Significant Changes to SCPC Article Two, and Related Forms

Lancaster County Probate Court

Hon. Sandra S. Estridge

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

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A clarification in 62-2-114:

- an action by a party to deny or limit one or both of a decedent's parents from his/her/their share of a decedent's intestate estate based on one/both of the parents' failure to reasonably support the decedent during his/her minority must be commenced by a Summons and Petition and notice. The Court will make its determination based upon the preponderance of the evidence. If the Court determines that there was not reasonable support, the disqualified parent/s is/are treated as if he/she/they predeceased the decedent.

62-2-202:

- kept the definition of a probate estate but added a sub-paragraph, stating, “Except as provided in Section 62-7-401(c) with respect to a revocable inter vivos trust found to be illusory, the elective share shall apply only to the decedent's probate estate,” meaning, if there is a revocable trust which has been found to be illusory, it is subject to the elective share.

Significant changes made to Elective Share proceedings in 62-2-207:

- Now, a spouse's elective share interest in the probate estate is offset by the non-probate transfers made to him/her as well as any interest he/she has in the probate estate (see the statute for a detailed treatment). In satisfying the elective share, probate assets are valued at the date of distribution value.

Elective Share, cont'd

- Note for Practitioners: As will be discussed later, the Personal Representatives are no longer required to disclose non-probate assets on the standard, short-form inventory. Thus, parties in a contested case may need to file a (new form) Demand for Non-Probate Property Inventory and, to the extent this does not resolve the dispute (since a PR is not statutorily required to list amounts on this form or file it with the Court), detailed discovery. Note also the reporter's comment on this issue: "Probate courts may require that nonprobate assets be identified sufficiently on the inventory and appraisement to enable the calculation to be made."

Elective Share, cont'd

The law is unchanged with regard to valuing the electing spouse's beneficial interest in property for qualifying federal estate tax marital deductions. An electing spouse who is the beneficiary of an income trust that can be treated as qualifying property has the right to require a conversion of the income trust to a total return unitrust. Qualifying property is valued at the date of death.

Abatement is unchanged.

Changes to 62-2-301-302 (Omitted spouses and children):

Have extended periods to file their summons and petitions: they must do it "within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after the omitted [spouse/child] is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will." The spouse/child shall give notice of the time and place set for the hearing on the omitted spouse/child claim to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the share.

Also, a will devising substantially all of a testator's estate to his/her spouse is valid against the claim of an omitted child regardless of whether the will was executed by the decedent before or after the child was born or adopted.

- 62-2-401: Changes the value of exempt personal property from $5,000 to $25,000.
- 62-2-403 exempts “insurance, compensation, or pensions” from the claims of creditors for veterans who served “during any ‘period of war’” (rather than just WWII or before, as was the case in the old code).
- Per 62-2-503, married or emancipated minors may execute wills.

62-2-504 expands the definition of an interested witness to a will:

- Now, interested witnesses are persons named in the will as a devisee, or a devisee's spouse or issue. A devise is null and void to the extent it grants an interest over the interested witness' intestate share UNLESS there are two disinterested witnesses to the will. (Ex: a will leaves all to testator's wife. The witnesses are a stranger, and the child of Testator and Testator's wife. The devise would fail, since wife has been left more than her intestate share (50%). However, if there was a third witness who was disinterested, the devise would not fail).

62-2-506 clarifies how a will may be revoked:

- A will may still be revoked by being destroyed. It may also be revoked by executing a subsequent will that expressly or by inconsistency revokes the old will. A subsequent will (that does not expressly revoke the old will) may be presumed to intend to supplement, rather than revoke, a previous will if it does not make a complete disposition of the estate. If the subsequent will does make a complete disposition of the estate, it is presumed to have been intended to replace, not supplement, the old will. Clear and Convincing evidence will be needed to rebut a presumption.

Section 62-2-507

- Provides that a divorce or annulment revokes a decedent's revocable dispositions, including life insurance, POD accounts, and retirement plan beneficiary designations, and severs the interest of property held with right of survivorship between former spouses unless there is "a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment" controlling.

Section 62-2-507

- Has its own definition section defining all applicable terms. These terms differ from the previous code somewhat. Please note that the definition of a "divorce or annulment" includes all 62-2-802 events but is a broader definition ("It also includes a court order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent's death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.")

62-2-507

Revocations are revived by subsequent remarriage or a nullification of divorce/annulment.

Good faith payors are not liable for transfers/payments made in reliance on an instrument if they have not received written notice of the divorce, annulment or remarriage. The code directs how proper notice may be given. Purchasers of property for value without notice/persons who have received payments in partial/full satisfaction of legally enforceable obligations do not have to return the payment/property. If the purchase was not for value, or the party is not entitled to repayment, they would need to return it, and may be personally liable (unless this section is preempted by federal law).

62-2-601 indicates states the longstanding rule of interpretation:

- "The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions" and indicates that "the rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will."
- It adds another subsection, indicating that "the court may reform the terms of the will, even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement."

62-2-603

- makes one change to the previous law regarding antilapse, indicating that if there are terms regarding survivorship, there is a presumption that the testator did not intend for the antilapse section to apply.

Disclaimer changes in 62-2-801:

- The biggest change is that the time limitation is loosened: "Unless barred, a disclaimer must be made within a reasonable time after the disclaimant acquires actual knowledge of the interest. A disclaimer is conclusively presumed to have been made within a reasonable time if made within nine months after the date of effectiveness of the transfer."
- A parent may disclaim on behalf of a minor child and unborn issue, unless there is a conservator or guardian appointed and unless that disclaimer will result in that parent outright inheriting/receiving the interest or power.

62-2-802 defines a surviving spouse:

- "An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section."

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62-2-802

Under this section (contrast with 62-2-507): a surviving spouse does not include:

- an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or live together as husband and wife at the time of the decedent's death;
- an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person;

Not a 62-2-802 "surviving spouse":

- an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent's death; or
- an individual claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

Also, "A divorce or annulment is not final until signed by the court and filed in the office of the clerk of court."

Primary Forms Associated with Article 2

- Exempt Property Claim- #435ES
- Petition for Omitted Spouse- #382ES
- Petition for Omitted Child- #383ES
- Petition to Limit Parent's Inheritance- #417ES
- Petition for Elective Share- #404ES
- Filing of Will for Record- #306ES
- Filing of Disclaimer for Record- #447PC