2013 Revisions to Probate Code Article One & Related Forms

Lancaster County Probate Court

Hon. Anna S. Miller

104 N. Main St.
P.O. Box 1809 Lancaster, SC 29720

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62-1-106 Injured party may receive relief **and** restitution **(formerly "or").**	• Section 62-1-106. Whenever fraud […] 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. […]

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Summary: “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” has two remedies.

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62-1-107

(Additional rules deleted)

OLD CODE	NEW CODE
In proceedings under this Code the 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.~~	In proceedings under this Code the South Carolina Rules of Evidence are applicable unless specifically displaced by the Code.

62-1-107

Cont'd

OLD CODE

~~(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.~~

NEW CODE

In proceedings under this Code the South Carolina Rules of Evidence are applicable unless specifically displaced by the Code.

62-1-111

(Brand new section)

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.

62-1-201
(Changes in definitions)

- (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.
- (18) **'Guardian' means a person appointed by the court as guardian, but excludes one who is a guardian ad litem.**
  - OLD CODE: "Guardian" means a person 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.

62-1-201 (Changes in definitions, cont'd)

- **(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.**
  - OLD CODE: "Person" means an individual, a corporation, an organization, or other legal entity.
  - **(use of term "person" limited in new code)**

62-1-201 (Changes in definitions, cont'd)

- (35) ' Probate estate' means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy.
- (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.
  - OLD CODE: "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

62-1-201
(Changes in definitions, cont'd)

- OLD CODE: ~~"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.~~

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;

62-1-302
(changes, cont'd)

- (NEW) (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;

- (OLD) (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;

62-1-302
(changes, cont'd)

- (NEW): (6) the involuntary commitment of persons suffering from mental illness, **mental retardation**, alcoholism, drug addiction, and active pulmonary tuberculosis.
- (OLD): (6) the involuntary commitment of persons suffering from mental illness, ~~intellectual disability~~, alcoholism, drug addiction, and active pulmonary tuberculosis.

Editor's notes in Title 44

- 2011 Act No. 47, § 13, provides as follows:
- "SECTION 13. In Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded'."

--After removing the term "mental retardation" in 2011 from Title 44, the Legislature has added it to the Probate Code.

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62-1-302
(changes, cont'd)

(NEW):(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 […] must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: […]
(3) actions to try title **concerning property in which the estate of a decedent or protected person asserts an interest;**

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 […] must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: […]
(3) actions to try title;

62-1-302
(changes, cont'd)

(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**;

(4) trusts;

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Special Needs Trusts

- The Legislature wants litigation concerning Special Needs Trusts to remain with the Probate Court.

62-1-302
(changes, cont'd)

- (NEW SECTION): (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.

62-1-303

- (New subsection) (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.

62-1-308

- Procedure for Appealing a Probate Court Order has been significantly changed.
- Summary:
  - Unless the non-default parties agree in writing or on the record in open Court, the appeal is to the circuit court. If there is an agreement, the appeal may be made directly to the Supreme Court.*
  - Appealing party must file a Notice of Intention to Appeal to the Circuit Court with the Probate Court within ten days after receipt of the Order, and serve a copy of this Notice on all parties not in default.
  - Within forty-five days after receipt of the order, 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.

Appeals

"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…"

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Appeals Summary Cont'd

- "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)."

Appeals Summary Cont'd

- Summary: of transcript duties:
  - Burden shifted from Court to Appellant
  - Since many of the Probate Courts do not provide Court Reporters (including Lancaster County), parties should be sure to make arrangements for a Court Reporter to be present if there is *any* possibility you will need to appeal.

Appeals (cont'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" (follow Rule 209, SCACR) "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."

"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." (Follow 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." (Follow 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. " (Follow Rule 208(b)(3), SCACR)

Appeals (cont'd)

"Within thirty days after service of the respondent's brief, the appellant shall serve a copy of the Record on Appeal" (follow Rule 210, SCACR (c), (e), (f) and (g) but not 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."

-The SCACR do not apply except as provided.

-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.

-While on appeal, "all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment" […]

Appeals (cont'd)

"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."

-Judgment shall be certified to the Probate Court, and "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."

-" 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."

- Appeals to the Supreme Court* follow the SCACR

Summary of the Changes to the Uniform Simultaneous Death Act

1. If an issue regarding simultaneous death arises, review Article 1, Part 5, in detail.
2. This part has its own definition sections.
3. When any right/benefit/title/property depends upon survivorship, an individual must be shown <u>by clear and convincing evidence</u> to have survived the other (burden on party asserting survivorship.)

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Summary of Changes to the Uniform Simultaneous Death Act

4. If two or more parties are to take property alternately/ or by ROS, and neither/none can show by C&C evidence to have survived 120 hours, the property shall be divided into equal shares and distributed into each of their estates.
5. If language* disposes of property to the member/members of a class who survive an individual, each member of the class will be deemed to have survived by at least 120 hours **unless it is established by clear and convincing evidence** that the individual survived the class by at least 120 hours. (Burden on the individual, not the class).

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Simultaneous Death Act
(cont'd)

6. Burden on an individual to show by C&C to have survived an event by 120 hours, if language* requires surviving the event.
7. In murder-suicide situations, burden is on the killer's estate to show, by C&C evidence, that he/she survived the murder victim by 120 hours (or any greater time established in the killer's will)

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Simultaneous Death Act (cont'd)

8. There are limited situations where the 120 hours may not be required…read the documents closely: see if operable language addresses survivorship, see if imposition of 120 hours will cause nonvested property interest or a power of appointment to be invalid under other provisions of the Code, see if a disposition will (unintentionally) fail or be duplicated, see if there will be bad tax consequences or an echeat.

TO DETERMINE IF 120 HOURS IS REQUIRED, READ THE DOCUMENTS AND REVIEW THE CODE.

9. There are special definitions of when a death has occurred, and how it may be proved in 62-1-507.

52-1-508

10. 62-1-508 provides protection to a payor who in good faith transferred property/benefits wrongfully (if not given notice) unless there was a purchase for value without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation. 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 (property*) or is personally liable.

Significant Article 1 and Administrative Forms

- Motion for Transfer of Venue- #123ES
- Motion for Removal- #109 ES
- Notice of -#110ES
- Notice Of Hearing Only- #326ES
- Proof of Delivery- #120PC
- Motion for Service by Publication and Affidavit of Due Diligence- #122ES , #409ES
- Waiver, Request or Demand for Notice- #111ES
- Demand for Hearing- #113ES
- Motion to be Relieved as Counsel- #355ES
- Notice of Intent to Appeal- #356ES

Significant Article 1 and Administrative Forms

- Receipt- #401ES
- Waiver of Filing Requirements- #364ES
- Affidavit of Adeemed or Abated Property- #366ES
- Special Certificate- #155ES
- Safe Deposit Affidavit- #480ES