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THE PROPOSED SOUTH CAROLINA PROBATE CODE

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I. INTRODUCTION

The proposed South Carolina Probate Code¹ is expected to be considered for enactment during the 1985 session of the South Carolina General Assembly. If adopted, the legislation

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1. A BILL TO PROVIDE FOR THE SOUTH CAROLINA PROBATE CODE, S.704 and H.3417 [hereinafter S.704], contained in SPC LEGISLATIVE HISTORY [hereinafter HISTORY], on file in the Coleman Karesh Library at the University of South Carolina School of Law, was introduced in the South Carolina Senate on January 19, 1984, and in the House on January 24, 1984.

In early 1985, the General Assembly's Joint Legislative Committee to Study Revisions in the Probate Code is expected to review S.704. The joint committee's review will undoubtedly include an examination of four pieces of probate legislation enacted during the 1984 session: S.C. CODE ANN. § 21-7-615 (1976 & Supp. 1984) (providing for self-proving will affidavits); *id.* § 21-15-1450 (revision of existing law concerning commissions of executors and administrators); *id.* § 21-15-400 (revision of existing law concerning fees of estate appraisers); and *id.* § 32-13-10 (revision of existing law concerning durable powers of attorney). See S.704, *supra*, §§ 2-503, 3-719, 3-721(b) and 5-501, respectively.

The joint committee is also expected to consider two 1984 South Carolina Supreme Court decisions, *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (affecting S.C. CODE ANN. §§ 21-3-30 and 21-3-40 (1976)) (concerning intestate succession from paternal relatives by persons born out of wedlock), and *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984) (affecting S.C. CODE ANN. §§ 21-5-10 to -990 (1976)) (concerning surviving widow's dower right). See S.704, *supra*, §§ 2-109(2)(ii) and 2-201 to -207, respectively.

The legislators will also consider several amendments suggested by the Probate Judges Association in 1984. See Report to Joint Legislative Committee to Study Revisions of the Probate Code, Reporter's and Probate Judges' Recommended Revisions to S.704 and H.3417 (1/7/85) [hereinafter Report], HISTORY, *supra*. The probate judges' suggested revisions would mainly affect several of the procedural provisions of the SPC but also would affect a few of its substantive provisions. Of particular interest to the judges are the sections governing probate court jurisdiction, S.704, *supra*, § 1-302; the surviving spouse's share in intestacy, *id.* § 2-102; and the process of administration of decedents' estates, especially *id.* §§ 3-101 (devolution of property at death), 3-704 (court supervision of administration), and 3-1001 to -1003 (accountings of personal representatives).

will bring dramatic changes to the existing South Carolina law of trusts and estates.

This Article outlines the history of the proposed South Carolina Probate Code (hereinafter SCPC). The Article also presents an overview of the subject matter covered by the legislation and concludes with an illustration of the policies of the SCPC by comparing its provisions with existing South Carolina statutes and case law on trusts and estates.

II. HISTORY OF THE SCPC

The movement for reform of the probate law of South Carolina originated in the 1946 publication of the Model Probate Code by the American Bar Association's Section of Real Property, Probate and Trust Law.² The Model Probate Code, together with two state codes that were heavily influenced by the model code,³ formed the basis for the first draft SCPC produced in 1965 by the Committee on Probate Laws of the Judicial Council of South Carolina. The compiler and Reporter of that draft was former South Carolina Supreme Court Associate Justice Lionel K. Legge. Thus, the 1965 draft is often referred to as the "Legge Code." The Legge Code was introduced as legislation in the General Assembly of South Carolina, but was never adopted.⁴

In 1969 and 1970, the South Carolina State Bar and the South Carolina Bar Association each formed Probate Code Committees to study the Uniform Probate Code as a model for the reform of South Carolina's law.⁵ In 1977, the successor of the

2. For background on the Model Probate Code, see generally L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946).

3. Missouri Probate Code, 1955 Mo. LAWS 385, effective January 1, 1956, and Iowa Probate Code, 1963 IOWA ACTS 417, effective January 1, 1964.

4. A BILL TO AMEND, REVISE AND CODIFY THE PROBATE LAWS OF SOUTH CAROLINA, *see* HISTORY, *supra* note 1, was introduced as H.1748 on May 19, 1965.

When the Legge Code was proposed in 1965, the ABA Section of Real Property, Probate and Trust Law, and the National Conference of Commissioners on Uniform State Laws were drafting the Uniform Probate Code, which was eventually published in 1969. UNIFORM PROBATE CODE, 8 U.L.A. 1 (1983). Undoubtedly, the impending revision of its national model forestalled serious consideration of the enactment of the Legge Code.

5. Copies of the committees' correspondence and memoranda are contained in HISTORY, *supra* note 1. The committees' deliberations were the impetus for the 1972 appointment, by the Judicial Council of South Carolina, of University of South Carolina

two Probate Code Committees and of the formerly separated state bar associations, the Estate Practices Committee of the South Carolina Bar, began drafting its version of the SCPC.⁶ In 1979, the Estate Practices Committee submitted this second draft SCPC, a version of the Uniform Probate Code, to the South Carolina Bar's Board of Governors and its House of Delegates. Both bodies approved the 1979 draft.⁷

In 1980, the South Carolina Bar's draft of the SCPC was introduced as legislation in the General Assembly. The SCPC was referred to the judiciary committees of the South Carolina House and Senate. The measure was then sent to the Joint Legislative Committee to Study Revisions in the Probate Code. The joint committee met during 1980,⁸ studied and revised the draft, and recommended a third draft SCPC for adoption.⁹ The Senate Judiciary Committee adopted several revisions recommended by the Probate Judges Association,¹⁰ and gave its approval for the printing of this revised third draft SCPC as a bill.¹¹ The measure was recommitted to the joint committee for further consideration.

In June 1981, proponents of the SCPC ordered the preparation of a report that would compare the provisions of the proposed SCPC with those of existing South Carolina law, and that would contain a section-by-section analysis of the effects of the

Professor Coleman Karesh as Reporter to study the question. Karesh, with the assistance of other professors from the University of South Carolina School of Law, produced a report comparing the Uniform Probate Code and the existing South Carolina law. The report was completed in 1976. See C. KARESH, T. HINDES & J. JACOBS, REPORT: SOUTH CAROLINA REPORTER'S COMMENTS ON THE U.P.C. (1976), HISTORY, *supra* note 1.

6. Copies of the committee's correspondence, memoranda and drafts are contained in HISTORY, *supra* note 1.

7. Copies of the committee's drafts of May and November 1979 are contained in HISTORY, *supra* note 1. On November 15, 1979, the South Carolina Bar's House of Delegates approved the slightly revised November 1979 draft.

8. The joint committee had the continuing assistance of the Estate Planning, Probate and Trust Section of the South Carolina Bar, including testimony from some members of the section's Probate Committee and from some members of the Probate Judges Association. Copies of the joint committee's minutes and memoranda are contained in HISTORY, *supra* note 1.

9. The joint committee's draft, dated February 17, 1981, is contained in HISTORY, *supra* note 1.

10. See memorandum of revisions suggested by the Probate Judges Association (1/12/81), HISTORY, *supra* note 1.

11. A BILL TO PROVIDE FOR THE SOUTH CAROLINA PROBATE CODE, see HISTORY, *supra* note 1, was introduced as S.351 on March 19, 1981.

passage of the SCPC.¹² In 1984, a fourth draft of the SCPC, together with the SCPC Report, was introduced as Bills S.704 and H.3417 (hereinafter S.704) in the General Assembly by the members of the joint committee.¹³

In early 1984, the Probate Judges Association met to study the fourth draft SCPC and subsequently suggested certain revisions.¹⁴ The Association's suggestions were under consideration by the Senate Judiciary Committee when the General Assembly adjourned its 1984 session. At the time of the writing of this Article, it is anticipated that the SCPC and its Report, as well as changes recommended by the Probate Judges Association, will be considered by the joint committee at the inception of the 1985 session of the General Assembly.

III. OVERVIEW OF THE SCPC

As its drafting history demonstrates, the fourth draft SCPC is an altered version of the Uniform Probate Code. Both the Uniform Probate Code and the SCPC collect into integrated codes the substantive and procedural law concerning the administration of estates of decedents, of minors and living persons with disabilities, and of estates held in trust. The SCPC is divided into several articles covering the various estates and their personal representatives, guardians, conservators, and trustees.

A. *Estates of Decedents*

The estates of decedents are treated in Articles II, III, IV, and VI of the SCPC. Articles II and VI concern the substantive law of decedents' estates: the rules of property that answer the questions of to whom, in what shares, and when the assets of a decedent's estate pass after his or her death.¹⁵

Article II of the SCPC regulates succession of property upon

12. The author was appointed Reporter of the SCPC. With the assistance of several then law students and also of members of the South Carolina Bar, and after a series of meetings of the joint committee during 1983, the SCPC Report was produced. See S.704, *supra* note 1.

13. See S.704, *supra* note 1.

14. See Report, *supra* note 1.

15. To compare existing South Carolina law, see S.C. CODE ANN. tit. 21, chs. 1-7, 33, 37 (1976).

the death of an owner who is partially or totally intestate,¹⁶ protection of the owner's surviving spouse against the owner's intended disinheritance of the spouse,¹⁷ and succession by will.¹⁸ Article II particularly focuses on the validity,¹⁹ construction,²⁰ and custody of wills.²¹ It establishes rules that protect certain relatives of the deceased owner from unintentional disinheritance,²² as well as from immediate after death competition for access to the minimal assets necessary for the relatives' survival.²³ Article II also regulates the contracts of the deceased owner concerning his succession,²⁴ and his survivors' rights to take by succession from him.²⁵

Article VI regulates the succession of property upon the owner's death, as well as property ownership during his lifetime, for some arrangements that are not subject to intestate and testate succession. These matters include multiple party accounts offered by financial institutions²⁶ and written, nontestamentary contracts, gifts, conveyances and trusts.²⁷

Articles III and IV contain the procedural law of decedents' estates, including rules that govern the process of administering estates, the selection of the personal representative to whom the estate is entrusted, the treatment of the decedent's directions, and the court supervision of the process.²⁸ The broadest procedural matters are covered by Article III. These include the effect and necessity of probate court proceedings, regulations governing jurisdiction, and statutes of limitations for probate court proceedings.²⁹ Rules concerning the more specific matters of

16. See S.704, *supra* note 1, at art. II, pt. 1.

17. *Id.* at art. II, pt. 2.

18. *Id.* at art. II, pts. 5, 6 & 9.

19. *Id.* at art. II, pt. 5.

20. *Id.* at art. II, pt. 6.

21. *Id.* at art. II, pt. 9.

22. *Id.* at art. II, pt. 3.

23. *Id.* at art. II, pt. 4. The SCPC also provides certain relatives of the deceased owner with protection from the competing claims of the decedent's creditors. *Id.*

24. *Id.* at art. II, pt. 7.

25. *Id.* at art. II, pt. 8.

26. *Id.* at art. VI, pt. 1.

27. *Id.* at art. VI, pt. 2.

28. To compare existing South Carolina law, see S.C. CODE ANN. tit. 21, chs. 7, 13-17 (1976).

29. See S.704, *supra* note 1, at art. III, pt. 1.

venue and demand for notice also appear in Article III.³⁰

Article III also contains procedural rules for the probate of a will and for the appointment of a personal representative in cases concerning a will or intestacy. The article provides informal³¹ and formal³² proceedings for the probate and appointment. Article III contains rules for the qualification, appointment, and termination of the appointment of personal representatives,³³ and for the duties and powers of personal representatives generally.³⁴ Personal representatives' duties and powers concerning the claims of creditors,³⁵ distributions to beneficiaries,³⁶ and the compromise of controversies³⁷ are detailed in Article III. The article also provides for personal representatives' duties and powers in the sale of real and personal property,³⁸ as well as for the closing and subsequent administration of estates.³⁹

Article IV contains rules for personal representatives appointed in other states. The article covers the recognition of foreign personal representatives' powers in South Carolina,⁴⁰ and the assertion of jurisdiction over those foreign personal representatives in the South Carolina courts.⁴¹ Article IV also establishes the effect on personal representatives appointed in South Carolina of adjudications for or against any other personal representative of the same estate.⁴²

B. Estates of Living Persons

The estates of living persons who have disabilities are the

30. *Id.* at art. III, pt. 2.

31. *Id.* at art. III, pt. 3.

32. *Id.* at art. III, pt. 4.

33. *Id.* at art. III, pt. 2, § 3-203; art. III, pt. 6.

34. *Id.* at art. III, pt. 7.

35. *Id.* at art. III, pt. 8.

36. *Id.* at art. III, pt. 9.

37. *Id.* at art. III, pt. 11.

38. *Id.* at art. III, pt. 7, §§ 3-711, 3-715; art. III, pt. 13.

39. *Id.* at art. III, pt. 10. The extraordinary matters covered in Article III include administration under the close supervision of the probate court and small estate administration. See *id.* at art. III, pts. 5 & 12, respectively.

40. *Id.* at art. IV, pt. 2.

41. *Id.* at art. IV, pt. 3.

42. *Id.* at art. IV, pt. 4.

subject matter of Article V of the SCPC.⁴³ Article V sets forth the law that protects the persons of, and governs the administration of the estates of, those persons who are unable to protect themselves. The article defines certain terms, provides a rule on jurisdiction for proceedings under the article, and details special rules for cases that concern small dollar amounts and short periods of time.⁴⁴

Article V provides methods for the appointment of guardians of veterans,⁴⁵ guardians of incapacitated persons,⁴⁶ and conservators of the estates of persons who require protection for any reason.⁴⁷ It also provides, in certain circumstances, for the binding effectiveness of acts of agents of a disabled or dead person, under powers of attorney that are unaffected by the disability or death of the person who gave the power of attorney.⁴⁸

C. *Estates Held in Trust*

Article VII applies, without distinction, to inter vivos and testamentary trusts.⁴⁹ Also, importantly, its provisions apply to personal representatives⁵⁰ and to conservators⁵¹ in their status as trustees of the funds that are administered by them. Article VII covers fundamental aspects of trust creation,⁵² procedural and remedial matters,⁵³ substantive aspects of trust administration law,⁵⁴ trust principal and income accounting,⁵⁵ charitable trust

43. To compare existing South Carolina law, see S.C. CODE ANN. tit. 21, chs. 19-25 and tit. 44, ch. 23 (1976).

44. See S.704, *supra* note 1, at art. V, pt. 1.

45. Proposed amendment of S.704, *supra* note 1, at art. V, suggested in Report, *supra* note 1.

46. *Id.* at art. V, pt. 3.

47. *Id.* at art. V, pt. 4. Article V also provides procedural details for the appointments. It also outlines the powers and duties of appointees, court jurisdiction over appointees, rules concerning the venue of proceedings subsequent to the appointments, and the termination, resignation or removal of appointees. *Id.*

48. *Id.* at art. V, pt. 5.

49. To compare existing South Carolina law, see S.C. CODE ANN. tit. 21, chs. 11, 27-31, 35 (1976).

50. See S.704, *supra* note 1, at arts. III & IV.

51. *Id.* at art. V, pt. 4.

52. *Id.* at art. VII, pt. 1.

53. *Id.* at art. VII, pt. 2.

54. *Id.* at art. VII, pt. 3.

55. *Id.* at art. VII, pt. 4.

reporting requirements,⁵⁶ and certain fiduciary powers.⁵⁷

D. Other Coverage

Article I of the SCPC contains rules that generally apply to the matters covered by Articles II through VII,⁵⁸ definitions of certain SCPC terms,⁵⁹ delineation of the probate court's jurisdiction and the course of appeals from the probate court to higher courts,⁶⁰ notice requirements for proceedings,⁶¹ and the Uniform Simultaneous Death Act.⁶²

IV. ARGUMENT FOR ADOPTION OF THE SCPC

Three main policies support the enactment of the proposed SCPC. First, the SCPC would vastly improve the organization of South Carolina's probate law. Second, it would increase the clarity of the statement of the law. Third, it would beneficially reform the substantive and procedural content of the law. The SCPC would more closely track the desires and expectations of modern decedents. Further, the SCPC would operate more efficiently than current law.

A. Organization

The existing South Carolina statutory probate law is dispersed among various titles of the South Carolina Code.⁶³ The SCPC, with its integration of the whole body of the probate law within a single, internally well organized and tabulated unit, would produce easier access to the law.⁶⁴

56. *Id.* at art. VII, pt. 5.

57. *Id.* at art. VII, pt. 6.

58. *Id.* at art. I, pt. 1.

59. *Id.* at art. I, pt. 2.

60. *Id.* at art. I, pt. 3.

61. *Id.* at art. I, pt. 4.

62. *Id.* at art. I, pt. 5.

63. See generally S.C. CODE ANN. tits. 14, 15, 18, 21, 27, 32, 34, 44 (1976). See also S.704, *supra* note 1, at 504, 543 (Reconciliation Table).

64. The SCPC is internally well organized. It is divided into separate articles, parts and sections, which are arranged in logical sequences. For example, SCPC Article III, which concerns the process of the administration of a decedent's estate, is divided into thirteen parts. Parts 1 and 2 concern general and preliminary matters; parts 3, 4, and 5 concern the opening of the administration of the estate; parts 6, 7, and 8 relate to the

Supplementing the SCPC is a Report⁶⁵ that enhances the organizational qualities of the SCPC by providing explanations of the seven articles,⁶⁶ the several parts,⁶⁷ and the many sections⁶⁸ of the SCPC. Additionally, the Report provides extensive tables of contents,⁶⁹ of cross-references within the SCPC,⁷⁰ of cross-references to other provisions of the South Carolina Code that would be retained⁷¹ or repealed,⁷² and of cross-references to the Uniform Probate Code.⁷³ The SCPC also contains tables of cases⁷⁴ and tables of other authorities⁷⁵ cited in the Report's commentary. Section 2 of S.704 contains a Reconciliation Table,⁷⁶ which shows how provisions of the current South Carolina Code would be affected by enactment of the SCPC.⁷⁷ The table shows whether the current provision would be repealed or retained under the SCPC and provides a reference to the relevant sections of the SCPC.

The tabular and explanatory information contained in the SCPC Report, the sensible internal arrangement of the SCPC's subject matter, and its proposed consolidation of the probate law into one place within the South Carolina Code indicate that the enactment of the SCPC should improve access to, and understanding of, the probate law. The improved organization should also reduce the costs in time and money required to discover and apply the law.

personal representative's duties and powers; parts 9 and 10 govern the closing of the administration of the estate; and parts 11, 12, and 13 relate to special circumstances. *See generally* S.704, *supra* note 1, at Reporter's Comments on art. III, pts. 1-13. To compare the organization of existing South Carolina law, see S.704, *supra* note 1, at 442 (Table C).

65. *See supra* note 12 and accompanying text.

66. *See, e.g.*, S.704, *supra* note 1, at 30-31 (Reporter's Comments on Art. II).

67. *See, e.g.*, *id.* at 31-36 (Reporter's Comments on art. II, pts. 1-9).

68. *See, e.g.*, *id.* at 43-47 (Reporter's Comments on art. II, pt. 1, § 2-103).

69. *See, e.g.*, *id.* at 1-6 (Summary Table of Contents); 8-9 (Art. I Table of Contents).

70. *See, e.g.*, *id.* at 387-88 (Art. I, Table A).

71. *See, e.g.*, *id.* at 389-90 (Art. I, Table B).

72. *See, e.g.*, *id.* at 391-92 (Art. I, Table C).

73. *See, e.g.*, *id.* at 393-94 (Art. I, Table D).

74. *See, e.g.*, *id.* at 395 (Art. I, Table E).

75. *See, e.g.*, *id.* at 396 (Art. I, Table F).

76. S.704, *supra* note 1, at 504-46 (Reconciliation Table).

77. The Reconciliation Table compares the SCPC with S.C. CODE ANN. tits. 14, 15, 18, 21, 27, 32, 34, 44.

B. Clarity

The wording of many South Carolina probate statutes does not adequately predict the effects of the statutes. Problems may arise because the statute is archaic, is affected by uncodified case law, is contradicted by other statements in the statutes, has been held unconstitutional, or because the statute fails to answer questions easily raised but not yet answered by case law. The draftsmen of the SCPC have attempted to clarify the statement of the probate law to correct many of these statutory deficiencies.

1. Archaism

The statutes concerning creditors' claims against decedents' real property contain an example of archaism in current South Carolina probate law. Even a careful reading of current South Carolina Code section 21-7-440, titled "Wills fraudulent as against creditors," with Code sections 21-17-10 through 21-17-110, titled "Liability of Heirs and Devisees," would leave many lawyers and most laymen with questions concerning the general thrust of these provisions, not to mention the detailed operation of the statutes.

These statutes have two major problems. Their poorly arranged codification complicates an archaic statement. Most of the wording of these statutes is directly derived from one ancient source, the English Statute of Fraudulent Devises, enacted by Parliament in 1692.⁷⁸ However, three sections of the current probate law are derived from the English Statute of Frauds, enacted in 1677.⁷⁹ Section 21-7-440⁸⁰ reveals the general thrust of these provisions. Realty as well as personalty is subject to the

78. Statute of Fraudulent Devises, 3 & 4 W. & M., ch. 14 (1692)(received into the law of South Carolina in 1712; see II S.C. Stat. at Large 533 (1837)). Provisions in current probate law that correspond to the English Statute of Fraudulent Devises are S.C. CODE ANN. §§ 21-7-440, 21-17-10, 21-17-20, 21-17-30, 21-17-40, 21-17-50, 21-17-60, 21-17-90, and 21-17-110 (1976), which derive, respectively, from Articles II, III, III, V, V, VI, VII and IV of the English statute.

79. Statute of Frauds, 29 C.2, ch. 3 (1677)(received into the law of South Carolina in 1712; see II S.C. Stat. at Large 525 (1837)). Provisions in current probate law that correspond to this English statute are S.C. CODE ANN. §§ 21-17-70, 21-17-80, and 21-17-100 (1976), which derive, respectively, from Articles X, XII and XI of the English statute.

80. S.C. CODE ANN. § 21-7-440 (1976).

claims of a decedent's creditors.⁸¹ Unfortunately, section 21-7-440 is divorced from its true context⁸² and, furthermore, the section retains the archaic language of 1692, "wills . . . concerning any lands . . . shall be deemed . . . as against a creditor . . . to be fraudulent and clearly, absolutely and utterly void, frustrate and of no effect. . . ."⁸³ By contrast, the SCPC simply and clearly states that, "Upon the death of a person, his real property devolves . . . subject to exempt property, to rights of creditors and to administration."⁸⁴ The SCPC thus avoids verbosity and possible confusion.

The SCPC also eliminates archaism in codification. Chapter 17 of Title 21 of the South Carolina Code is a jumble of archaically stated ideas, subsidiary to the main point that realty is subject to creditors' claims. Untangled, the chapter protects the claims of creditors arising out of "bonds or other specialites"⁸⁵ that are asserted against the debtor-decedent's realty.⁸⁶ Chapter 17 also establishes the usual order of priorities among creditors,⁸⁷ with a startling exception favoring children of the decedent protected by marriage contracts or prenuptial agreements.⁸⁸ The SCPC logically and conveniently restates as much of this material as should be restated.⁸⁹

Another significant example of archaism that would be eliminated by the SCPC is found in the current South Carolina intestacy statutes,⁹⁰ particularly section 21-3-20, the progenitors of which were the 1670 English Statute of Distribution⁹¹ and the

81. *Id.*

82. The proper context of § 21-7-440 is S.C. CODE ANN. tit. 21, ch. 17, which concerns creditors' claims.

83. S.C. CODE ANN. § 21-7-440 (1976).

84. See S.704, *supra* note 1, at art. III, pt. 1, § 3-101.

85. See S.C. CODE ANN. §§ 21-17-10, 21-17-20, 21-17-50, 21-17-60 (1976).

86. The relevant property includes the debtor-decedent's life estates *pur autre vie*, see S.C. CODE ANN. § 21-17-80 (1976), and the proceeds of the sale of his realty, see *id.* §§ 21-17-30 and 21-17-90, but does not include the decedent's survivors' own assets, *id.* § 21-17-100.

87. S.C. CODE ANN. § 21-17-40 (1976).

88. *Id.* §§ 21-17-110, 21-7-440.

89. See S.704, *supra* note 1, at art. III, pt. 1, § 3-101; *id.* at art. III, pt. 8, §§ 3-801 to -816.

90. S.C. CODE ANN. §§ 21-3-10 to -40 (1976).

91. Statute of Distribution, 22 & 23 C.2, ch. 10 (1670)(received into the law of South Carolina in 1712; see II S.C. Stat. at Large 523 (1837)).

South Carolina Statute of Descent and Distribution of 1791.⁹² Currently, section 21-3-20 of the South Carolina Code is difficult to read,⁹³ requires highly sophisticated interpretation,⁹⁴ and raises questions that it fails to answer.⁹⁵ The SCPC makes a clearer statement in its proposed reform of the law of intestacy.⁹⁶

2. Uncodified Case Law

Title 21 of the South Carolina Code does not purport to codify all the probate law of South Carolina. Court decisions form much of the existing probate law. The SCPC, however, makes significant progress in collecting case law into a well stated and well organized code.⁹⁷

An example of a recent, prominent decision that would be codified by the SCPC⁹⁸ is *Moultis v. Degen*.⁹⁹ In *Moultis*, the South Carolina Supreme Court construed the current short statute of limitations on claims of creditors asserted against a decedent's estate to apply to tort claims, except to the extent that such tort claims are covered by liability insurance available to the decedent's personal representative.¹⁰⁰

92. Statute of Descent and Distribution of 1791, V S.C. Stat. at Large 162 (1839). This statute has been amended seven times since 1791. See V S.C. Stat. at Large 304 (1839)(amended in 1797); VI S.C. Stat. at Large 284 (1839)(amended in 1826); 1920 S.C. Acts 873; 1945 S.C. Acts 313; 1949 S.C. Acts 281; 1955 S.C. Acts 309; 1964 S.C. Acts 2181.

93. The statute is verbose and repetitive. See, e.g., S.C. CODE ANN. § 21-3-20(2)-(4), (7)-(9) (1976).

94. The basic division of an estate between a spouse and descendants other than children requires a very careful reading of § 21-3-20(1) and its use of the terms "child" and "children." See S.C. CODE ANN. § 21-3-20(1)(1976). The statute would be clearer if the terms "stock" and "stocks" were used.

95. One unanswered question is how lineal ancestors would share property among themselves under § 21-3-20(5). See S.C. CODE ANN. § 21-3-20(5)(1976).

96. See S.704, *supra* note 1, at art. II, pt. 1, §§ 2-101 to -103, 2-106.

97. For some examples of codification of case law, see *id.* at art. II, pt. 1, § 2-108 (intestate succession by posthumously born persons); *id.* at art. II, pt. 1, § 2-110 (advancements against intestate shares); *id.* at art. II, pt. 5, § 2-509 (incorporation by reference); *id.* at art. II, pt. 5, § 2-511 (facts of independent significance); *id.* at art. II, pt. 6, § 2-609 (construction of family relationship terminology); *id.* at art. II, pt. 7, § 2-701 (contracts concerning succession).

98. See *id.* at art. III, pt. 8, § 3-803.

99. 279 S.C. 1, 301 S.E.2d 554 (1983).

100. *Id.* at 7-9, 301 S.E.2d at 558-59 (construing S.C. CODE ANN. § 21-15-640 (1976)).

3. Unconstitutionality

The draftsmen of the SCPC have attempted to eliminate from the probate law statutes that have been held unconstitutional. The current South Carolina statutory law on dower¹⁰¹ would, therefore, be repealed under the SCPC.¹⁰² The dower statutes were recently held unconstitutional in *Boan v. Watson*.¹⁰³ Similarly, the SCPC deletes state statutes that bar persons born out of wedlock from sharing in intestate succession from their paternal relatives. These statutes were recently held unconstitutional in *Wilson v. Jones*.¹⁰⁴ Finally, the SCPC rules governing the eligibility of nonresident corporations to serve as trustees in South Carolina¹⁰⁵ were drafted with attention to cases that have put into constitutional limbo parts of the current South Carolina Code.¹⁰⁶

4. Contradiction

A few current South Carolina Code provisions are self-contradictory. For example, in cases of homicide of the decedent by a prospective beneficiary of the decedent's estate, current Code section 21-1-50 orders the redirection of the benefit of the estate not only to "vest in . . . the estate of the person unlawfully killed," but also to be "immediately take[n]" by the killer's children, provided the latter would have been heirs of the decedent if the killer had predeceased the decedent.¹⁰⁷ Neither of these contradictory redirections of benefit necessarily renders the appropriate result. The SCPC eliminates the contradiction by redirecting the estate's benefit so that it passes as it would have

101. S.C. CODE ANN. §§ 21-5-10 to -990 (1976).

102. The SCPC would incorporate the South Carolina Bar's November 1979 draft version of the Uniform Probate Code provisions for an elective share of a surviving spouse as a replacement for dower. See Report, *supra* note 1; November 1979 draft, *supra* note 7. Cf. UNIFORM PROBATE CODE, *supra* note 4, §§ 2-201 to -207.

103. 281 S.C. 516, 316 S.E.2d 401 (1984).

104. 281 S.C. 230, 314 S.E.2d 341 (1984)(holding unconstitutional S.C. CODE ANN. § 21-3-30 (1976)); see S.704, *supra* note 1, at art. II, pt. 1, § 2-109.

105. See S.704, *supra* note 1, at art. VII, pt. 2, § 7-207.

106. See *American Trust Co. v. S.C. State Board of Bank Control*, 381 F. Supp. 313 (D.S.C. 1974)(affecting the last paragraph of S.C. CODE ANN. § 21-29-40(a)(3) (1976)); *Dunn v. North Carolina National Bank*, 276 S.C. 202, 277 S.E.2d 143 (1981)(affecting S.C. CODE ANN. § 21-29-40(a)(4) (1976)).

107. S.C. CODE ANN. § 21-1-50 (1976).

passed had the killer predeceased the decedent.¹⁰⁸

5. *Incomplete Coverage*

Existing South Carolina probate statutes are sometimes drafted too narrowly to resolve problems that arise under such statutes. Examples of provisions historically insufficient in this respect include the current South Carolina Code sections expressly protecting banking institutions that make payments from accounts held in joint names.¹⁰⁹

Joint bank accounts create three distinct types of legal relationship—the relationship between the bank and each of the joint signatories, the relationship between the signatories themselves, and the relationship between the signatories and their cosignatories' creditors. Existing South Carolina statutory law explicitly covers only one of these relationships.¹¹⁰ The SCPC covers all three.¹¹¹

Elimination of these and other instances of incompleteness of coverage, self-contradiction, unconstitutionality, insufficient codification and archaism should make the SCPC superior to the current South Carolina statutory probate law in the clarity of its statement, and in the ease, certainty, and relative cost of its application.

C. *Reform*

Reform of the content of parts of current South Carolina probate law is in order. At points, the substantive law is in disharmony with the desires and expectations of those whose interests are sought to be served by that law. The procedural law is sometimes cumbersome, time consuming, and expensive to use. The SCPC would significantly reform the probate law of South

108. See S.704, *supra* note 1, at art. II, pt. 8, § 2-803(a).

109. See S.C. CODE ANN. §§ 34-11-10, 34-25-80 (1976).

110. *Id.* Neither statute expressly regulates the relationship between the signatories or the relationship between their creditors and their cosignatories. These aspects of the joint bank account form of ownership have been left to regulation by case law. See *Clinkscales v. Clinkscales*, 275 S.C. 308, 270 S.E.2d 715 (1980); *Johnson v. Herrin*, 272 S.C. 224, 250 S.E.2d 334 (1978); *Gilford v. South Carolina National Bank*, 257 S.C. 374, 186 S.E.2d 258 (1972); *Austin v. Summers*, 237 S.C. 613, 118 S.E.2d 684 (1961); *Hawkins v. Thackston*, 224 S.C. 445, 79 S.E.2d 714 (1954).

111. See S.704, *supra* note 1, at art. VI, pt. 1.

Carolina.

1. *Substantive Law*

Many of the rules that govern to whom, and in what shares, a decedent's estate passes at death would undergo reform if the SCPC is enacted. The SCPC attempts to state such rules in the form that will effectuate the probable intentions and expectations of the greatest number of contemporary decedents. For example, the rules of intestate succession would be changed under the SCPC to more fully favor a decedent's surviving spouse over a decedent's issue¹¹² and over a decedent's other relatives.¹¹³ Among issue of the decedent who are related to the decedent in different generations, representative sharing is accomplished on a per capita basis with per capita representation.¹¹⁴ Heirs must survive the decedent by five days to share in the decedent's estate.¹¹⁵ These, and several other reforms of the intestacy rules,¹¹⁶ should more closely approximate the probable wishes of the modern intestate decedent.

The rules governing the contents, execution, construction, and revocation of wills would be reformed under the SCPC to increase the frequency of the effectuation of the testator's intentions. Written wills under the SCPC would require only two witnesses,¹¹⁷ and could validly refer to an unwitnessed writing directing the disposition of certain tangible personal property.¹¹⁸

112. *Id.* at art. II, pt. 1, § 2-102(2)(spouse never takes less than one-half the estate). This compares to the current law which provides the spouse with a minimum of one-third of the estate. *See* S.C. CODE ANN. § 21-3-20(1)(1976).

113. The spouse never shares with anyone other than issue. *See* S.704, *supra* note 1, at art. II, pt. 1, § 2-102(1). Existing law mandates extensive sharing. *See* S.C. CODE ANN. § 21-3-20(2)-(6)(1976).

114. Those in the nearest degree take, per capita, equal shares, while those in the more remote degrees take, by representation, the share that their deceased ancestor in the nearest degree would have taken if the ancestor had survived the decedent. The more remote issue take their deceased ancestor's equal share, in turn, per capita with per capita representation. *See* S. 704, *supra* note 1, at art. II, pt. 1, §§ 2-106, 2-103(1). The current law provides for strict per stirpital sharing among issue. *See* S.C. CODE ANN. § 21-3-20(1)(1976).

115. S.704, *supra* note 1, at art. II, pt. 1, § 2-104. There is no such requirement in current law.

116. *See, e.g., id.* at art. II, pt. 1, §§ 2-103(2), 2-109(2), 2-110.

117. *Id.* at art. II, pt. 5, § 2-502. South Carolina law currently requires three witnesses for written wills. S.C. CODE ANN. § 21-7-50 (1976).

118. *See* S.704, *supra* note 1, at art. II, pt. 5, § 2-512.

Oral wills, however, would no longer be valid.¹¹⁹ An expanded and clarified antilapse rule¹²⁰ would more often preserve wills' gifts against the unexpected predecease of the named donee. Specific devises under the SCPC would be charged with encumbrances existing at the date of death.¹²¹

Another reform that would be accomplished by the SCPC touches the South Carolina law that regulates the disposition of assets held in multiple-party bank accounts. The SCPC would regulate these funds' beneficial ownership by living parties, contributing and noncontributing.¹²² Ownership would be shared in proportion to the individual net contributions made by or for each owner.¹²³ These SCPC regulations thus would overturn the South Carolina Supreme Court decision of *Clinkscapes v. Clinkscapes*.¹²⁴ *Clinkscapes* held that a contributing husband is presumed to intend to make an immediate gift to his cosignatory wife of one-half of each of his deposits of funds into any joint account.¹²⁵ Under *Clinkscapes*, a cosignatory wife has a right, against the husband, to withdraw that one-half, presumably leaving the husband the right, against the wife, to withdraw only the other one-half.¹²⁶

Finally, the SCPC's reform measures also include the validation of P.O.D. (payable on death)¹²⁷ and Totten Trust accounts,¹²⁸ as well as other written nontestamentary devices that have dispositive effects at death.¹²⁹ Again, these measures would tend to carry out the wishes of decedent property owners.

119. Compare S.C. CODE ANN. § 21-7-60 (1976)(soldiers' and mariners' wills) and *id.* §§ 21-7-1110 to -1140 (nuncupative wills).

120. See S.704, *supra* note 1, at art. II, pt. 6, § 2-603. Compare S.C. CODE ANN. §§ 21-7-470, 21-1-50 (1976).

121. See S. 704, *supra* note 1, at art. II, pt. 6, § 2-607. Compare *Henagan v. Harlee*, 31 S.C. Eq. (10 Rich. Eq.) 286 (1858)(court permits exoneration, out of residuary estate, from encumbrances as to gifts of realty); *Lawton v. Hunt*, 25 S.C. Eq. (4 Rich. Eq.) 233 (1852)(court permits exoneration, out of residuary estate, from encumbrances as to gifts of personalty).

122. See S.704, *supra* note 1, at art. VI, pt. 1, § 6-103.

123. *Id.* §§ 6-103, 6-101(6).

124. 275 S.C. 308, 270 S.E.2d 715 (1980).

125. *Id.* at 311, 270 S.E.2d at 716.

126. *Id.* at 311-12, 270 S.E.2d at 716.

127. See S.704, *supra* note 1, at art. VI, pt. 1, § 6-104(b).

128. *Id.* at art. VI, pt. 1, § 6-104(c).

129. *Id.* at art. VI, pt. 2, § 6-201.

2. *Procedural Law*

The SCPC would also significantly affect procedural probate law. Changes in procedural law under the SCPC are designed to reduce the complexity of and costs associated with probate procedures.

Under the SCPC, probate procedures would generally be concentrated in the hands of the probate courts. The SCPC grants the probate court exclusive and original jurisdiction over decedents' estates, will construction, protection of minors and incapacitated persons, and the internal matters of trusts.¹³⁰ The SCPC also provides for jury trials in the probate court.¹³¹ It gives the probate court, and any party in a proceeding, the right to have the proceeding removed to the circuit court for processing,¹³² and allows the appeal of probate court decisions to the circuit court.¹³³

The SCPC would thus simplify existing law by granting broad jurisdiction to the probate court. It would also create more flexibility by providing the option to easily remove trusts and estates matters to the circuit court.

Under the SCPC, the administration of a decedent's estate by a personal representative, under the supervision of the probate court,¹³⁴ would also be simpler, quicker, and less expensive. Whether in the probate of a will or in intestacy, administration of the estate may be initiated either through informal proceedings with reduced notice, hearing and proof requirements¹³⁵ or through formal proceedings with enhanced notice, hearing and proof requirements.¹³⁶ Parties may select the type of proceedings most convenient to the needs of the estate.¹³⁷ This selection of

130. *Id.* at art. I, pt. 3, § 1-302(a)(1)-(3); art. III, pt. 1, § 3-105; art. VII, pt. 2, § 7-201. For treatment of external matters concerning trusts as to which the probate and circuit courts have concurrent jurisdiction, see *id.* at art. VII, pt. 2, § 7-204. For a discussion of whether the probate court currently has jurisdiction over all of these matters, see Karesh, *Probate Court Jurisdiction Over Testamentary Trusts*, 2 S.C.L.Q. 13 (1949).

131. See S.704, *supra* note 1, at art. I, pt. 3, § 1-306.

132. *Id.* § 1-302(c).

133. *Id.* § 1-308.

134. *Id.* at art. III, pt. 1, § 3-105; art. III, pt. 7, § 3-704.

135. *Id.* at art. III, pt. 3, §§ 3-303, 3-306, 3-308, 3-310.

136. *Id.* at art. III, pt. 4, §§ 3-403, 3-405, 3-406.

137. Administration under the extraordinarily close supervision of the probate court is also available. *Id.* at art. III, pt. 5. See also *id.* at art. III, pt. 12 (summary administra-

proceedings is roughly equivalent to the choice available under the existing South Carolina probate law between probate of a will in common form¹³⁸ and probate of a will in solemn or due form of law.¹³⁹ Differences do exist, however. Currently there is no such choice provided for intestate estates.¹⁴⁰ Furthermore, the SCPC provisions¹⁴¹ are more detailed than the comparable provisions in the existing law.¹⁴²

The SCPC rules on the qualification, rights, powers, duties and liabilities of personal representatives are contained in numerous sections that describe in depth the core of the administration process.¹⁴³ The coverage is comprehensive and clear. The SCPC squarely places responsibility for the proper administration of the estate upon the shoulders of the personal representative. Under the SCPC, property in a decedent's estate devolves automatically to the appropriate successors, without the requirement of a specific instrument of transfer.¹⁴⁴ This occurs, however, subject to the prompt administration and settlement of the estate.¹⁴⁵ Meanwhile, the SCPC would require the personal representative to qualify,¹⁴⁶ to carefully perform his duties¹⁴⁷ and exercise his powers,¹⁴⁸ and to protect the interests of the decedent's creditors¹⁴⁹ and the interests of the successors who are entitled to the estate¹⁵⁰ before closing out the estate with an accounting.¹⁵¹ A will must be probated to be effective under the SCPC.¹⁵² Furthermore, the appointment of a personal representative is required for an estate's administration¹⁵³ and to permit

tion of very small estates).

138. S.C. CODE ANN. §§ 21-7-610, 21-7-620, 21-7-630 (1976).

139. S.C. CODE ANN. §§ 21-7-610, 21-7-640, 21-7-650 (1976).

140. S.C. CODE ANN. § 21-15-90 (1976).

141. See S. 704, *supra* note 1, at art. III, pts. 3-4.

142. See S.C. CODE ANN. §§ 21-7-610 to -960, 21-15-10 to -150 (1976).

143. See S.704, *supra* note 1, at art. III, pts. 6-11 & 13.

144. *Id.* at art. III, pt. 1, § 3-101.

145. *Id.*

146. *Id.* at art. III, pt. 6, § 3-601; art. III, pt. 2, § 3-203.

147. *Id.* at art. III, pt. 7, §§ 3-703, 3-705, 3-709.

148. *Id.* at art. III, pt. 7, §§ 3-710 to -721; art. III, pt. 11, §§ 3-1101 to -1102; art. III, pt. 13, §§ 3-1301 to -1312.

149. *Id.* at art. III, pt. 8, §§ 3-801 to -816.

150. *Id.* at art. III, pt. 9, §§ 3-902 to -916.

151. *Id.* at art. III, pt. 10, §§ 3-1001 to -1008.

152. *Id.* at art. III, pt. 1, § 3-102.

153. *Id.* § 3-103.

the assertion of creditors' claims against an estate.¹⁵⁴

All of the administrative acts must be accomplished within periods fixed by statutes of limitation.¹⁵⁵ Otherwise, each proceeding before the probate court on matters such as the probate of the will, appointment of the personal representative, construction of the will, determination of the heirs in intestacy, allowance of claims of creditors, and approval of accountings and of distributions, is independent of the other.¹⁵⁶ These proceedings may be brought separately or together and generally may be brought or avoided according to the needs of the estate.¹⁵⁷

The details of the SCPC system of decedents' estate administration differ in several respects from those of existing South Carolina law.¹⁵⁸ However, the SCPC system would reform the current South Carolina probate law most importantly by way of its organized, clear, detailed description of the process of decedents' estate administration.¹⁵⁹ This system of administration, coupled with the expansion of the jurisdiction of the probate court, should reduce the costs of trusts and estates procedures.

D. Conclusion

The SCPC would vastly improve the organization, clarity, and substantive and procedural content of the current probate law of South Carolina. Undoubtedly, mistakes will be found among the seven articles, forty-five parts, and hundreds of sections that compose the SCPC. Such errors, however, may be corrected by revision as they come to light and as the need arises.

154. *Id.* § 3-104.

155. *Id.* §§ 3-108, 3-109; art. III, pt. 8, §§ 3-802 to -803.

156. *Id.* at art. III, pt. 1, § 3-107.

157. *Id.*

158. *See, e.g., id.* § 3-108, which establishes, for the first time in South Carolina, a period of limitations for the probate of a will (*cf. Satcher v. Grice*, 53 S.C. 126, 31 S.E. 3 (1898)); *id.* § 3-601, which dispenses with the oath formerly required of personal representatives (*cf. S.C. CODE ANN.* §§ 21-13-10, 21-13-20 (1976)); *id.* § 3-715, which establishes for the first time in South Carolina a statutory list of transactions authorized for personal representatives (*cf. S.C. CODE ANN.* §§ 21-13-310 to 21-15-1780 (1976)); *id.* § 3-804, which dispenses with the requirement of due attestation of a creditor's claim (*cf. S.C. CODE ANN.* § 21-15-630 (1976); *Southern Coatings & Chemical Co. v. Belcher*, 274 S.C. 76, 261 S.E.2d 162 (1979)).

159. *Compare S.704, supra* note 1, at art. III, pts. 6-11, §§ 3-601 to -1102 and *id.* at art. III, pt. 13, §§ 3-1301 to -1312 with *S.C. CODE ANN.* §§ 21-11-10 to 21-17-110 (1976).

