62-4-301, of the foreign personal representative's acting (1) under Section 62-4-204 of this Code, (2) under Section 62-4-201 of this Code, or (3) within the state in a manner which would have subjected him, as an individual, to the state's jurisdiction, and, under Section 62-4-302, (4) of the decedent's having been subject to the courts' jurisdiction immediately prior to his death. The words 'courts of this state' are sufficient under federal legislation to include a federal court having jurisdiction in South Carolina.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration. See Section 62-3-203(g). Once appointed as local personal representative, he remains subject to the jurisdiction of the appointing court under Section 62-3-602.

**Section 62-4-302.** In addition to jurisdiction conferred by Section 62-4-301, a foreign personal representative is subject to the jurisdiction of the courts of this State to the same extent

that his decedent was subject to jurisdiction immediately prior to death.

#### REPORTER'S COMMENT

For the context of Section 62-4-302, see comment to Section 62-4-301. Section 62-4-302 subjects the foreign personal representative to jurisdiction on the basis of his decedent's immediate pre-death condition or activities, whether the decedent was domiciled, doing business, or maintaining his principal place of business in South Carolina (see Section 36-2-802 Code) of the 1976 Code or engaged in conduct encompassed in South Carolina's 'long-arm' statutes (see Sections 36-2-803, 15-5-130, 15-5-140, and 15-9-350, et seq.). As to survival of causes of action, see Sections 15-5-90, 15-51-10, et seq., and 35-1-1520 of the 1976 Code.

Uniform Commercial Code Section 36-2-801 might be read to subject a personal representative 'whether or not a citizen or domiciliary of this State,' including a foreign personal representative, to the jurisdiction of the South Carolina courts. Section 62-4-302 settles any doubt as to the foreign personal representative's immunity from suit.

Section 62-4-302 should be read with Sections 15-5-130 and 15-5-140 as augmenting and simplifying the process available to persons involved in South Carolina in automobile accidents also involving deceased nonresident motorists. Section 62-4-302 allows for suit directly against the foreign personal representative.

#### **Section 62-4-303.**

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this State on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a), he shall be allowed thirty days within which to appear or respond.

#### REPORTER'S COMMENT

Section 62-4-303 provides for service of process upon a foreign personal representative, first, either by registered or by certified mail, with return receipt requested, if available under postal regulations; second, by ordinary first class mail, where registered or certified mail is unavailable; and, third, by any means available under other laws of South Carolina for service on the decedent (or on the foreign personal representative himself) immediately prior to the decedent's death. For service on the decedent, see Sections 36-2-804, et seq., for service of process in support of personal jurisdiction under the 'long-arm' provisions of the Uniform Commercial Code, Sections 36-2-801, et seq. See Sections 15-9-350, et seq., for substituted service of process in South Carolina on the statutorily designated agents of nonresident motorists, motor carriers, aircraft operators, vessel operators, certain traveling shows, nonresident directors of domestic corporations, nonresident trustees of inter vivos trusts, and nonresident individual fiduciaries.

See Sections 62-1-401 through 62-1-403 of this Code for the general notice provisions of this Code.

## **Part 4**

### **Judgments and Personal Representatives**

**Section 62-4-401.** An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication; provided, however, that notice and the opportunity to defend must be given to the local representative in order that the judgment be collectible.”

#### **REPORTER’S COMMENT**

For the determinative effect of domiciliary foreign orders determining testacy or the validity of a will and of domiciliary certificates of the efficacy of a will, see Section 62-3-408 and 62-3-409.

## **V. FINAL LEGISLATION**

### **“Article 1**

#### **General Provisions, Definitions, and Probate Jurisdiction of Court**

##### **Part 1**

###### **Short Title, Construction, General Provisions**

###### **Section 62-1-100.**

- (a) Except as otherwise provided, this Code takes effect July 1, 1987.
- (b) Except as provided elsewhere in this Code, on the effective date of this Code:
  - (1) the Code applies to any estates of decedents dying thereafter;
  - (2) the procedural provisions of the Code apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;
  - (3) every personal representative, including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;
  - (4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. Unless otherwise provided in the Code, a substantive right in the decedent’s estate accrues in accordance with the law in effect on the date of the decedent’s death. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right;
  - (5) a rule of construction or presumption provided in this code applies to multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

(c) Section 62-2-502 is effective for all wills executed after June 27, 1984, whether the testator dies before or after July 1, 1987.

**Section 62-1-101.** Sections 62-1-101 et seq. shall be known and may be cited as the South Carolina Probate Code. References in Sections 62-1-101 et seq. to the term ‘Code’, unless the context clearly indicates otherwise, shall mean the South Carolina Probate Code.

**Section 62-1-102.**

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

- (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;
- (2) to discover and make effective the intent of a decedent in the distribution of his property;
- (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
- (4) to facilitate use and enforcement of certain trusts;
- (5) to make uniform the law among the various jurisdictions.

**Section 62-1-103.** Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

**Section 62-1-104.** If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application and to this end the provisions of this Code are declared to be severable.

**Section 62-1-105.** This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

**Section 62-1-106.** Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may: (i) obtain appropriate relief against the perpetrator of the fraud and (ii) restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

**REPORTER’S COMMENT**

By virtue of this section, the six-year period of limitation provided by Section 15-3-530(7) of the 1976 Code for actions for relief on the ground of fraud is reduced, with respect to fraud perpetrated in connection with proceedings and statements filed under this Code, or to

circumvent its provisions or purposes. Under this section, actions for relief on the ground of fraud must be brought within two years after discovery of the fraud. In no event, however, may an action be brought against one not the perpetrator of the fraud (such as an innocent party benefiting from the fraud) later than five years after the commission of the fraud.

The last sentence of this section, however, excepts from this section actions ‘relating to fraud practiced on a decedent during his lifetime which affect the succession of his estate’ such as fraud inducing the execution or revocation of a will. There is some general authority for the proposition that one who is damaged by fraud which interferes with the making of a will may maintain an action for damages against the person who commits the fraud, 79 Am. Jur. 2d, Wills Section 414. In cases involving direct contest of wills which are allegedly the result of fraud, however, the provisions of Section 62-3-108 would be applicable and a formal probate proceeding would have to be commenced within the later of twelve months from the informal probate or three years from the decedent’s death, at which time the allegations of fraud would be considered.

The 2013 amendment clarified that any person injured by the effects of fraud may (i) obtain relief against the perpetrator of the fraud and (ii) restitution from any other person (other than a bona fide purchaser) benefitting from the fraud.

**Section 62-1-107.** In proceedings under this Code the South Carolina Rules of Evidence are applicable unless specifically displaced by the Code.

#### REPORTER’S COMMENT

This section states that the rules of evidence that apply in circuit court also apply in probate court proceedings unless specifically displaced by provisions of the South Carolina Probate Code. The 2011 Amendment removed those sections related to evidence as to the status of death, and these provisions have been incorporated into §62-1-507 of the Uniform Simultaneous Death Act. See §§62-1-500 to 62-1-510 for the Uniform Simultaneous Death Act.

**Section 62-1-108.** For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. The term ‘presently exercisable general power of appointment’ includes a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder’s last will and testament, and the inclusion of a provision in the will sufficient to exercise this power.

#### REPORTER’S COMMENT

This section allows one who is the holder of a presently exercisable ‘general power of appointment’ (which, in this context, means one having the power to take absolute ownership of property to himself, either by appointment, by amendment, or by revocation) to agree to actions taken by a personal representative or by a trustee, to consent to the modification or termination of a trust or a deviation from its terms, and, thereby, to bind the beneficiaries whose interests are

subject to the power.

**Section 62-1-109.** Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

#### REPORTER'S COMMENTS

This section was enacted and intended to clarify to whom an attorney representing a fiduciary owes a duty: unless a written employment agreement expressly provides otherwise, the attorney for a fiduciary owes a duty only to the fiduciary and not to any other person. Thus, this section confirms that an attorney for the fiduciary does not owe any duty or obligation to a beneficiary of the estate for which the fiduciary serves; there is no direct or vicarious duty owed by the attorney to a beneficiary without an express written agreement to the contrary. Moreover, the attorney for the fiduciary owes no duty to the fiduciary estate or property. The attorney effectively represents the fiduciary and not the fiduciary estate. The rule of this section applies even if the fiduciary pays the attorney from the estate for which the fiduciary serves. The section is expressly declarative of the common law and applies to attorney-client relationships existing before and after the enactment of this section.

**Section 62-1-110.** Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

#### REPORTER'S COMMENT

This section was enacted and intended to: (i) expressly reject the concept of a 'fiduciary exception' to any attorney-client privilege; (ii) encourage full disclosure by the fiduciary to the lawyer to further the administration of justice; and (iii) foster confidence between a fiduciary and his lawyer that will lead to a trusting and open attorney-client dialogue. See *Estate of Kofsky*, 487 Pa. 473 (1979). This section also expressly rejects the holding set forth in the case of *Riggs Natl. Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)(trustee's invocation of the attorney-client privilege does not shield document from disclosure to trust beneficiaries) as applied by the Court in *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).

**Section 62-1-111.** In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

#### REPORTER'S COMMENT

This section was enacted to clarify the probate court's authority to award costs and expenses.

See §62-7-1004 for a similar provision in the South Carolina Trust Code.

## Part 2

### Definitions

**Section 62-1-201.** Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in this Code:

(1) ‘Application’ means a written request to the probate court for an order. An application does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court.

(2) ‘Beneficiary’, as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) ‘Child’ includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) ‘Claims’, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) ‘Court’ means the court or branch having jurisdiction in matters as provided in this Code.

(6) ‘Conservator’ means a person who is appointed by a court to manage the estate of a protected person.

(7) ‘Devise’, when used as a noun, means a testamentary disposition of real or personal property, including both devise and bequest as formerly used, and when used as a verb, means to dispose of real or personal property by will.

(8) ‘Devisee’ means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(9) ‘Disability’ means cause for a protective order as described by Section 62-5-401.

(10) ‘Distributee’ means any person who has received property of a decedent from his personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, ‘testamentary trustee’ includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(11) ‘Estate’ includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(12) ‘Exempt property’ means that property of a decedent’s estate which is described in Section 62-2-401.

(13) 'Expense of administration' includes commissions of personal representatives, fees and disbursements of attorneys, fees of appraisers, and such other expenses that are reasonably incurred in the administration of the estate.

(14) 'Fair market value' is the price that property would sell for on the open market that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.

(15) 'Fiduciary' includes personal representative, guardian, conservator, and trustee.

(16) 'Foreign personal representative' means a personal representative of another jurisdiction.

(17) 'Formal proceedings' means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons.

Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title.

(18) 'Guardian' means a person appointed by the court as guardian, but excludes one who is a guardian ad litem.

(19) 'General power of appointment' means any power that would cause income to be taxed to the fiduciary in his individual capacity under Section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under Section 2041(a)(2) or 2514(c) of the Internal Revenue Code.

(20) 'Heirs' means those persons, including the surviving spouse, who are entitled under the statute of intestate succession to the property of a decedent.

(21) 'Incapacitated person' is as defined in Section 62-5-101.

(22) 'Informal proceedings' means those commenced by application and conducted without notice to interested persons by the court for probate of a will or appointment of a personal representative. Informal proceedings are not governed by or subject to the rules of civil procedure adopted for the circuit court.

(23) 'Interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(24) 'Issue' of a person means all his lineal descendants whether natural or adoptive of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.

(25) 'Lease' includes an oil, gas, or other mineral lease.

(26) 'Letters' includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(27) 'Minor' means a person who is under eighteen years of age, excluding a person under the age of eighteen who is married or emancipated as decreed by the family court.

(28) 'Mortgage' means any conveyance, agreement, or arrangement in which real property is used as security.

(29) 'Nonresident decedent' means a decedent who was domiciled in another jurisdiction at the time of his death.

(30) 'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a

joint or common interest, or any other legal entity.

(31) 'Parent' includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(32) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(33) 'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. 'General personal representative' excludes special administrator.

(34) 'Petition' means a complaint as defined in the rules of civil procedure adopted for the circuit court. A petition requires a summons and is governed by and subject to the rules of civil procedure adopted for the circuit court and other rules of procedure in this title.

(35) 'Probate estate' means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy.

(36) 'Proceeding' includes action at law and suit in equity.

(37) 'Property' includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(38) 'Protected person' is as defined in Section 62-5-101.

(39) 'Protective proceeding' is as defined in Section 62-5-101.

(40) 'SCACR' means the South Carolina Appellate Court Rules.

(41) 'Security' includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(42) 'Security interest' means any conveyance, agreement, or arrangement in which personal property is used as security.

(43) 'Settlement' in reference to a decedent's estate includes the full process of administration, distribution, and closing.

(44) 'Special administrator' means a personal representative as described by Sections 62-3-614 through 62-3-618.

(45) 'State' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(46) 'Successor personal representative' means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(47) 'Successors' means those persons, other than creditors, who are entitled to property of a decedent under his will or this Code.

(48) 'Testacy proceeding' means a formal proceeding to establish a will or determine intestacy.

(49) 'Trust' includes any express trust, private or charitable, with additions thereto, wherever

and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. 'Trust' excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101 et seq.), custodial arrangements pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(50) 'Trustee' includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(51) 'Ward' is as defined in Section 62-5-101.

(52) 'Will' includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

#### REPORTER'S COMMENT

The definitions set out in this section are applicable throughout this Code. Of interest is the definition of 'claims' in item (4) which includes claims arising out of tort.

Also see Sections 62-4-101, 62-5-101, and 62-6-101 for additional definitions for Articles 4, 5, and 6.

The 2010 amendment revised certain definitions in Section 62-1-201, i.e., 'application' in item (1), 'formal proceedings' in item (17), 'informal proceedings' in item (22), 'petition' in item (34), and 'testacy proceeding' in item (48), as well as other relevant sections throughout the Probate Code, to clarify that the law requires a summons in formal proceedings and the rules of civil procedure adopted for the circuit court and other rules of procedure in this title apply to and govern formal proceedings in probate court. See S.C. Code §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; also see, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

Prior to the 2010 amendments, certain confusion existed regarding the requirement of a summons in a formal proceeding and how the South Carolina Rules of Civil Procedure apply to formal proceedings in the probate court. The 2010 amendments in this section and throughout other portions of the Probate Code are intended to minimize such confusion and to expressly clarify that a 'formal proceeding' is commenced by a summons and petition and governed by the rules of civil procedure adopted for the circuit court and other rules of procedure in this title, and that an 'application' does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court. Where applicable and appropriate, the 2010 amendments expand the matters in which an application may be utilized.

The 2013 amendment added definitions for 'Fair Market Value' and 'Probate Estate'. The 2013 amendment also made changes to the definitions of 'Guardian', 'Person', and 'State'. The definition of 'Stepchild' has been removed as a result of changes to Section 62-2-103(6).

## Part 3

### Scope, Jurisdiction, and Courts

**Section 62-1-301.** Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

#### REPORTER'S COMMENT

This section merely states that this Code applies to matters having a connection to this State by reason of a person's domicile or the situs of property.

#### **Section 62-1-302.**

- (a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:
- (1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court;
  - (2) subject to Part 7, Article 5, and excluding jurisdiction over the care, custody, and control of a person or minor:
    - (i) protective proceedings and guardianship proceedings under Article 5;
    - (ii) gifts made pursuant to the South Carolina Uniform Gifts to Minors Act under Article 5, Chapter 5, Title 63;
  - (3) trusts, inter vivos or testamentary, including the appointment of successor trustees;
  - (4) the issuance of marriage licenses, in form as provided by the Bureau of Vital Statistics of the Department of Health and Environmental Control; record, index, and dispose of copies of marriage certificates; and issue certified copies of the licenses and certificates;
  - (5) the performance of the duties of the clerk of the circuit and family courts of the county in which the probate court is held when there is a vacancy in the office of clerk of court and in proceedings in eminent domain for the acquisition of rights of way by railway companies, canal companies, governmental entities, or public utilities when the clerk is disqualified by reason of ownership of or interest in lands over which it is sought to obtain the rights of way; and
  - (6) the involuntary commitment of persons suffering from mental illness, mental retardation, alcoholism, drug addiction, and active pulmonary tuberculosis.
- (b) The court's jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.
- (c) The probate court has jurisdiction to hear and determine issues relating to paternity,

common-law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court, pursuant to Section 63-3-530.

(d) Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

(1) formal proceedings for the probate of wills and for the appointment of general personal representatives;

(2) construction of wills;

(3) actions to try title concerning property in which the estate of a decedent or protected person asserts an interest;

(4) matters involving the internal or external affairs of trusts as provided in Section 62-7-201, excluding matters involving the establishment of a 'special needs trust' as described in Article 7;

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value; and

(6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63.

(e) The removal to the circuit court of an action or proceeding within the exclusive jurisdiction of the probate court applies only to the particular action or proceeding removed, and the probate court otherwise retains continuing exclusive jurisdiction.

(f) Notwithstanding the exclusive jurisdiction of the probate court over the matters set forth in subsections (a) through (c), if an action described in subsection (d) is removed to the circuit court by motion of a party, or by the probate court on its own motion, the probate court may, in its discretion, remove any other related matter or matters which are before the probate court to the circuit court if the probate court finds that the removal of such related matter or matters would be in the best interest of the estate or in the interest of judicial economy. For any matter removed by the probate court to the circuit court pursuant to this subsection, the circuit court shall proceed upon the matter de novo.

#### REPORTER'S COMMENT

This section clearly states the subject matter jurisdiction of the probate court. It should be noted that the probate court has 'exclusive original jurisdiction' over the matters enumerated in this section. This means, when read with other Code provisions (such as subsection (c) of this section and Section 62-3-105), that matters within the original jurisdiction of the probate court must be brought in that court, subject to certain provisions made for removal to the circuit court by the probate court or on motion of any party.

The language of this section is similar to Section 14-23-1150 of the 1976 Code, which, in item (a), provides that probate judges are to have jurisdiction as provided in Sections 62-1-301 and 62-1-302, and other applicable sections of this South Carolina Probate Code.

The 2013 amendments added 'determination of property in which the estate of a decedent or protected person has an interest' to subsection (a)(1), substantially rewrote subsections (a)(2), (d)(3), and (d)(4), and added subsection (f), which allows the probate court to remove any pending matter to circuit court in the event a party or the court removes a related matter pursuant

to subsection (d), even if that pending matter is not otherwise covered by the removal provisions of (d).

**Section 62-1-303.**

(a) Subject to the provisions of Section 62-3-201, where a proceeding under this Code could be maintained in more than one place in South Carolina, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected persons, ward, or trust are commenced in more than one court of South Carolina, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and, if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that, in the interest of justice, a proceeding or a file should be located in another court of probate in South Carolina, the court making the finding may transfer the proceeding or file to the other court.

(d) If a court transfers venue of a proceeding or file to a court in another county, venue for that proceeding or file, and any subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which the venue has been transferred.

(e) If a probate court judge is disqualified from matters concerning a proceeding or a file, and venue has not been transferred to another county, a special probate court judge appointed for that proceeding or file has all of the powers and duties appertaining to the probate court judge of the county where the proceeding or file commenced, and venue for any subsequent matters concerning that proceeding or file, including appeals, remains with the county where that proceeding or file commenced.

**REPORTER'S COMMENTS**

This section provides that, where a proceeding could be held in more than one county under Section 62-3-201, the probate court in which the proceeding is first commenced has the exclusive right to proceed. If proceedings are commenced in more than one probate court, the court in which the proceeding was first commenced must continue to hear the matter unless it decides that venue is properly in another county, in which event it is to transfer the matter to that other county. Section 62-3-201 relates to testacy or appointment proceedings after death and grants venue to the county of the decedent's domicile or, if the decedent was not domiciled in this State, to any county in which his property was located.

This section also provides that venue with respect to a nonresident's estate could be in any county where he owned property. The 2013 amendment clarified that, when venue of a proceeding or file is transferred to another county, subsequent matters concerning that proceeding or file, including appeals, shall be retained by the county to which venue has been 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.

**Section 62-1-304.** The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title. A formal proceeding is a 'civil action' as defined in Rule 2, SCRCP, and must be commenced as provided in Rule 3, SCRCP.

#### REPORTER'S COMMENT

The 2010 amendment revised and essentially rewrote Section 62-1-304 in order to clarify that 'formal proceedings' are governed by and subject to the rules of civil procedure adopted for the circuit court [SCRCP] and other rules of procedure in this title and that the SCRCP also govern formal proceedings and commencement of same. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRCP; see also, *Weeks v. Drawdy*, 495 S.E. 2d 454 (Ct. App. 1997) (the rules of probate court governing procedure address only a limited number of issues and in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code).

**Section 62-1-305.** The court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this Code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the probate court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to letters must show the date of appointment.

#### REPORTER'S COMMENT

This section requires that the probate court keep a record of all matters filed with the court and that records be so indexed and filed as to make them useful to those examining them. Further, the court is required to issue certified copies of documents on file.

This section does not go into the detail of Sections 14-23-1100 and 14-23-1130 of the 1976 Code which list in some detail the records which must be kept by the probate court. These sections are not incompatible with Section 62-1-305. Probate Court Rule 1, pertaining to a calendar and to books denoting titles of all cases and transactions therein, is not disturbed by this section.

#### **Section 62-1-306.**

(a) If duly demanded, a party is entitled to trial by jury in any proceeding involving an issue of fact in an action for the recovery of money only or of specific real or personal property, unless waived as provided in the rules of civil procedure for the courts of this State. The right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will.

(b) If there is no right to trial by jury under subsection (a) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

(c) The method of drawing, summoning, and compensating jurors under this section shall be within the province of the county jury commission and shall be governed by Chapter 7, Title 14 of the 1976 Code relating to juries in circuit courts.

#### REPORTER'S COMMENT

This section confers a right to trial by jury in the probate court in the same kinds of

proceedings in which the right to jury trial exists in the circuit court, namely, proceedings involving an issue of fact in an action for the recovery of money only or of specific real or personal property, Section 15-23-60 of the 1976 Code. If no right to trial by jury exists, the court may impanel a jury to decide any issue or fact on an advisory basis.

Chapter 7, Title 14 of the 1976 Code, relating to juries in the circuit court, governs the method of drawing, summoning, and compensating jurors.

**Section 62-1-307.** The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court.

**Section 62-1-308.** Except as provided in subsection (1), appeals from the probate court must be to the circuit court and are governed by the following rules:

(a) A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court.

(b) Within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal (in a format described in Rule 208(b)(1)(B), SCACR) with proof of service and a copy served on all parties.

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

(d) Within thirty days after service of the Statement of Issues on Appeal, all parties to the appeal shall serve on all other parties to the appeal a Designation of Matter to be Included in the Record on Appeal (in a format described in Rule 209, SCACR) and file with the clerk of the circuit court one copy of the Designation of Matter to be Included in the Record on Appeal with proof of service.

(e) At the same time the appellant serves his Designation of Matter to be Included in the Record on Appeal, the appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The appellant's brief shall be in a format described in Rule 208(b)(1), SCACR. Within thirty days after service of the appellant's brief, the respondent shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The respondent's brief shall be in a format described in Rule 208(b)(2), SCACR. Appellant may file and serve a brief in reply to the brief of the respondent. If a reply brief is prepared, the appellant shall, within ten days after service of the respondent's brief, serve one copy of the reply brief on all parties to the appeal and file with the clerk of circuit court one copy of the reply brief with proof of service. The appellant's reply brief shall be in a format described in Rule 208(b)(3), SCACR.

(f) Within thirty days after service of the respondent's brief, the appellant shall serve a copy of the Record on Appeal (in a format described in subsections (c), (e), (f) and (g) of Rule 210, SCACR, except that the Record of Appeal need not comply with the requirements of Rule 267, SCACR) on each party who has served a brief and file with the clerk of the circuit court one copy of the Record on Appeal with proof of service.

(g) Except as provided in this section, no party is required to comply with any other requirements of the South Carolina Appellate Court Rules. Upon final disposition of the appeal, all exhibits filed separately (as described in Rule 210(f), SCACR), but not included in the Record on Appeal, must be forwarded to the probate court.

(h) When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.

(i) The circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law. The hearing must be strictly on appeal and no new evidence may be presented.

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

(k) A judge of a probate court must not be admitted to have any voice in judging or determining an appeal from his decision or be permitted to act as attorney or counsel.

(l) If the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court, and the procedure for the appeal must be governed by the South Carolina Appellate Court Rules.

#### REPORTER'S COMMENTS

This section provides that appeals from the probate court are to the circuit court. Under Section 62-1-308(i), any appeal from the probate court is strictly on the record.

The 2013 amendments to this section were intended to clarify the process for appeals from the probate court. With these changes, (i) the form for the Statement of Issues on Appeal follows that form set forth in Rule 208(b)(1)(B); (ii) the use of briefs is specifically contemplated and the form of the briefs follows that set forth in Rule 208, SCACR; (iii) the appellant bears the burden of preparing the record on appeal; and (iv) the prevailing party bears the burden of providing the probate court with a copy of the final decision and judgment from the circuit court, court of appeals, or Supreme Court. While the 2013 amendments do incorporate certain provisions of the SCACR, paragraph (g) clarifies that not all provisions of the SCACR apply to appeals from probate court to circuit court.

**Section 62-1-309.** The judges of the probate court shall be elected by the qualified electors of the respective counties for the term of four years in the manner specified by Section 14-23-1020.

## REPORTER'S COMMENT

This section does not disturb Section 14-23-1040 of the 1976 Code which requires that a probate judge or an associate judge must be a qualified elector of the county in which he is to be a judge.

### Part 4

#### Notice, Parties, and Representation in Estate Litigation and Other Matters

##### Section 62-1-401.

(a) If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least twenty days before the time set for the hearing; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy thereof in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.

(b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

(d) Notwithstanding a provision to the contrary, the notice provisions in this section do not, and are not intended to, constitute a summons that is required for a petition.

## REPORTER'S COMMENT

This section provides that, where notice of hearing on a petition is required, the petitioner shall give notice to any interested person or his attorney (1) by mailing at least twenty days in advance of the hearing, or (2) by personal delivery at least twenty days in advance of the hearing, or (3) if the person's address or identity is not known and cannot be ascertained, by publication as in the court of common pleas.

Under this Code, when a petition is filed with the court, the court is to fix a time and place of hearing and it is then the responsibility of the petitioner to give notice as provided in Section 62-1-401. See, for example, Sections 62-3-402 and 62-3-403.

The 2010 amendment added subsection (d) to clarify and avoid confusion that previously existed regarding the notice provisions in this section. The effect of the 2010 amendment was intended to make it clear that the notice provisions in this section are not intended to and do not constitute a summons, which is required for a petition in formal proceedings. See 2010 amendments to certain definitions in S.C. Code §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC.

**Section 62-1-402.** A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

**Section 62-1-403.** In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements the following apply:

(1) Interests to be affected must be described in pleadings that give reasonable information to owners by name or class by reference to the instrument creating the interests or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a person may represent his minor or unborn issue.

(iii) A minor or unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Service of summons, petition, and notice is required as follows:

(i) Service of summons, petition, and notice must be given to every interested person or to one who can bind an interested person as described in (2)(i) or (2)(ii) above. Service of summons and petition upon, as well as notice, may be given both to a person and to another who may bind him.

(ii) Service upon and notice is given to unborn or unascertained persons who are not represented under (2)(i) or (2)(ii) above by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

#### REPORTER'S COMMENT

This section applies to formal proceedings and judicially supervised settlements. It provides that in certain specified instances a person will be bound by orders which are binding on others.

Subitem (i) of item (2) provides that an order which is binding upon the person or persons holding a power of revocation or a general power of appointment will bind others, such as objects or takers in default, to the extent that their interests are subject to the power. This would mean that an order which is binding on one who has discretion will bind those in whose favor he might act.

Absent a conflict of interest, subitem (ii) of item (2) provides that orders binding a conservator or guardian are binding on the protected person. In certain limited instances, orders binding on a trustee or a personal representative are binding on beneficiaries and interested persons. Further, under subitem (iii) of item (2) an unborn or unascertained person is bound by orders affecting persons having a substantially identical interest. These provisions facilitate proceedings by limiting multiplicity of parties.

Item (4) permits the court at any point in a proceeding to appoint a guardian ad litem to represent a minor, an incapacitated person, an unborn or unascertained person, or one whose identity or address is unknown if the court determines that representation of that interest would otherwise be inadequate. Accordingly, in a proceeding where there are adult parties having the same interest as the minor or incapacitated person, the court may not deem it necessary to appoint a guardian ad litem if it appears that the common interest will be adequately represented. In the case of minors, the appointment of a guardian ad litem (or an attorney having the powers and duties of a guardian ad litem) is discretionary with the court. However, this Code does require that notice of the proceeding be given to adults presumably having an interest in the minor's welfare, such as the person having care and custody of the minor, parent(s), or nearest adult relatives.

The 2010 amendment revised subsections (1) and (3) to clarify procedure for a formal proceeding, which requires a summons and petition to commence a formal proceeding. See 2010 amendments to certain definitions in S.C. Code §62-1-201 and also see §§14-23-280, 62-1-304, and Rules 1 and 81, SCRPC. The 2010 amendment also revised subsection (2)(ii) to delete 'parent' and replace it with 'person,' so that it is consistent with the remainder of that subsection and also delete 'child' and replace it with 'issue' to be broader and more inclusive.

## **Part 5**

### **Uniform Simultaneous Death Act**

**Section 62-1-500.** This part may be cited as the 'Uniform Simultaneous Death Act'.

#### **REPORTER'S COMMENT**

The 2013 amendment made significant changes to Part 5. Prior to the 2013 amendment, Part 5 did not include a 120 hour survival requirement similar to §62-2-104. The revisions to Part 5 now incorporate a default 120 hour survival requirement for testate and intestate decedents as well as for nonprobate transfers, subject to the exceptions set forth in §62-1-506.

**Section 62-1-501.** For purposes of this part:

(1) 'Co-owners with right of survivorship' includes joint tenants in a joint tenancy with right of survivorship, joint tenants in a tenancy in common with right of survivorship, tenants by the entirety, and other co-owners of property or accounts held under circumstances that entitle one or more to the whole of the property or account on the death of the other or others.

(2) 'Governing instrument' means a deed, will, trust, insurance or annuity policy, account with POD designation, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(3) 'Payor' means a trustee, insurer, business entity, employer, government, governmental agency, subdivision, or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments.

**Section 62-1-502.**

(a) Except as otherwise provided by this Code, where the title to property, the devolution of property, the right to elect an interest in property, or any other right or benefit depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by at least one hundred twenty hours is deemed to have predeceased the other individual.

(b) If the language of the governing instrument disposes of property in such a way that two or more beneficiaries are designated to take alternatively by reason of surviving each other and it is not established by clear and convincing evidence that any such beneficiary has survived any other beneficiary by at least one hundred twenty hours, the property shall be divided into as many equal shares as there are alternative beneficiaries, and these shares shall be distributed respectively to each such beneficiary's estate.

(c) If the language of the governing instrument disposes of property in such a way that it is to be distributed to the member or members of a class who survived an individual, each member of the class will be deemed to have survived that individual by at least one hundred twenty hours unless it is established by clear and convincing evidence that the individual survived the class member or members by at least one hundred twenty hours.

**Section 62-1-503.** Except as otherwise provided by this Code, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by at least one hundred twenty hours is deemed to have predeceased the event.

**Section 62-1-504.** Except as otherwise provided by this Code, if:

(a) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by at least one hundred twenty hours, one-half of the property passes as if one had survived by at least one hundred twenty hours and one-half as if the other had survived by at least one hundred twenty hours;

(b) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by at least one hundred twenty hours, the property passes to the estates of each of the co-owners in the proportion that one bears to the whole number of co-owners.

## REPORTER'S COMMENT

This section applies to property or accounts held by co-owners with right of survivorship. As defined in §62-1-501, the term 'co-owners with right of survivorship' includes multiple-party accounts with right of survivorship.

**Section 62-1-505.** Notwithstanding any other provisions of the Code, solely for the purpose of determining whether a decedent is entitled to any right or benefit that depends on surviving the death of a decedent's killer under Section 62-2-803, the killer is deemed to have predeceased the decedent, and the decedent is deemed to have survived the killer by at least one hundred twenty hours, or any greater survival period required of the decedent under the killer's will or other governing instrument, unless it is established by clear and convincing evidence that the killer survived the victim by at least one hundred twenty hours.

**Section 62-1-506.** Survival by one hundred twenty hours is not required if any of the following apply:

- (1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
- (2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;
- (3) the imposition of a one hundred twenty hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under other provisions of the Code; but survival must be established by clear and convincing evidence;
- (4) the application of a one hundred and twenty hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence;
- (5) the application of a one hundred twenty hour requirement of survival would deprive an individual or the estate of an individual of an otherwise available tax exemption, deduction, exclusion, or credit, expressly including the marital deduction, resulting in the imposition of a tax upon a donor or a decedent's estate, other person, or their estate, as the transferor of any property. 'Tax' includes any federal or state gift, estate or inheritance tax;
- (6) the application of a one hundred twenty hour requirement of survival would result in an escheat.

## REPORTER'S COMMENT

The 2013 amendment rewrote this section.

Subsection (1). Subsection (1) provides that the 120-hour requirement of survival is inapplicable if the governing instrument 'contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case.' The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that 'in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first,' my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under this section, G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Subsection (2). Subsection (2) provides that the 120-hour requirement of survival is inapplicable if 'the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a stated period.'

Mere words of survivorship in a governing instrument do not expressly indicate that an individual is not required to survive an event by any specified period. If, for example, a trust provides that the net income is to be paid to A for life, remainder in corpus to B if B survives A, the 120-hour requirement of survival would still apply. B would have to survive A by 120 hours. If, however, the trust expressly stated that B need not survive A by any specified period, that language would negate the 120-hour requirement of survival.

Language in a governing instrument requiring an individual to survive by a specified period also renders the 120-hour requirement of survival inapplicable. Thus, if a will devises property 'to A if A survives me by 30 days,' the express 30-day requirement of survival overrides the 120-hour survival period provided by this Act.

Subsection (4). Subsection (4) provides that the 120-hour requirement of survival is inapplicable if 'the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition.' The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a \$50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised \$50,000 to the charity if W predeceased him. W's will devised \$50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (4), not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the \$50,000 devise, subsection (4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the \$50,000 charitable devise in W's will is effective.

Subsection (4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended \$50,000 devise from H's estate and half from W's estate.

Under subsection (5), if the application of the 120-hour survival requirement would cause the loss of an available tax exemption, deduction, exclusion, or credit, creating a federal or State gift, estate or inheritance tax, the 120-hour survival requirement will not be applied. Additionally, under subsection (6), the 120-hour survival requirement is not applicable if it would cause an escheat.

**Section 62-1-507.** In addition to the South Carolina Rules of Evidence, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual is determined to be dead under the Uniform Determination of Death Act, Section 44-43-460.

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death, and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under subsection (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) A person whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stated on a document described in subsection (2) or (3), a document described in subsection (2) or (3) that states a time of death one hundred twenty hours or more after the time of death of another person, however the time of death of the other person is determined, establishes by clear and convincing evidence that the person survived the other person by one hundred twenty hours.

#### REPORTER'S COMMENT

The 2013 amendment rewrote this section. This section incorporates the provisions of former Section 62-1-107.

#### **Section 62-1-508.**

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a person designated in a governing instrument who, under this part, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this part. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this part.

(2) Written notice of a claimed lack of entitlement under subsection (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this part, a payor or other third party may pay any amount owed or transfer or deposit any item of property, other than tangible personal property, held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the

funds or item of property and, upon its determination under this part, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(3) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is not obligated under this part to return the payment, item of property, or benefit, and is not liable under this part for the amount of the payment or the value of the item of property or benefit. However, a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this part is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this part.

**Section 62-1-509.** This part [Sections 62-1-501 et seq.] shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact substantially identical laws.

#### REPORTER'S COMMENT

Prior to the 2013 amendment this section was previously Section 62-1-508.

### Article 4

## Local and Foreign Personal Representatives; Ancillary Administration

### Part 1

#### Definitions

**Section 62-4-101.** In this article [Sections 62-4-101 et seq.]:

(1) 'Local administration' means administration by a personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.].

(2) 'Local personal representative' includes any personal representative appointed in this State pursuant to appointment proceedings described in Article 3 [Sections 62-3-101 et seq.] and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 62-4-205.

(3) 'Resident creditor' means a person domiciled in, or doing business in, this State who is, or could be, a claimant against an estate of a nonresident decedent.

#### REPORTER'S COMMENT

Section 62-4-101 defines 'local administration' and 'local personal representative' in order to distinguish 'local' matters from that matter covered by Article 4, the 'foreign personal representative' and his administrative acts in South Carolina undertaken on the strength of his 'foreign administration,' without his appointment in South Carolina pursuant to Article 3 of this Code. Section 62-1-201 includes definitions of 'foreign personal representative', 'personal representative', and 'non-resident decedent'.

## Part 2

### Powers of Foreign Personal Representatives

**Section 62-4-201.** At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

- (1) the date of the death of the nonresident decedent;
- (2) that no local administration, or application or petition therefor, is pending in this State;
- (3) that the domiciliary foreign personal representative is entitled to payment or delivery.

#### REPORTER'S COMMENT

Sections 62-4-201, 62-4-202, and 62-4-203 must be read, together with Section 62-4-206, as providing a means, less cumbersome than those provided by Sections 62-4-204 and 62-4-205 and by Section 62-4-207, for the unification and simplification of the administration of multi-state estates in the hands of the domiciliary foreign personal representatives of nonresident decedents. These sections allow the domiciliary foreign personal representative to collect estate assets in South Carolina without requiring local appointment (Section 62-4-201), while protecting debtors of the estate against double payment (Section 62-4-202) and also protecting resident creditors of the estate from nonpayment (Section 62-4-203). See Section 62-5-431 for a provision similarly allowing the collection of the assets of a nonresident protected person by his domiciliary foreign conservator.

Sections 62-4-201 and 62-4-202 preserve the domiciliary foreign personal representative's power to collect estate assets in South Carolina from debtors willing to make voluntary payment on the strength of his foreign appointment, and also preserve the corresponding effect, the full discharge of the debtor, resulting from the payment.

These sections by their terms apply only to estates of nonresident decedents and allow for payment only to the domiciliary, not to any ancillary, foreign personal representative. Presumably, an ancillary personal representative is empowered to collect assets only in the state of his appointment. The debtor's good faith reliance on the foreign personal representative's proof of appointment and affidavit, inaccurately showing that the decedent was a nonresident of South Carolina and that the personal representative was appointed as a domiciliary personal representative, should protect the debtor under Section 62-4-202. These sections apply even if local administration is actually pending or applied for, as long as the foreign personal representative supplies the documentation detailed in Section 62-4-201 and the debtor has no actual notice of the pending local administration. Section 62-4-202 requires only good faith of the debtor who receives that documentation; his release then depends solely on his making payment to the foreign personal representative. See Section 62-4-206.

These sections apply even though interested persons, including estate creditors, are domiciled in, or doing business in, South Carolina. Such creditors are protected under Section 62-4-203. These sections apply to the collection of all debts owed to and tangible and intangible personal

property owned by the estate. Section 62-3-201(d) refers to the location of tangible personal property and intangible personal property which may be evidenced by an instrument. Transfers of securities are covered by these sections as well as by Sections 35-7-10, et seq. the Uniform Act for Simplification of Fiduciary Security Transfers.

Section 62-4-201 provides for a waiting period of sixty days from the death of the decedent before payment can be made with the expectation of an immediate discharge of the debtor. Presumably, having made payment before the expiration of the period, a debtor will be discharged at the expiration of the period if he would have been discharged had he then paid, but, for example, not if, in the meantime, a local administration has come to the attention of the debtor.

See Section 12-16-1150 for estate tax duties and liabilities imposed on personal representatives.

**Section 62-4-202.** Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action to the same extent as if payment or delivery had been made to a local personal representative.

#### REPORTER'S COMMENT

See Comment to Section 62-4-201.

**Section 62-4-203.** Payment or delivery under Section 62-4-201 may not be made if a resident creditor of the nonresident decedent has given written notice to the debtor of the nonresident decedent or the person having possession of the personal property or of the instrument evidencing a debt, obligation, stock, or chose in action belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

#### REPORTER'S COMMENT

For the context of Section 62-4-203, see comment to Section 62-4-201. Section 62-4-203 provides a means by which a resident creditor of the decedent can attempt to protect himself from nonpayment of his debt, resulting from assets of the estate being removed from South Carolina by a domiciliary foreign personal representative. The creditor simply notifies the debtors of the decedent not to pay their debts under Sections 62-4-201 and 62-4-202. The notice must be in writing, thereby excluding constructive notice. Section 62-4-203 provides for a mechanism protective of resident creditors, while Section 62-4-202 deprives of such protection resident creditors who fail to give notice under Section 62-4-203.

**Section 62-4-204.** If no local administration or application or petition therefor is pending in this State, a domiciliary foreign personal representative may file with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of the will, if any. The filing of a bond shall not be required unless the court in its discretion orders it.

#### REPORTER'S COMMENT

Sections 62-4-204 and 62-4-205 must be read, together with Section 62-4-206, as providing a

means, additional to those of Sections 62-4-201 through 62-4-203 and of Section 62-4-207, for the unification and simplification of the administration of multi-state estates, without requiring the local appointment of a personal representative. Predicated on no local administration having been instituted, the domiciliary foreign personal representative, who files with the court the documents required by Section 62-4-204, obtains under Section 62-4-205 all of the powers of a local personal representative. See Article 3 for the powers of local personal representatives.

**Section 62-4-205.** A domiciliary foreign personal representative who has complied with Section 62-4-204 may exercise as to assets (including real and personal property) in this State all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

#### REPORTER'S COMMENT

See comment to Section 62-4-204.

**Section 62-4-206.** The power of a domiciliary foreign personal representative under Section 62-4-201 or 62-4-205 shall be exercised only if there is no administration or application therefor pending in this State. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 62-4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this State.

#### REPORTER'S COMMENT

Section 62-4-206 limits the powers of foreign personal representatives, under both Sections 62-4-201, et seq., and 62-4-204, et seq., to cases in which no local administration is pending, with provision, however, for court approved exercise of limited powers to preserve the estate, for protection of any person acting in reliance upon these sections and without actual notice of a pending local administration, and for subjection of the local personal representative to the obligations accrued by the foreign personal representative under these sections. See Article 3 for provisions concerning local administration.

**Section 62-4-207.** In respect to a nonresident decedent, the provisions of Article 3 [Sections 62-3-101 et seq.] govern (1) proceedings, if any, in a court of this State for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration. The initiation of a proceeding under Article 3 (Sections 62-3-101 et seq.) is the appropriate procedure for an ancillary administration relating to the real property of a nonresident decedent located in this State and is an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

## REPORTER'S COMMENT

The purpose of this section is to direct attention to Article 3 for sections controlling ancillary, i.e., local administration of estates of nonresident decedents. See in particular Sections 62-3-101, 62-3-201, 62-3-202, 62-3-203, 62-3-307(a), 62-3-308, 62-3-611(b), 62-3-803(a), 62-3-815, and 62-3-816. Section 62-4-207 and Article 3 must be read as providing an alternative to the procedures available to a foreign personal representative under Sections 62-4-201 through 62-4-206.

## Part 3

### Jurisdiction Over Foreign Personal Representatives

**Section 62-4-301.** A foreign personal representative submits personally to the jurisdiction of the courts of this State in any proceeding relating to the estate by (1) filing authenticated copies of his appointment as provided in Section 62-4-204, (2) receiving payment of money or taking delivery of personal property under Section 62-4-201, or (3) doing any act as a personal representative in this State which would have given the State jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

## REPORTER'S COMMENT

Sections 62-4-301 and 62-4-302 assert the South Carolina courts' jurisdiction over foreign personal representatives, not appointed in South Carolina pursuant to Article 3. Jurisdiction is asserted in the circumstances, under Section 62-4-301, of the foreign personal representative's acting (1) under Section 62-4-204 of this Code, (2) under Section 62-4-201 of this Code, or (3) within the state in a manner which would have subjected him, as an individual, to the state's jurisdiction, and, under Section 62-4-302, (4) of the decedent's having been subject to the courts' jurisdiction immediately prior to his death. The words 'courts of this state' are sufficient under federal legislation to include a federal court having jurisdiction in South Carolina.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration. See Section 62-3-203(g). Once appointed as local personal representative, he remains subject to the jurisdiction of the appointing court under Section 62-3-602.

**Section 62-4-302.** In addition to jurisdiction conferred by Section 62-4-301, a foreign personal representative is subject to the jurisdiction of the courts of this State to the same extent that his decedent was subject to jurisdiction immediately prior to death.

## REPORTER'S COMMENT

For the context of Section 62-4-302, see comment to Section 62-4-301. Section 62-4-302 subjects the foreign personal representative to jurisdiction on the basis of his decedent's immediate pre-death condition or activities, whether the decedent was domiciled, doing business, or maintaining his principal place of business in South Carolina (see Section 36-2-802 Code) of the 1976 Code or engaged in conduct encompassed in South Carolina's 'long-arm' statutes (see Sections 36-2-803, 15-5-130, 15-5-140, and 15-9-350, et seq.). As to survival of causes of

action, see Sections 15-5-90, 15-51-10, et seq., and 35-1-1520 of the 1976 Code.

Uniform Commercial Code Section 36-2-801 might be read to subject a personal representative 'whether or not a citizen or domiciliary of this State,' including a foreign personal representative, to the jurisdiction of the South Carolina courts. Section 62-4-302 settles any doubt as to the foreign personal representative's immunity from suit.

Section 62-4-302 should be read with Sections 15-5-130 and 15-5-140 as augmenting and simplifying the process available to persons involved in South Carolina in automobile accidents also involving deceased nonresident motorists. Section 62-4-302 allows for suit directly against the foreign personal representative.

### **Section 62-4-303.**

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this State on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a), he shall be allowed thirty days within which to appear or respond.

### **REPORTER'S COMMENT**

Section 62-4-303 provides for service of process upon a foreign personal representative, first, either by registered or by certified mail, with return receipt requested, if available under postal regulations; second, by ordinary first class mail, where registered or certified mail is unavailable; and, third, by any means available under other laws of South Carolina for service on the decedent (or on the foreign personal representative himself) immediately prior to the decedent's death. For service on the decedent, see Sections 36-2-804, et seq., for service of process in support of personal jurisdiction under the 'long-arm' provisions of the Uniform Commercial Code, Sections 36-2-801, et seq. See Sections 15-9-350, et seq., for substituted service of process in South Carolina on the statutorily designated agents of nonresident motorists, motor carriers, aircraft operators, vessel operators, certain traveling shows, nonresident directors of domestic corporations, nonresident trustees of inter vivos trusts, and nonresident individual fiduciaries. See Sections 62-1-401 through 62-1-403 of this Code for the general notice provisions of this Code.

## **Part 4**

### **Judgments and Personal Representatives**

**Section 62-4-401.** An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication; provided, however, that notice and the opportunity to defend must be given to the local representative in order that the judgment be collectible.

#### REPORTER'S COMMENT

For the determinative effect of domiciliary foreign orders determining testacy or the validity of a will and of domiciliary certificates of the efficacy of a will, see Section 62-3-408 and 62-3-409.”