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Selective Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law

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SELECTED SUBSTANTIVE PROVISIONS OF THE SOUTH CAROLINA PROBATE CODE: A COMPARISON WITH PREVIOUS SOUTH CAROLINA LAW

S. ALAN MEDLIN*

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I. INTRODUCTION

The enactment of the South Carolina Probate Code (SCPC)¹ introduces into South Carolina law a body of statutory material far-reaching in its scope, wide-ranging in its effect, and relatively detailed (some may argue labyrinthian) in its content. The SCPC significantly affects the law governing the transfer and administration of estates, areas of legal study and practice perhaps heretofore recognized as resistant to change and modernization.² Although the Code replaces, rearranges, and complements estate law in many areas, it impacts most significantly the treatment of decedents' estates, both substantively and procedurally. This Article focuses on the changes wrought by the Code to the substantive areas concerning the transfer of dece-

1. South Carolina Probate Code, 1986 S.C. Acts 34, No. 539. This Article also refers to the South Carolina Probate Code as the "SCPC" and the "Code." The SCPC is codified at Title 62 of the South Carolina Code. References to the Code herein are to Title 62. The article and section numbers of the act correspond to the part and section numbers of Title 62. For example, a reference to S.C. CODE ANN. § 62-1-201 (1976) refers to the section found at SCPC § 1-201.

2. The historical progress of the SCPC seems to pay homage to the static tradition of trust and estate law. Based upon the Uniform Probate Code promulgated by the American Bar Association's Section of Real Property, Probate and Trust Law, the SCPC received consideration, in varying degrees of seriousness, over the last two decades. For an excellent detailed history of the Code, see LeBlanc, *The Proposed South Carolina Probate Code*, 36 S.C.L. REV. 511 (1985). For an example of the call for probate reform during the period of consideration, see Braun, *Probate Reform for South Carolina: An Introduction to the Uniform Probate Code*, 29 S.C.L. REV. 397 (1978).

dents' estates, testate and intestate, comparing the prior South Carolina law where appropriate.³

II. INTESTATE SUCCESSION: APPLICATION OF THE SYSTEM

A. *Shares of Heirs*

1. *General Policy Considerations*

The SCPC sections governing intestate succession provide for the passing of any part of a decedent's estate that is not disposed of by the decedent's will.⁴ The prior South Carolina statute of descent and distribution did not provide expressly for the situations in which it would apply.⁵

The SCPC system of distributing intestate property contemplates certain policy considerations. In any intestacy scheme the legislature presumes a dispositive preference of the intestate decedent. The state must decide which relatives of the decedent will receive the decedent's property to the exclusion of others. The SCPC essentially utilizes a parentelic system of determining which relatives should take.⁶ A parentelic method refers to a decedent's parents (and possibly other lineal ancestors, depending upon the extent the statute allows) and their issue to decide the priority of taking. Prior South Carolina law relied more on a degree-of-relationship, or consanguinity, method to determine which relatives to favor over others.⁷

Another policy consideration concerns the limit of relationship after which the state becomes a more worthy taker than a

3. The SCPC generally became effective on July 1, 1987. A number of sections of the SCPC were amended before the general effective date by 1987 S.C. Acts ___, No. 171 (S.530), also generally effective on July 1, 1987. This Article refers to the South Carolina law in effect before that date as the "prior law" or "prior South Carolina law." References herein to South Carolina Code sections not contained in Title 62 refer to statutory sections in effect prior to the effective date of the Code, some of which were repealed or reclassified by the Code as indicated.

4. S.C. CODE ANN. § 62-2-101 (1976).

5. See S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC). The 1976 codification inadvertently deleted the introductory paragraph from its predecessor, S.C. CODE ANN. § 19-52 (1962), which read as follows: "When any person shall die without disposing of the same by will his estate, real and personal, shall be distributed in the following manner:"

6. See, e.g., S.C. CODE ANN. § 62-2-103 (1976).

7. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

distant relative. A well-drafted intestacy statute prohibits the inheritance of property by the laughing heir, so called because he is too distantly related to grieve over the decedent's death but is thrilled about his windfall. The SCPC limits the possibility of a laughing heir more effectively than did prior South Carolina law.⁸ By reducing the possibility of extremely remote relatives from inheriting, the SCPC also recognizes the policy concern of streamlining resolution of title questions, particularly with respect to real property.⁹

2. *South Carolina Probate Code*

(a) *The Spouse*

The SCPC provides that the surviving spouse of the intestate decedent will receive all of the estate if no issue survive the decedent and one-half of the estate if issue survive.¹⁰

(b) *Heirs Other than the Surviving Spouse*

After determination of the share of the surviving spouse, the other heirs take the balance, if any.¹¹ These heirs take in the following order of priority and in the following proportions:

(1) The issue of the decedent take equally if they are all of the same degree of kinship. If, however, they are of unequal degree of kinship, they take by representation, a system by which certain issue of a predeceased heir take the share that predeceased heir would have taken had he survived the decedent.¹²

(2) If no issue survive, then the parents of the decedent take equally. If only one parent of the decedent survives, that parent

8. Compare S.C. CODE ANN. §§ 62-2-103, -105 (1976) with S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC). See Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935). Deciding at what point to exclude relatives from inheritance in order to prevent a windfall to the laughing heir is a policy decision that risks an overly restrictive limitation on the rights of deserving heirs.

9. See, e.g., *In re Wendel's Will*, 143 Misc. 480, 257 N.Y.S. 87 (1932). For a more scientific approach to the determination of a decedent's dispositive preferences, see Beckstrom, *Sociobiology and Intestate Wealth Transfer*, 76 NW. U.L. REV. 216 (1981).

10. S.C. CODE ANN. § 62-2-102 (1976).

11. *Id.* § 62-2-103.

12. S.C. CODE ANN. § 62-2-103(1) (1976). For a discussion of the operative elements of representation under the SCPC, see *infra* text accompanying notes 53-60.

takes all.¹³ Note that the entire estate passes at this level and at all other levels of heirs more remotely related. To reach this level, the decedent's spouse necessarily has predeceased the decedent since a surviving spouse must share only with surviving issue and otherwise takes the entire estate, leaving no remainder for heirs at this and other more remote levels.¹⁴

(3) If no issue or parent survive, the issue of the decedent's parents take by representation.¹⁵ Issue may take whether of the whole-blood or of the half-blood,¹⁶ except that if any whole-blood sibling of the decedent survives, then that sibling, or those siblings, and the issue of predeceased whole-blood siblings take to the exclusion of half-blood siblings and their issue.¹⁷ Thus, the SCPC retains in a somewhat modified form the preference under prior law for whole-blood brothers and sisters over half-blood brothers and sisters.¹⁸

(4) If no issue, parent, or issue of a parent survive, the grandparents of the decedent take equally. One-half of the estate passes to the maternal grandparent side and the other half passes to the paternal side. If more than one grandparent survives on the maternal side, the paternal side, or both, then the grandparents on that side share equally. If only one grandparent survives on the maternal side, the paternal side, or both, then that grandparent takes the entire share for that side. If no grandparent survives on the maternal side, the paternal side, or both, then the issue of the grandparents on that side take the share of that side by representation.¹⁹ If no grandparent or issue survive on the maternal side or the paternal side, then the share of that side passes to the side that does have a surviving grand-

13. S.C. CODE ANN. § 62-2-103(2) (1976).

14. See *supra* text accompanying note 10.

15. For a discussion of the operative elements of representation under the SCPC, see *infra* text accompanying notes 53-60. Collateral kindred are blood relatives of the decedent who are not ancestors or issue. Descendants of the decedent's parents (who are not issue of the decedent) are first line collateral. The SCPC system of intestate succession, being generally parentelic, prefers those kindred who are in nearer collateral lines to those in more remote collateral lines. See *supra* text accompanying notes 6 & 7.

16. Children of both parents are whole blood. Children with only one common parent are half blood.

17. S.C. CODE ANN. § 62-2-103(3) (1976). For a more detailed discussion with examples of the treatment of whole and half-blood kin under the SCPC, see *infra* text accompanying notes 61-67.

18. See *infra* text accompanying notes 61-74.

19. See *infra* subpart II.C.

parent or issue.²⁰

(5) If no issue, parent, issue of a parent, grandparent, or issue of a grandparent survive, then the great-grandparents of the decedent take equally. One-half of the estate passes to the maternal great-grandparent side and the other half passes to the paternal side. If more than one great-grandparent survives on the maternal side, the paternal side, or both, then the great-grandparents on that side share equally. If only one great-grandparent survives on the maternal side, the paternal side, or both, then that great-grandparent takes the entire share for that side. If no great-grandparent survives on the maternal side, the paternal side, or both, then the issue of the great-grandparents on that side take the share of that side by representation.²¹ If no great-grandparent or issue survive on the maternal side or the paternal side, then the share of that side passes to the side which does have a surviving great-grandparent or issue.²²

(6) If no issue, parent, issue of a parent, grandparent, issue of a grandparent, great-grandparent, or issue of a great-grandparent survive, then the stepchildren²³ of the decedent take equally.²⁴ Surviving issue of predeceased stepchildren take by representation.²⁵

(7) If no issue, parent, issue of a parent, grandparent, issue of a grandparent, great-grandparent, issue of a great-grandparent, stepchild, or issue of a stepchild survive, then the estate escheats to the State of South Carolina.²⁶

3. *Prior South Carolina Law*

(a) *The Spouse*

Prior South Carolina law provided that the share of the surviving spouse depended upon whether certain other classes of

20. S.C. CODE ANN. § 62-2-103(4) (1976).

21. See *infra* subpart II.C.

22. S.C. CODE ANN. § 62-2-103(5) (1976).

23. A stepchild is the child of decedent's spouse but not the child of decedent. S.C. CODE ANN. § 62-1-201(40) (1976).

24. *Id.* § 62-2-103(6).

25. See *infra* subpart II.C.

26. S.C. CODE ANN. § 62-2-105 (1976).

heirs also survived the decedent.²⁷

The spouse received one-third of the estate if more than one child either survived the decedent or predeceased the decedent but left issue surviving at the time of the intestate's death.²⁸ The spouse received one-half²⁹ of the estate if only one child survived the decedent or if no child survived the decedent but issue of only one child survived the intestate.³⁰ If no children or issue survived the decedent, the surviving spouse received one-half the estate if any of the following classes of heirs survived the decedent: Father, mother, whole-blood sibling, child of whole-blood sibling (*i.e.*, whole-blood niece or nephew), half-blood sibling, or lineal ancestor.³¹ The surviving spouse inherited the entire estate only if none of these heirs survived the decedent.³²

(b) *Heirs Other than the Surviving Spouse*

After determination of the share of the surviving spouse, the other heirs took the balance, if any.³³ These heirs took in the following order of priority and in the following proportions:

(1) If only one child (or issue of only one child) survived the decedent, that child, or his issue, took the balance of the estate (one-half if the decedent's spouse survived, and all if no surviving spouse). If more than one child survived the decedent or left issue surviving the decedent, those children or their issue divided the balance of the estate (two-thirds if the decedent's spouse survived; all if no surviving spouse).³⁴ The methodology

27. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

28. *Id.*

29. Section 21-3-20 (repealed by the SCPC) referred to a moiety, which is equivalent to one-half of the intestate estate.

30. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

31. *Id.*

32. *Id.* The SCPC generally allows the surviving spouse to take a greater share of the intestate estate, since the share of that spouse is never less than one-half and is divided with other heirs in far fewer situations (only with surviving children or issue) than under prior law. *See supra* text accompanying note 10. Consequently, as to spousal inheritance, the SCPC appears to reflect more accurately the expectations of many laymen. *See* Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1078-1100 (1978); *see also* LeBlanc, *supra* note 2, at 525; Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1929).

33. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

34. *Id.*

of representation determined whether and to what extent issue would share in the estate.³⁵

(2) If no child or issue survived, then the surviving father, mother, and whole-blood siblings of the intestate took equal shares.³⁶ The prior statute of descent and distribution allowed limited representation at this level: children (but no other issue) of predeceased whole-blood siblings could take the share their parent would have taken had that parent survived the intestate.³⁷ If no parent or whole-blood sibling survived, any child representing a whole-blood sibling would have to share with any surviving half-blood brother or sister of the intestate.³⁸

(3) If no child or issue of a child, parent, or brother or sister of the whole blood survived, then the half-blood siblings divided the estate equally, but had to share with any children of whole-blood siblings.³⁹ Unlike a whole-blood niece and nephew, however, a half-blood niece or nephew of the intestate could not take the share his or her parent would have taken had that parent survived.⁴⁰ If half-blood siblings had to share with children of whole-blood siblings, each took per stirpes.⁴¹ For example, if the intestate were survived by two half-blood siblings and two whole-blood nephews (the sons of a predeceased whole-blood brother), each half-blood sibling would take one-third of the estate while each whole-blood nephew would inherit one-sixth.⁴²

35. *Stent v. M'Leod*, 7 S.C. Eq. (2 McCord Eq.) 354 (1827). For a discussion of the operative elements of representation under prior South Carolina law, see *infra* text accompanying notes 55-59.

36. S.C. CODE ANN. § 21-3-20(2) (1976) (repealed by the SCPC). Prior South Carolina law preferred whole-blood kin over half-blood kin at this level. For a discussion of the treatment of half-blood kin under prior South Carolina law, see *infra* text accompanying notes 68-74.

37. S.C. CODE ANN. § 21-3-20(2), (3) (1976) (repealed by the SCPC).

38. *Id.* § 21-3-20(4) (repealed by the SCPC); see *infra* text accompanying notes 68-74.

39. S.C. CODE ANN. § 21-3-20(4) (1976) (repealed by the SCPC).

40. S.C. CODE ANN. § 21-3-20 (1976) maintained a discrimination for whole blood and half blood at the niece and nephew level as well.

41. For a discussion of the treatment of half-blood kin under prior South Carolina law, see *infra* text accompanying notes 68-74.

42. The statute divided the shares to be taken by these heirs into the number of the intestate's half-blood siblings plus the number of predeceased whole-blood siblings who left surviving children. The half-blood siblings each took a share. The whole-blood nieces and nephews each divided the share their parent (the whole-blood sibling) would have taken had he or she survived. *Felder v. Felder*, 26 S.C. Eq. (5 Rich. Eq.) 509 (1853). This led to an interesting result, since one simplified view of representation is that it allows a

(4) If no child or issue of a child, parent, whole-blood sibling or child thereof, or brother or sister of the half-blood survived, then lineal ancestors shared the estate equally.⁴³

(5) If no child or issue of a child, parent, whole-blood brother or sister or child thereof, half-blood sibling, or lineal ancestor survived, then the uncles and aunts of the decedent took equal shares of the estate. Prior law allowed limited representation at this level: children, but no other issue, of a predeceased uncle or aunt could take the share their parent would have taken had that parent survived the intestate.⁴⁴ Note that for an heir at this and more remote levels to share in the estate, the decedent's spouse necessarily predeceased the decedent. If the decedent's spouse had survived, heirs at this and more remote levels would not have shared in the estate; the spouse would have taken all.⁴⁵

(6) If no child or issue of a child, parent, whole-blood sibling or child thereof, half-blood sibling, lineal ancestor, or uncle or aunt or child of an uncle or aunt survived, then the nearest next-of-kin took equally.⁴⁶ All next-of-kin of the nearest equal degree of proximity shared. Any next-of-kin of more remote degree did not inherit. The degree-of-relationship, or consanguinity, method determined the proximity of the next-of-kin.⁴⁷

(7) If no child or issue of a child, parent, whole-blood sibling or child thereof, half-blood sibling, lineal ancestor, uncle or aunt or child of an uncle or aunt, or next-of-kin survived, then any stepchildren of the decedent divided the estate equally.⁴⁸

(8) If no child or issue of a child, parent, whole-blood sibling or child thereof, half-blood sibling, lineal ancestor, uncle or aunt or child of an uncle or aunt, next-of-kin, or stepchild survived, the estate escheated to the State.⁴⁹

descendent of a predeceased "heir" to take the share that heir would have taken had he or she survived. In this example, however, had the nephews' father survived, he would not have had to share the estate with any half-blood siblings. For a discussion of half and whole-blood siblings, see *infra* text accompanying notes 61-74.

43. S.C. CODE ANN. § 21-3-20(5) (1976) (repealed by the SCPC).

44. *Id.* § 21-3-20(6) (repealed by the SCPC).

45. See *supra* text accompanying notes 31-32.

46. S.C. CODE ANN. § 21-3-20(6) (1976) (repealed by the SCPC).

47. *Simonton v. Edmunds*, 202 S.C. 397, 25 S.E.2d 284 (1943).

48. S.C. CODE ANN. § 21-3-20(10) (1976) (repealed by the SCPC).

49. S.C. CODE ANN. §§ 21-3-20 (repealed by the SCPC), 27-19-10 to -30 (1976); see *Gibson v. Rikard*, 143 S.C. 402, 141 S.E. 726 (1927).

B. Survivorship

The SCPC requires that an heir survive the decedent by 120 hours in order to take an intestate share. The heir (or, in the usual case, the heir's successor) carries the burden of proving compliance with the survivorship requirement. The survivorship requirement is not applicable, however, where the intestate estate would escheat.⁵⁰ For example, assume that the intestate dies twenty-four hours before his stepchild, who would have been his only heir under the SCPC's intestacy scheme. If the SCPC treated the stepchild as predeceased, the State would take the entire estate.⁵¹ The survivorship requirement would not apply.

Prior South Carolina law did not impose a survivorship requirement of a stated length of time, but did, of course, require an heir to survive the decedent for some time period, although perhaps only an instant, in order to inherit.⁵²

50. S.C. CODE ANN. § 62-2-104 (1976). The survivorship requirement of this section also applies to the exempt property set aside, *see infra* text accompanying note 240, but not to testate or anti-lapse situations, nor does the SCPC version of the Uniform Simultaneous Death Act, codified at S.C. CODE ANN. §§ 62-1-501 to -508 (1976), contain a 120-hour survivorship requirement. *Cf.* UNIF. PROB. CODE § 2-601, 8 U.L.A. 128 (1983) (requiring a devisee to survive the testator by 120 hours); *id.* § 2-605 (also containing a 120-hour survivorship requirement).

The SCPC 120-hour survivorship requirement only for intestate estates and the exempt property set aside, but not for testate, anti-lapse, or Uniform Simultaneous Death Act purposes, can lead to inconsistent dispositive results.

For example, Testator (T) leaves a will which has only one dispositive provision: One item thereof devises Blackacre (titled solely in T's name) to her husband (H). The will contains no residuary clause. At her death, T also owns Whiteacre (titled solely in T's name). T and H die in a car accident, with H surviving T by one hour. After both deaths, T's only heir is her brother (B); H, who dies intestate, is survived only by his sister (S). Since H survives T, he takes Blackacre under the will. At H's death, Blackacre passes to S. Because T's will did not dispose effectively of Whiteacre, it passes by intestacy. The 120-hour survivorship requirement prevents H from taking as an heir. B takes Whiteacre.

In situations where anti-lapse, exempt property set aside, and the Uniform Simultaneous Death Act provisions also apply, the dispositive result can be even more confusing. *See generally* S.C. CODE ANN. §§ 62-1-501 to -508 (1976).

51. S.C. CODE ANN. § 62-2-105 (1976).

52. *See* Nolf v. Patton, 114 S.C. 323, 103 S.E. 528 (1920); Pell v. Ball, 15 S.C. Eq. (Chev. Eq.) 99 (1840). *See also* the prior South Carolina version of the Uniform Simultaneous Death Act, S.C. CODE ANN. §§ 21-9-10 to -80 (1976), which has been re-codified by the SCPC at S.C. CODE ANN. §§ 62-1-501 to -508 (1976).

C. Representation

The SCPC provides for unlimited representation. When an heir predeceases the intestate, his issue take the share he would have taken if he had survived the decedent.⁵³ Calculation and division of shares is made according to the per capita with per capita representation method. The estate is divided only at a generational level at which there is a living taker. Once the generational level of division is determined, the number of shares into which the division at that level is made equals the number of living takers at that generational level plus the number of takers at that generational level who predeceased the intestate leaving issue that survive the decedent. Issue of a predeceased taker take their shares by the same rule of determination and division.⁵⁴

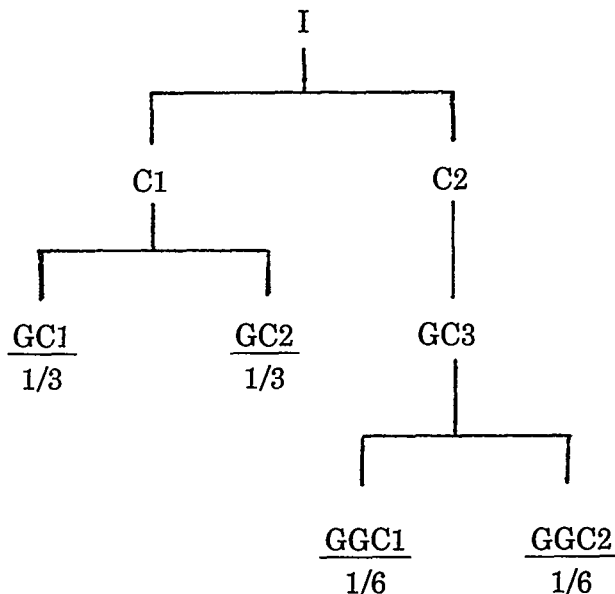
Example 1

Intestate (I) dies, survived by two grandchildren, GC1 and GC2, the children of I's predeceased child C1, and by two great-grandchildren, GGC1 and GGC2 (the children of I's predeceased grandchild GC3, the child of I's predeceased child, C2). Under the SCPC method of representation, division of the estate is made at the grandchild generational level since there is no surviving taker at the child generational level. The number of shares into which the estate is divided totals three: The number of living takers at that level (GC1 and GC2) plus the number of predeceased takers leaving surviving issue (GC3). GC1 and GC2 each take one-third of the estate. Of course, GC3 cannot inherit since she predeceased the intestate, but her children (GGC1 and GGC2), divide her share by representation.

53. S.C. CODE ANN. § 62-2-103 (1976). Used herein, the term "heir" means one who would have inherited from the intestate if he had survived the intestate.

54. S.C. CODE ANN. § 62-2-106 (1976).

Example 1



Prior South Carolina law allowed unlimited representation by issue in only one situation. Issue of predeceased children of the intestate took "the share or shares to which their parents would have been entitled had such parent survived the intestate."⁵⁵ The specific language of this section required a strict per stirpital method of representation in determining the calculation and division of shares. Under the strict per stirpes method, the estate was divided at every generational level regardless of whether there was a living taker at that generational level. The number of shares into which the division at that level was made equaled the number of living takers at that generational level plus the number of takers at that generational level who predeceased the intestate leaving issue surviving the decedent. Issue of a predeceased taker took his share by the same rule of determination and division.⁵⁶

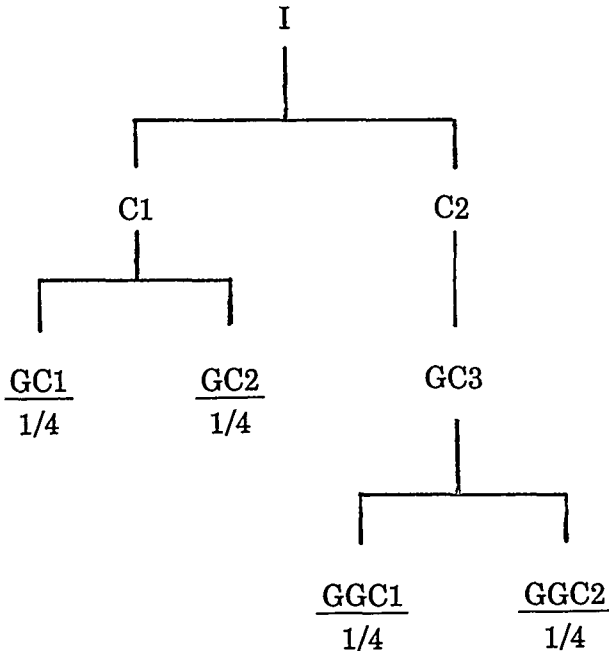
55. S.C. CODE ANN. § 21-3-20 (1) (1976) (repealed by the SCPD). Used herein, unlimited representation means that issue of a predeceased heir may take the share of that predeceased heir regardless of the generational level of the issue. Limited representation restricts representation by issue to only certain specified generational levels.

56. See *Stent v. M'Leod*, 7 S.C. Eq. (2 McCord Eq.) 354 (1827).

Example 2

Thus, under the same facts as in Example 1, prior South Carolina law provided for the strict per stirpital method of representation, with division of the estate at the child generational level even though there was no surviving taker at that generational level. The number of shares into which the estate was divided totaled two: The number of living takers at that level (none) plus the number of predeceased takers leaving surviving issue (C1 and C2). The estate was divided again at the grandchild generational level. C1's share was divided into two shares: The sum of living takers at the grandchild level (two) plus the number of predeceased takers at that level leaving surviving issue (none). GC1 and GC2 each took one-half of C1's one-half, or one-fourth of the total estate. GC3 would have taken C2's share in its entirety had she survived, but since she predeceased the intestate, her issue inherited her share. GGC1 and GGC2 each took one-half of the C2/GC3 share, or one-fourth of the entire estate.

Example 2



Prior South Carolina law allowed limited representation in only two situations.⁵⁷ Whole-blood nieces and nephews of the decedent took the share their predeceased parent (decedent's whole-blood sibling) would have taken if she had survived the intestate.⁵⁸ First cousins of the intestate took the share their parent (decedent's uncle and aunt) would have taken if he or she had survived the decedent.⁵⁹

Because the method of representation changes under the SCPC, the estate planner should be wary of a trap. If, prior to the SCPC, a lawyer has drafted a will using a shorthand term of art such as "by representation," "per stirpes," "issue," or "heirs," the result attained under the new Code may differ from the client's intent.⁶⁰

D. Half-Blood Kindred

The SCPC allows, with one exception, half-blood kindred of the decedent to take a share of the intestate estate in the same manner and share as whole-blood kindred.⁶¹ The SCPC retains, however, the preference for whole-blood siblings over half-blood siblings of the intestate.⁶² Even more intriguing, and confusing,

57. Used herein, unlimited representation means that issue of a predeceased heir may take the share of that predeceased heir regardless of the generational level of the issue. Limited representation restricts representation by issue to only certain specified generational levels.

58. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC); see *supra* text accompanying notes 37-38.

59. S.C. CODE ANN. § 21-3-20(6) (1976) (repealed by the SCPC).

60. Use of these terms may require reference to the statutory sections governing intestacy for definition. See, e.g., *Pate v. Ford*, No. 0935 (S.C. App. Apr. 13, 1987), *modified*, — S.C. —, 360 S.E.2d 145 (Ct. App. 1987), *petition for cert. filed*, No. 0935 (S.C. Sept. 21, 1987); *Bonney v. Granger*, 292 S.C. 308, 356 S.E.2d 138 (Ct. App. 1987); see also, e.g., *Alley v. Strickland*, 279 S.C. 126, 302 S.E.2d 866 (1983); *Irvin v. Brown*, 160 S.C. 374, 158 S.E. 733 (1931); *Allen v. Allen*, 13 S.C. 512 (1879); RESTATEMENT OF PROPERTY § 303 (1940). Since the SCPC changes the method of representation under intestacy, a will which uses these shorthand terms, and which was drafted under prior law, may no longer accomplish the client's objectives. The estate planner should consider specifically defining these terms to suit the particular purposes of his clients, especially when the client prefers distribution in a manner which varies from the distribution system of the intestacy provisions of the Code.

The operation of S.C. CODE ANN. § 62-2-106 (1976) in conjunction with the disclaimer provisions of S.C. CODE ANN. § 62-2-801 (1976) can create a different type of trap (or opportunity). See *supra* text accompanying notes 216-17.

61. S.C. CODE ANN. § 62-2-107 (1976).

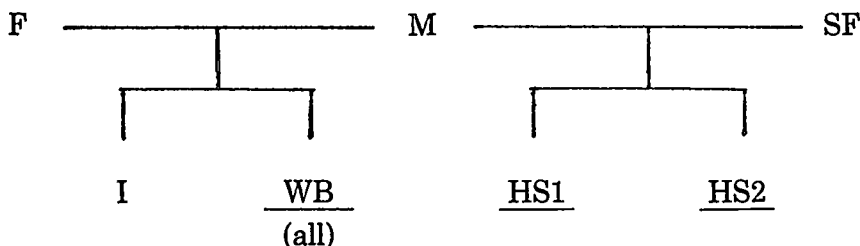
62. *Id.* For the prior South Carolina law, see *infra* text accompanying notes 68-74. A

is the SCPC treatment of issue of siblings of the half or whole blood. If the intestate is survived by any whole-blood sibling, neither a half-blood sibling nor the issue of a predeceased half-blood sibling may take. Yet, if no whole-blood sibling survives the decedent, but issue of a whole-blood sibling survive, then the whole-blood issue will share the estate with any surviving half-blood sibling or their issue by representation.⁶³ The survival of a whole-blood sibling triggers the discriminatory effect of Code section 62-2-107.⁶⁴ The operation of the section can lead to interesting, albeit perhaps indefensible, results.

Example 3

Intestate (I) is survived by WB, a whole-blood brother (the son of I's parents M and F), and by HS1 and HS2, sisters of the half blood (the daughters of I's mother, M, and I's stepfather, SF). The whole-blood brother takes the entire estate to the exclusion of the half sisters.

Example 3



proponent of this retained discrimination for whole-blood siblings at the expense of half-blood siblings should be hard pressed to defend the practice. The discrimination under prior law resulted both from antiquated ideas about the relationships of whole blood to half blood and from the haphazard manner of amendment by which the intestacy statute in its most recent form evolved. Even if rationale exist for the preference of whole-blood heirs to half-blood heirs, the singling out at the sibling level for this practice remains enigmatic. Note that prior South Carolina law did not discriminate except at the sibling level (and their issue) and then only in intestate, but not testate, situations. Because of the operation of S.C. CODE ANN. § 62-2-609 (1976), the preference for whole-blood siblings will now extend into testate situations. This departure from prior law renders unconvincing one possible argument for the SCPC practice of retention: that of continuity.

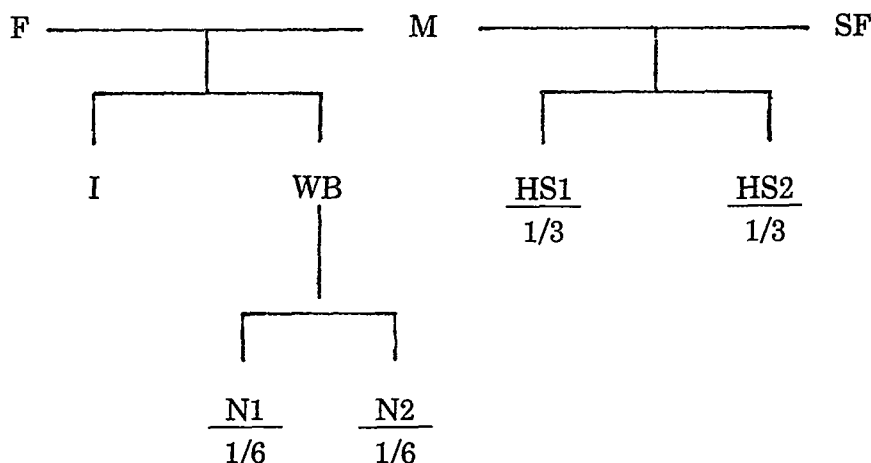
63. S.C. CODE ANN. § 62-2-107 (1976). For the treatment of siblings' issue under the prior law, see *infra* text accompanying notes 68-74.

64. S.C. CODE ANN. § 62-2-107 (1976).

Example 4

Intestate (I) is survived by her nieces, N1 and N2, daughters of her predeceased whole-blood brother, WB, and by HS1 and HS2, her half sisters. HS1 and HS2 each take one-third of the estate, and N1 and N2 each take one-sixth by representation.⁶⁵ Because no whole-blood sibling survives, there is no trigger of the preference for the whole blood.

Example 4



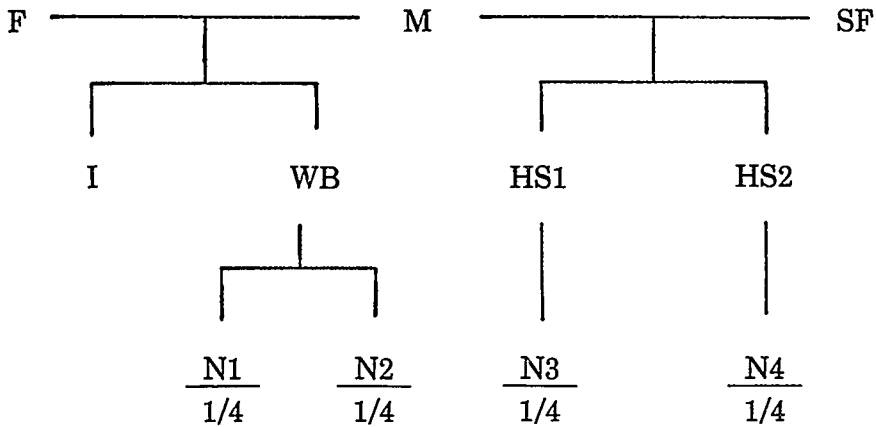
Example 5

Intestate (I) is survived by her nieces, N1 and N2 (the daughters of her predeceased whole-blood brother, WB), by niece N3 (the daughter of her predeceased half-blood sister, HS1), and by niece N4 (the daughter of her predeceased half-blood sister, HS2). The nieces all share in the estate by representation.⁶⁶ Each takes one-fourth.

65. See *supra* subpart II.C.

66. See *id.*

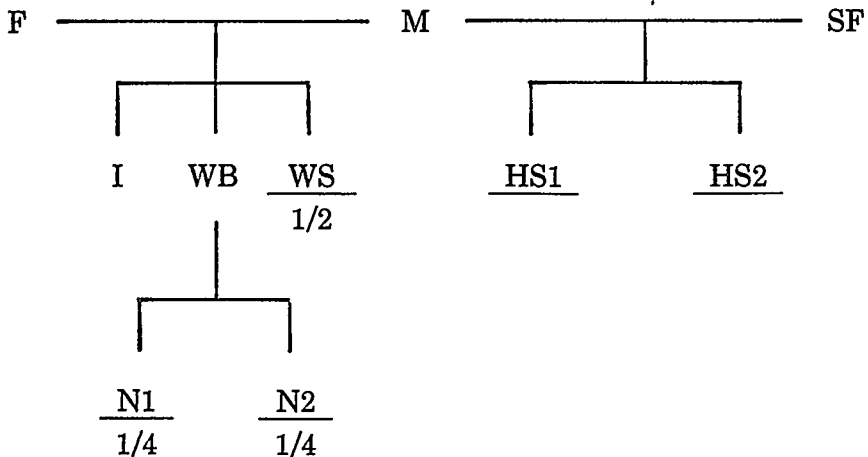
Example 5



Example 6

Intestate (I) is survived by nieces N1 and N2 (daughters of her predeceased whole-blood brother WB), by WS (a whole-blood sister), and by half-blood sisters HS1 and HS2. N1, N2, and WS share the estate to the exclusion of HS1 and HS2, be-

Example 6



cause the survival of the whole-blood sister triggers the discriminatory effect of SCPC section 62-2-107. WS takes one-half of the estate, and N1 and N2 each take one-fourth by representation.⁶⁷

Prior South Carolina law allowed half-blood kindred to take a share of the intestate estate in the same manner and share as whole-blood kindred, except Code section 21-3-20 preferred whole-blood siblings of the decedent and their children to half-blood siblings and their children.⁶⁸ If the decedent was survived by whole-blood siblings *and* by half-blood siblings, the whole-blood siblings shared the estate to the exclusion of the half-blood siblings.⁶⁹ Children, but no other issue, of predeceased whole-blood siblings (*i.e.*, nieces and nephews of the decedent) received the share their parent would have taken had that parent survived.⁷⁰ No issue of predeceased half-blood siblings received a share of the estate at this level.⁷¹ If the decedent was survived only by whole-blood nieces or nephews and by half-blood brothers or sisters, these survivors shared in the estate.⁷² The nieces and nephews divided the share their parent would have taken had that parent survived.⁷³

Example 7

Intestate (I) was survived by her nieces N1 and N2 (daughters of her predeceased whole-blood brother WB), and by HS1 and HS2, her half sisters. The nieces shared the estate with the two half sisters. HS1 and HS2 each took a third, and N1 and N2 each took a sixth by representation.⁷⁴

67. See *id.* N1 and N2 step into the shoes of their predeceased parent WB and take the share he would have taken had he survived the intestate.

68. See S.C. Code Ann. § 21-3-20 (1976) (repealed by the SCPC).

69. *Id.*

70. *Id.*; see also *Stent v. M'Leod*, 7 S.C. Eq. (2 McCord Eq.) 354 (1827).

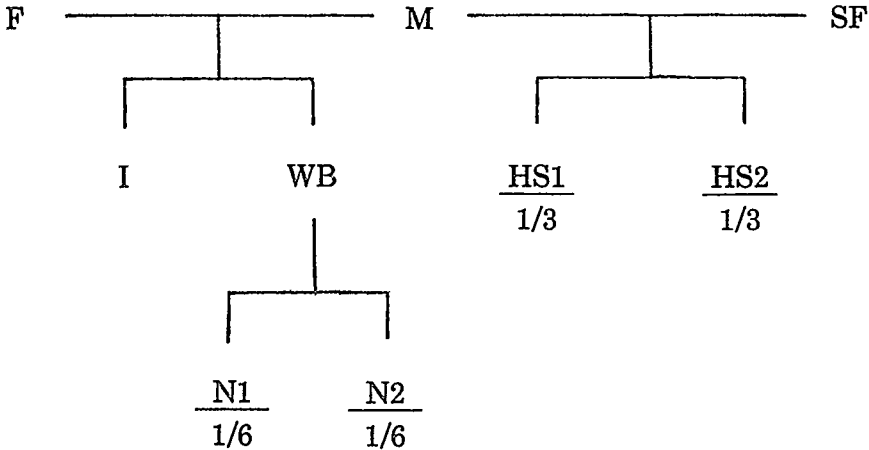
71. *Ex parte Mays*, 31 S.C.L. (2 Rich. Eq.) 61 (1845); S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

72. S.C. CODE ANN. § 21-3-20 (1976) (repealed by the SCPC).

73. *Id.* In *Felder v. Felder*, 26 S.C. Eq. (5 Rich. Eq.) 509 (1853), the defendants argued that the statute called for an equal distribution such that each child of a predeceased whole-blood sibling took the same share as each half blood-sibling (a per capita division). The South Carolina Supreme Court held that the clear language of the statute required the whole-blood nieces and nephews to divide the share their predeceased parent would have taken (*i.e.*, a per stirpital division).

74. *Felder v. Felder*, 26 S.C. Eq. (5 Rich. Eq.) 509 (1853).

Example 7



E. Afterborn Children

The SCPC provides that issue of the intestate who were conceived before but born after the death of the intestate inherit as though they were born prior to the intestate's death.⁷⁵ The Code does not, however, afford similar treatment to issue of persons other than the intestate who are conceived before but born after the intestate.⁷⁶

Example 8

Intestate (I) dies on June 1, 1988. I is survived by one child, C1. A second child, C2, was conceived on March 1, 1988, and is born on December 1, 1988. C2 shares in I's estate to the same extent as C1.

75. S.C. CODE ANN. § 62-2-108 (1976).

76. S.C. CODE ANN. § 62-2-108 (1976) excludes expressly the issue of decedents other than the intestate.

Example 9

Intestate (I) dies on June 1, 1988. I is survived by one nephew, N1, the son of his predeceased brother B (who died May 1, 1988). A second nephew, N2, was conceived on March 1, 1988, and is born on December 1, 1988. N2 will not share in I's estate.

Prior South Carolina cases followed the common-law rule that treated children of the intestate conceived before but born after the death of the intestate as though they were born prior to the intestate's death.⁷⁷ No South Carolina cases dealt specifically with the treatment of afterborn issue of a person other than the intestate.⁷⁸

F. Adopted Children

For intestacy purposes, the SCPC treats an adopted child as the child of the adoptive parents and not as the child of the natural parents, except in the case of a stepchild adoption.⁷⁹ A stepchild adoption occurs when a natural parent is married to the adoptive parent. In stepchild adoption situations, the SCPC treats the adopted child as the child of the adoptive parent and of the natural parent married to the adoptive parent, but not as the child of the natural parent not married to the adoptive parent.⁸⁰

77. See *Pearson v. Carlton*, 18 S.C. 47 (1882). For examples of the similar common-law treatment of afterborn children of the decedent, see *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959); *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907); 1 W. BLACKSTONE, COMMENTARIES 129. See also T. ATKINSON, LAW OF WILLS 75-96 (2d ed. 1953). For a discussion of an analogous treatment of afterborn children for purposes of vesting under the rule against perpetuities, see RESTATEMENT (SECOND) OF PROPERTY § 1.4 comment d (1983) (donative transfers).

78. The common law extended this inclusionary treatment of afterborns to the issue of any decedent who would have been an heir had he survived the intestate. See *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959); *Reeve v. Long*, 3 Lev. 408, 83 Eng. Rep. 754 (K.B. 1695); see also T. ATKINSON, *supra* note 77, at 52-3, 75-6; 1 W. BLACKSTONE, *supra* note 77, at 129. For a discussion of an analogous treatment of afterborn children for purposes of vesting under the rule against perpetuities, see RESTATEMENT (SECOND) OF PROPERTY § 1.4 comment d (1983) (donative transfers). The SCPC reverses the common-law rule with respect to issue of decedents other than the intestate.

79. S.C. CODE ANN. § 62-2-109(1) (1976).

80. *Id.* Under S.C. CODE ANN. § 62-2-113 (1976), a person who can inherit through two lines of relationship to the decedent is entitled only to the larger share.

Example 10

C is the natural child of NM (mother) and NF (father). NF and NM get a divorce, whereupon NM remarries. Her new husband (AF) adopts C. For intestacy purposes, C is the child of NM and AF, but not of NF.

The Code does not specify the requirements necessary for the recognition of an adoption as valid or final.⁸¹ The pertinent South Carolina law found outside the SCPC will continue to determine when an adoption is valid.⁸²

Prior South Carolina law also treated an adopted child as the child of the adoptive parents and not as the child of the natural parents, except in the case of a stepchild adoption.⁸³ In stepchild adoption situations, prior law presumably treated the adopted child as the child of the adoptive parent and of the natural parent married to the adoptive parent, but not as the child of the natural parent not married to the adoptive parent.⁸⁴

G. *Illegitimate Children*

For inheritance purposes, the SCPC considers an illegitimate child as the child of the mother in every case and of the father only in certain situations.⁸⁵ The illegitimate child is the child of the father if the parents participated in a wedding ceremony (regardless of whether the attempted marriage is valid)⁸⁶

81. But see the definitions of child, issue, and parent at S.C. CODE ANN. § 62-1-201 (1976).

82. S.C. CODE ANN. § 62-1-103 (1976) provides that, unless displaced by the provisions of the Code, the principles of law and equity supplement the Code. Under S.C. CODE ANN. § 20-7-1770 (1976), an adoption is effective only upon the issuance of a decree. S.C. CODE ANN. § 20-7-1825 (as enacted by 1987 S.C. Acts ___, No. 171 (S.530)) recognizes the validity of the adoption of an adult for inheritance purposes only if in the best interests of all the parties.

83. S.C. CODE ANN. § 20-7-1770 (1976).

84. *Id.* Prior to its amendment (see 1987 S.C. Acts ___, No. 171 (S.530); 1986 S.C. Acts 3023, No. 464; 1986 S.C. Acts 34, No. 539), this section was perhaps ambiguous, literally reading that the exclusion of the natural parent in favor of the adoptive parent applied even to the natural parent married to the adoptive parent. It is improbable that the literal reading of that section produced a true understanding of the intent of the legislature. See C. KARESH, WILLS 5 (1977). As to the effective date of an adoption, see *supra* note 82.

85. S.C. CODE ANN. § 62-2-109 (1976).

86. If the attempted marriage is valid, then the child is not illegitimate. S.C. CODE

or if paternity is established by adjudication. To establish paternity, the adjudicatory proceeding must commence before or within six months after the death of the putative father.⁸⁷ If the proceeding to adjudicate paternity commences after the death of the putative father, the Code imposes a stricter standard of clear and convincing proof.⁸⁸ When adjudication establishes paternity, the SCPC prohibits a putative father or his kindred from inheriting from or through a child unless the father has openly treated the child as his and has not refused to support the child.⁸⁹

The most recent prior South Carolina law effectively considered the illegitimate child to be a child of the mother.⁹⁰ The child was also considered a child of the father if an adjudication established paternity during the father's lifetime or if the father

ANN. § 62-2-109 (1976) applies only to illegitimates; the legitimizing factors under prior South Carolina law remain in effect. See S.C. CODE ANN. § 62-1-103 (1976), which provides that, unless displaced by the Code, the principles of law and of equity shall supplement the Code. Some examples of legitimizing factors include the subsequent marriage of the parents, the conception of children pursuant to a marriage contracted for after the disappearance for five years of the spouse of one of the parties to the marriage, and the conception of children pursuant to a marriage between a bigamist and one unaware of the bigamy. S.C. CODE ANN. §§ 20-1-50, -60, -90 (1976).

87. S.C. CODE ANN. § 62-2-109 (1976). For a thorough consideration of the tension between the need to ensure reliable evidence in establishing paternity and certainty in probate matters and the need to protect the rights of the illegitimate child, see, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); and *Lalli v. Lalli*, 439 U.S. 259 (1978) (full opinion of New York Court of Appeals in *In re Lalli*, 43 N.Y.2d 65, 371 N.E.2d 481 (1977)). An important issue in these cases concerns the time during which the illegitimate child may bring an action to adjudicate paternity.

88. S.C. CODE ANN. § 62-2-109 (1976) obviously imposes this stricter standard since the deceased putative father cannot rebut personally the evidence of paternity.

89. *Id.* This fairness provision prevents a father from refusing to acknowledge the existence of his child or denying his obligation of support, yet being able to receive a windfall if the child predeceases the father. This provision should also serve to prevent the proliferation of fraudulent claims upon the death of a fatherless child.

90. S.C. CODE ANN. § 21-3-30 (1976) (repealed by the SCPC). More precisely, the combined effect of S.C. CODE ANN. §§ 21-3-30 and -40 (1976) (repealed by the SCPC) treated the child as the child of the mother in all cases except with respect to inheritance by the child by and through that child's maternal relatives and by that child's maternal relatives from and through that child. The limitation with respect to maternal relatives did not apply if escheat to the state would otherwise result. Note that an illegitimate child derives the right to inherit from its mother only by statute. The common law did not recognize the illegitimate as anyone's child. Nor did the Statute of Descent and Distribution afford the right to the child. See *Gibson v. Rikard*, 143 S.C. 402, 141 S.E. 726 (1927); *Barwick v. Miller*, 4 S.C. Eq. (4 Des.) 434 (1814). Note also that the statutes regarding illegitimacy were inapplicable if the child was legitimized according to recognized factors. See *supra* note 86.

acknowledged paternity in writing.⁹¹ Similar to the SCPC, prior South Carolina law prohibited inheritance by the father from the child unless adjudication established paternity during the child's lifetime and the father provided reasonable support during the last three years of the child's minority.⁹²

H. Aliens

The SCPC allows an alien to take as an heir without limitation.⁹³ Prior South Carolina law generally allowed an alien to take as an heir without limitation,⁹⁴ except to the extent it imposed a limit of 500,000 acres on the amount of land owned by an alien or an alien-controlled corporation.⁹⁵

I. Effect of Lifetime Transactions with the Intestate

1. Advancements

The SCPC provides that a lifetime transfer from an intestate to an heir is chargeable as an advancement only if a writing indicates the intestate's intent to make an advancement.⁹⁶ Either a writing made by the intestate contemporaneously with the gift or a written acknowledgment by the heir will suffice to render the gift an advancement. The property advanced is valued as of the time the heir took possession or enjoyment of it or as of the time of the decedent's death, whichever occurs first. If the recipient of the property dies before the decedent, the property is charged against the recipient's issue, unless the writing

91. In *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984), the supreme court determined that § 21-3-30, which at that time prohibited inheritance by an illegitimate child from the father, violated the equal protection clause of the fourteenth amendment of the United States Constitution. Subsequently, the legislature amended that section, allowing the illegitimate child the opportunity, although limited, to establish paternity through adjudication, in concordance with the spirit of *Lalli* and *Trimble*.

92. S.C. CODE ANN. § 21-3-30 (1976) (repealed by the SCPC).

93. S.C. CODE ANN. § 62-2-112 (1976).

94. S.C. CODE ANN. §§ 21-1-40 (repealed by the SCPC), 27-13-10, -20, -30, -40 (1976).

95. *Id.* § 27-13-30.

96. S.C. CODE ANN. § 62-2-110 (1976). An advancement is an intention by one who will die intestate to make a lifetime gift to an heir, the value of the gift to be charged against the intestate share of that heir. For a discussion of the operative elements of an advancement, see *infra* note 98.

provides otherwise.⁹⁷

Prior South Carolina law treated property transferred by an intestate during his lifetime to his issue as an advancement depending not on intent, but rather on the nature of the gift.⁹⁸ The advancement was valued as of the date of death, although with relation to the condition of the gift at the time of the transfer.⁹⁹ If the child receiving the advancement predeceased the intestate, the advancement was chargeable against any share of the estate received by the child's issue.¹⁰⁰

97. S.C. CODE ANN. § 62-2-110 (1976).

98. S.C. CODE ANN. § 21-3-60 (1976) (repealed by the SCPC); see *Heyward v. Middleton*, 65 S.C. 493, 43 S.E. 956 (1903); *Rees v. Rees*, 32 S.C. Eq. (11 Rich. Eq.) 86 (1859); *Youngblood v. Norton*, 20 S.C. Eq. (1 Strob. Eq.) 122 (1845).

At common law, a lifetime transfer to an heir by a person who would die intestate would constitute an advancement regardless of intent. Today, most states by statute have reversed this result; such a transfer is not an advancement unless proof exists of intent to the contrary. Examples of transfers considered in South Carolina as advancements are cancellation or payment of a debt, see *Rees v. Rees*, 32 S.C. Eq. (11 Rich. Eq.) 86 (1859), and life insurance policies, see *Rickenbaker v. Zimmerman*, 10 S.C. 110 (1878). Examples of transfers not treated as advancements include those for education, see *White v. Moore* 23 S.C. 456 (1885); *Cooner v. May*, 22 S.C. Eq. (3 Strob. Eq.) 185 (1849), or for valuable consideration, see *Murrell v. Murrell*, 21 S.C. Eq. (2 Strob. Eq.) 148 (1848).

The theory of an advancement was that a parent intended to treat his children equally. *M'Caw v. Blewit*, 7 S.C. Eq. (2 McCord Eq.) (1827) 90; *Ex parte Lawton*, 3 S.C. Eq. (3 Des.) 199 (1811). If that child wished to share in the intestate estate, he had to add, for accounting purposes, the value of the advancement back to an augmented estate known as hotchpot. Hotchpot consisted of the probate estate less debts, taxes, and the surviving spouse's share, plus the value of all advancements. The shares of the children were calculated so that, taking into consideration the amount of the advancement to a child, each child received an equal amount of hotchpot (representing the total amount of property received by the intestate's children during his life and because of his death). See *Lawton*, 3 S.C. Eq. (3 Des.) at 200-02. If the child did not wish to share in the estate, he did not have to add his advancement to hotchpot. *Newton v. Boggs*, 274 S.C. 268, 262 S.E.2d 741 (1980); *Hamer v. Hamer*, 23 S.C. Eq. (4 Strob. Eq.) 124 (1850). He could share in the estate and not add his advancement to hotchpot if his siblings knew of the advancement but did not require him to add to hotchpot. This conduct would constitute a waiver of their rights. *Miley v. Deer*, 93 S.C. 66, 76 S.E. 27 (1912).

Example

I dies intestate with three children (C1, C2, and C3) and no spouse surviving him. He made a \$15,000 lifetime advancement to C1. His probate estate after debts and taxes totals \$60,000. C1 wishes to share in the estate so he adds the \$15,000 to hotchpot, which totals \$75,000 [\$60,000 plus \$15,000]. C2 and C3 each take \$25,000 of the probate estate; C1 takes \$10,000. Thus, each has received effectively \$25,000 from the testator.

99. *M'Caw v. Blewit*, 7 S.C. Eq. (2 McCord Eq.) 90 (1827); *Ex parte Glenn*, 20 S.C. 64 (1883).

100. *McLure v. Steele*, 35 S.C. Eq. (14 Rich. Eq.) 105 (1868); *Rees v. Rees*, 32 S.C.

2. *Debts to Decedents*

The SCPC allows charging a debt owed by an heir to the intestate decedent against that heir's intestate share, but not against the shares of that heir's issue if the heir should predecease the intestate.¹⁰¹ Thus, the SCPC codifies prior South Carolina law.¹⁰²

III. WILLS

A. *Requirements for Validity*

1. *Age*

The SCPC requires that a testator be at least eighteen years of age to execute a will. The minimum age limitation is inapplicable to married testators.¹⁰³

Prior South Carolina law also required that a testator be eighteen years old. Under prior law, however, the age limitation applied even if the underage testator was married.¹⁰⁴

2. *Capacity*

The SCPC requires that a testator be of sound mind in order to execute a valid will.¹⁰⁵ The Code does not specify the factors involved in determining the soundness of the testator's mind. Thus, existing South Carolina law addressing the determination of testamentary capacity should continue to be effective.¹⁰⁶ South Carolina enjoys a relatively rich body of case law dealing with such matters of testamentary capacity as mental capacity,¹⁰⁷ undue influence,¹⁰⁸ monomania or insane delusion,¹⁰⁹

Eq. (11 Rich. Eq.) 86 (1859).

101. S.C. CODE ANN. § 62-2-111 (1976).

102. See *Ex parte Wilson*, 84 S.C. 444, 67 S.E. 560 (1910); *Stokes v. Stokes*, 62 S.C. 346, 40 S.E. 662 (1902); *Sartor v. Beaty*, 25 S.C. 293 (1886); *Wilson v. Kelly*, 16 S.C. 216 (1881).

103. S.C. CODE ANN. § 62-2-501 (1976).

104. S.C. CODE ANN. § 21-7-10 (1976) (repealed by the SCPC).

105. S.C. CODE ANN. § 62-2-501 (1976).

106. See S.C. CODE ANN. § 62-1-103 (1976), which provides that, unless displaced by the Code, the principles of law and of equity shall supplement the Code.

107. *McCollum v. Banks*, 213 S.C. 476, 50 S.E.2d 199 (1948); *Moorer v. Bull* 212 S.C.

fraud,¹¹⁰ and mistake.¹¹¹

Prior South Carolina law also required that a testator be of sound mind.¹¹²

3. Execution

The technical execution requirements imposed by the SCPC are basically three-fold.¹¹³ First, the will must be in writing.¹¹⁴ Second, the testator, or his proxy at his direction and in his presence, must sign the will.¹¹⁵ Last, two persons must witness either the signature of the testator, or of his proxy, or an ac-

146, 46 S.E.2d 681 (1948); *Sumter Trust Co. v. Holman*, 134 S.C. 412, 132 S.E. 811 (1926); *Matheson v. Matheson*, 125 S.C. 165, 118 S.E. 312 (1923); *Kirkwood v. Gordon*, 41 S.C.L. (7 Rich.) 474 (1854); *Tomkins v. Tomkins*, 17 S.C.L. (1 Bailey) 92 (1828); *Lee v. Lee's Ex'rs*, 15 S.C.L. (4 McCord) 183 (1827). See generally Figg, *Of Carolina Quiddities, Quillets and Cases*, 18 S.C.L. REV. 719, 727 (1966); Means, *Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers*, 12 S.C.L.Q. 491, 531 (1960).

108. *In re Estate of Hicks*, 284 S.C. 462, 327 S.E.2d 345 (1985); *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982); *Mock v. Dowling*, 266 S.C. 274, 222 S.E.2d 773 (1976); *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946); *Means v. Means*, 36 S.C.L. (5 Strob.) 167 (1850); *Floyd v. Floyd*, 34 S.C.L. (3 Strob.) 44 (1848); *Farr v. Thompson*, 25 S.C.L. (Chev.) 37 (1839).

109. Although not an independent ground for overturning a will in South Carolina, this is a factor to be considered in the overall determination of testamentary capacity. *Havird v. Schissell*, 252 S.C. 404, 166 S.E.2d 801 (1969); *Evans v. Bates*, 212 S.C. 379, 46 S.E.2d 287 (1948); *Sumter Trust Co. v. Holman*, 134 S.C.412, 132 S.E. 811 (1926).

110. *Myers v. O'Hanlan*, 33 S.C. Eq. (9 Rich. Eq.) 196 (1861); *Floyd v. Floyd*, 34 S.C.L. (3 Strob.) 44 (1848); see Means, *supra* note 107, at 532.

111. *Ex parte King*, 132 S.C. 63, 128 S.E. 850 (1925); *Whitlock v. Wardlaw*, 41 S.C.L. (7 Rich.) 453 (1854); see Means, *supra* note 107, at 531.

112. S.C. CODE ANN. § 21-7-10 (1976) (repealed by the SCPC).

113. S.C. CODE ANN. § 62-2-502 (1976).

114. *Id.* The SCPC does not provide specifically that a typewritten document qualifies as a writing. S.C. CODE ANN. § 21-1-10 (1976) (repealed by the SCPC) specifically qualified a typewritten document as a writing. Presumably, modern convention should suffice to recognize typewritten as written even without express statutory authorization. The SCPC does not recognize any exceptions to the requirement that a will must be written in order to be validly executed. See *infra* text accompanying notes 120-23 for a discussion of exceptions under prior South Carolina law. The strict SCPC requirement of a writing possibly does not eliminate completely the possibility of probating an oral will in this state: the Code accepts for probate in South Carolina wills validly executed in another state and wills admitted to probate in another state. See S.C. CODE ANN. §§ 62-3-303(d), -408 (1976). S.C. CODE ANN. § 62-3-303(d) (1976) requires the deposit of an authenticated copy of a will probated elsewhere. Whether an authenticated copy of a will includes a copy of the reduction to writing of an oral will probated elsewhere is problematic. See S.C. CODE ANN. §§ 21-7-1110 to -1140 (1976) (repealed by the SCPC).

115. S.C. CODE ANN. § 62-2-502 (1976). The SCPC imposes no requirements as to where on the will the testator must sign.

knowledge by the testator of his signature or of his will.¹¹⁶ The Code does not require that the witnesses sign in the presence of the testator or of each other; nor does it specify a time at or by which either witness must attest.¹¹⁷

Example 11

Testator (T) types and signs his will in private. A week later, he acknowledges his signature to W1 (a witness), who does not attest at that time. A month thereafter, he acknowledges his will to W2 (a witness), who does not see T's signature nor does he sign at that time. Six months later, W1 privately affixes his

116. *Id.* The specification in the Code that a witness can attest to the testator's acknowledgement of either his will or his signature clarifies a gray area under previous South Carolina law. See *infra* note 126. Although July 1, 1987, is the general effective date of the Code, the legislature retroactively applied for wills executed on or after June 28, 1984, the requirement for only two witnesses. See *infra* note 145.

The Code does not specify the degree of competency, if any, required for a witness. Compare *infra* text accompanying notes 130-32. The Code, however, probably implies a requirement of witness competency since the witness may have to testify before the probate court (or before an officer of the court if the will is self-proved). See S.C. CODE ANN. §§ 62-1-103, 3-405, -406 (1976).

The Code does not recognize as validly executed a holographic will, i.e., an unwitnessed but signed will in the handwriting of the testator. For examples of the myriad problems which can arise in states which recognize holographic wills, see *Lorenzo v. Howard*, 708 P.2d 422 (Wyo. 1985); *Kaufhold v. McIver*, 682 S.W.2d 660 (Tex. Ct. App. 1984); *In re Estate of Cunningham*, 198 N.J. Super. 484, 487 A.2d 777 (1984). The SCPC nonrecognition of holographic wills may not eliminate completely the possibility of probating such a will in this state: the Code accepts for probate in South Carolina wills validly executed in another state and wills admitted to probate in another state. See S.C. CODE ANN. §§ 62-3-303(d), -408 (1976).

117. S.C. CODE ANN. § 62-2-502 (1976). The Nebraska Supreme Court, in interpreting that state's similar version of Uniform Probate Code § 2-502, held that the attestation by the witnesses three months after the death of the testator was not timely, despite the lack of express requirements in that section. *Newell v. Flicker*, 215 Neb. 495, 339 N.W.2d 914 (1983); see also *Painter v. Mikaska*, 140 Mich. App. 116, 362 N.W.2d 906 (1985). These rulings seem to recognize a couple of the oft-stated policy reasons for requiring the witnessing of wills, i.e., that of preventing fraud (or undue influence) and of ensuring reliability of the evidence. See *Gulliver & Tilson, Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941). Under prior South Carolina law, a witness attested both to the signature of the testator and to his capacity. The SCPC apparently may require similar averments from the witness. See, e.g., S.C. CODE ANN. § 62-2-503 (1976) with respect to attestation and self-proving wills; for the exception for lack of capacity in § 62-3-406 to the presumption of validity afforded self-proved wills, see S.C. CODE ANN. § 62-3-406 comment (1976). Query as to whether a failure to judicially impose a reasonable time limit for attestation (as in *Flicker*) lessens the ability of a witness to testify as to capacity at the time the testator executes the will.

signature to the will. Ten months later, W2 signs. T then dies. The SCPC presumably would uphold the will as properly executed.

Prior South Carolina law imposed more stringent execution requirements.¹¹⁸ First, the will must have been in writing,¹¹⁹ with several exceptions. In certain deathbed situations, the testator could bequeath personal property by an oral or nuncupative will.¹²⁰ The law also allowed a soldier in military service or a seaman at sea to bequeath his personal property as he could at common law.¹²¹ South Carolina would admit into probate a will that had been validly executed in another state¹²² or that previously had been admitted into probate in another state.¹²³

Second, the testator, or his proxy at his direction and in his presence, must have signed the will.¹²⁴ Any writing on the testamentary document intended as the signature of the testator, regardless of the location, served as a signature.¹²⁵

Last, three witnesses must have witnessed the testator sign the will or the testator acknowledge his signature.¹²⁶ The wit-

118. S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC).

119. *Id.* S.C. CODE ANN. § 21-1-10 (1976) (repealed by the SCPC) specifically qualified a typewritten document as a writing.

120. *See generally* S.C. CODE ANN. §§ 21-7-1110 to -1140 (1976) (repealed by the SCPC). A testator could bequeath a total of \$50 or less of personal property without complying with the provisions of these sections. To bequeath personalty valued at more than \$50, the testator had to communicate his will to three witnesses, whom he bade to bear witness, during his final illness and in the place he would die. The will had to be proved within six months after the testator's utterance thereof, unless the witnesses had reduced the contents to writing within six days of the utterance, in which event the will could be proved within twelve months.

121. S.C. CODE ANN. § 21-7-60 (1976) (repealed by the SCPC); *see Morgan v. United States*, 13 F.2d 763 (4th Cir. 1926). This section allowed a qualifying soldier or sailor to dispose of personal property by oral will (with the obvious requirement of a witness).

122. S.C. CODE ANN. § 21-7-70 (1976) (repealed by the SCPC).

123. S.C. CODE ANN. § 21-7-910 (1976) (repealed by the SCPC).

124. S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC).

125. *Denton v. English*, 9 S.C.L. (2 Mill) 391 (1818).

126. S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC). Prior South Carolina law was unclear about whether the witnessing requirements would be met if the witnesses observed the testator acknowledge his will without actually seeing his signature. Some cases discuss proving the signature of the testator. *See, e.g., Kaufman v. Caughman*, 49 S.C. 159, 27 S.E. 16 (1897). But *see Tucker v. Oxner*, 46 S.C.L. (12 Rich.) 141 (1849), in which the court at one point recognizes that a witness can observe "the acknowledgement of the testator that it is his handwriting—his will, &c. is a sufficient attestation . . ." (emphasis added), but later in the opinion holds the will improperly witnessed because the witness "did not see the testatrix sign the will either by writing

nesses had to sign in the presence of the testator and in the presence of each other.¹²⁷

(a) *Witness Competency*

The SCPC does not contain express provisions with respect to any generally required credibility of witnesses, but a requirement of competency (tantamount to credibility under the previous law) may be implied since the witness must testify before the probate court or, if the will is self-proved, before an officer of the court.¹²⁸ The SCPC prohibits a beneficiary under a will from receiving more than he would have without the will if he or his spouse served as a witness. The Code does not affect, however, the competency of the interested witness.¹²⁹

Prior South Carolina law required the witnesses to the will to be “credible,”¹³⁰ which case law equated with “competent” to testify in a court of law.¹³¹ Previous law provided that a witness

her name in his presence or by any subsequent acknowledgement of her signature” See also C. KARESH, *supra* note 84, at 30. The SCPC clarifies this gray area.

Prior law did not recognize as validly executed a holographic will, (an unwitnessed but signed will in the handwriting of the testator). The nonrecognition of a holographic will may not eliminate completely the possibility of probating such a will in this State: the prior law accepted for probate in South Carolina wills validly executed in another state and wills admitted to probate in another state. See S.C. CODE ANN. §§ 62-3-303(d), -408 (1976).

127. S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC). Thus, to validly witness a will in South Carolina, the testator and all the witnesses had to be present at the same time at which the witnesses attested the will. South Carolina used the line-of-sight test to define presence for this purpose: the witnesses and the testator must have been able to see each witness sign. *Reynolds v. Reynolds*, 28 S.C.L. (1 Speers) 253 (1843). If, however, the testator or a witness was blind, the pertinent standard became that of conscious presence, *i.e.*, the blind testator or witness was able through any sense to “observe” the attestation. *Ray v. Hill*, 34 S.C.L. (3 Strob.) 297 (1848); *Reynolds v. Reynolds*, 28 S.C.L. (1 Speers) 253 (1843).

128. See S.C. CODE ANN. § 62-1-103 (1976), which provides that, unless displaced by the provisions of the Code, the principles of law and equity supplement the Code. See also *supra* note 116.

129. S.C. CODE ANN. § 62-2-504 (1976). The Code does allow an interested witness to receive a fee for serving in an office (*e.g.*, executor or trustee) to which the will appoints him.

130. S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC).

131. See *Taylor v. Taylor*, 30 S.C.L. (1 Rich.) 531 (1845). Of course, the witness needed to be credible at the time of attestation. *Noble v. Burnett*, 42 S.C.L. (10 Rich.) 531 (1857). The law imposed no express minimum age standards, religious belief requirements, nor automatic prohibitions against convicted criminals (except for perjury or subornation of perjury). S.C. CODE ANN. §§ 16-9-10, -20 (1976). The existence of a criminal

who was a beneficiary or the spouse of a beneficiary was not rendered incompetent by this interest, but that beneficiary could not take more under the will than he would have taken without the will.¹³²

(b) *Self-Proof*

The SCPC introduces into South Carolina the concept of the self-proving will.¹³³ A will is self-proved when the testator and the witnesses acknowledge by oath to an officer authorized to take oaths (for example, a notary public) that (1) the testator (or his proxy) signed willingly, freely, and voluntarily—free of constraint and undue influence, (2) the testator was at least eighteen years old and of sound mind, and (3) the witnesses attested in the presence and within the hearing of the testator.¹³⁴ The self-proof may occur in one step (simultaneous with the execution and thus serving as the self-proof of the will as well as the attestation) or two steps (subsequent to the execution, *i.e.*, in addition to the “traditional” method of attestation).¹³⁵ A will that is properly self-proved generally relieves the proponent of the will at probate from producing one or more witnesses to the court.¹³⁶ If the will is not self-proved, however, the Code may

record could serve to impeach a witness's credibility. Recently, the South Carolina Court of Appeals found that the subsequent enactment of S.C. CODE ANN. § 19-11-60 (1976) repealed one of the Code sections that rendered a witness previously convicted of perjury not credible, *see* S.C. CODE ANN. § 16-9-10 (1976), but did not address the Code section with respect to subornation of perjury, *see id.* § 16-9-20. *See State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (1985).

132. S.C. CODE ANN. § 21-7-690 (1976) (recodified with amendments at § 62-2-504). Nor could an interested witness receive a fee for serving in an office (*e.g.*, executor or trustee) to which the will appoints him.

133. S.C. CODE ANN. § 62-2-503 (1976). Actually S.C. CODE ANN. § 21-7-615 (1976) (effective June 28, 1984) provided similarly. Although intended as a section of the overall SCPC, it was enacted separately. S.C. CODE ANN. § 62-2-503 (1976) recodifies § 21-7-615. *See infra* note 145.

134. S.C. CODE ANN. § 62-2-503 (1976). A witness may also serve as the notary public. *Id.* § 62-2-503(c) (as added by 1987 S.C. Acts ___, No. 171 (S.530)).

135. S.C. CODE ANN. § 62-2-503 (1976). The two-step process is appropriate even for wills executed prior to the enactment of this section. Some practitioners may consider it prudent to use the two-step process for all execution ceremonies, at least until more comfortable with the self-proof process, so that even if the self-proving section is executed improperly, the will retains its validity.

136. *See* S.C. CODE ANN. §§ 62-3-405, -406 (1976). The self-proof of a will may not obviate the need for a witness's testimony before the court in the event of grounds of attack other than the proper execution thereof: fraud, undue influence, duress, lack of

require the will to be “proved” by the oath of at least one witness.¹³⁷

The careful practitioner should observe that some of the averments contained in the self-proving forms do not correlate necessarily with the SCPC requirements for valid will execution found in section 62-2-502.¹³⁸ The suggested forms contain averments that the witness signed in the presence of the testator,¹³⁹ and that the witness signed within the hearing of the testator.¹⁴⁰ The suggested forms do *not* contain averments that the proxy for the testator, if any, signed for him in his presence;¹⁴¹ that the testator is younger than eighteen but married;¹⁴² and that the witnesses signed in the presence of each other.¹⁴³ Since lawyers use attestation clauses in general, and the self-proving forms in

testamentary capacity, mistake, or revocation. *See* S.C. CODE ANN. § 62-3-406 comment (1976).

137. S.C. CODE ANN. §§ 62-3-405, -406 (1976). Note that S.C. CODE ANN. § 62-3-303(c) (1976) allows a court in an informal probate proceeding to probate without further proof a will which appears to have the required signatures and an attestation clause which indicates an execution in compliance with the Code’s requirements. A properly self-proved will should pass muster under § 62-3-303(c).

138. *See* S.C. CODE ANN. § 62-2-502 (1976); *see also supra* text accompanying notes 113-17.

139. For valid will execution, S.C. CODE ANN. § 62-2-502 (1976) does not require that the witnesses sign in the presence of the testator. *See supra* text accompanying notes 113-17.

140. For valid will execution, S.C. CODE ANN. § 62-2-502 (1976) does not require that the witnesses sign in the hearing of the testator. *See supra* text accompanying notes 113-17.

141. For valid will execution by a testator’s proxy, S.C. CODE ANN. § 62-2-502 (1976) requires that the proxy sign in the testator’s presence and at the testator’s direction. *See supra* text accompanying note 115.

142. S.C. CODE ANN. § 62-2-501 (1976) recognizes an exception to the general age requirement for testamentary capacity if the underage testator is married. *See supra* text accompanying note 103.

143. For valid will execution, S.C. CODE ANN. § 62-2-502 (1976) does not require that the witnesses sign in the presence of each other. Because the two step self-proving procedure allows the self-proof of a will executed under the requirements of prior law, however, witness presence may have been necessary for validity. A will executed under prior law would have been valid only if the witnesses attested within the presence of each other, although the subsequent self-proof thereof occurred after enactment of S.C. CODE ANN. § 21-7-615 (Supp. 1986) or S.C. CODE ANN. § 62-2-503 (1976). In that event, the averments contained in the self-proving model form would not correspond with the execution requirements in effect and complied with at the time of the signing of the will. Even though the SCPC does not require that the witnesses sign in the presence of each other, many lawyers may continue this practice. In that event, the averments contained in the self-proving model would not correspond with the conduct of the execution ceremony.

particular, to corroborate that the execution ceremony complied with the requisite formalities for valid execution under applicable law, the practitioner presiding over the execution ceremony may consider amending the self-proving form so that it more accurately reflects the actual manner of execution.¹⁴⁴

Prior South Carolina law recognized the self-proving option as of June 28, 1984.¹⁴⁵ Before that date, however, South Carolina

144. Another traditional use of the attestation clause is to reduce the possibility of the witness at probate forgetting about or denying the occurrence of the will execution, at least as described therein. See *O'Neal v. Jennings*, 53 Md. App. 604, 455 A.2d 66 (1983); *Morris v. Estate of West*, 643 S.W.2d 204 (Tex. Ct. App. 1982). Presumably, the self-proving clause could serve a similar purpose, especially since in most cases the use of the self-proving form obviates the need for a witness at probate. See *supra* text accompanying note 136-37. S.C. CODE ANN. § 62-3-303(c) (1976) allows a court in an informal probate proceeding to probate without further proof a will which appears to have the required signatures and an attestation clause which indicates an execution in compliance with the Code's requirements. Thus, even though the Code does not require an attestation clause for a valid will execution, the use of such a clause may expedite the probate of the will.

Whether the self-proving form can be amended without affecting its validity is problematic. Although the SCPC does not expressly provide for alternative forms of self-proof (i.e., other than the forms specified in S.C. CODE ANN. § 62-2-503 (1976)), § 62-2-503 does provide that the self-proving language should be in "substantially" the statutory format.

145. The history of the passage of the previous self-proving section, S.C. CODE ANN. § 21-7-615 (Supp. 1986) (recodified at § 62-2-503), is of interest not only because of its path through the General Assembly but also because of the confusing effect that it may have had upon some will execution ceremonies in South Carolina. On June 28, 1984, Governor Richard W. Riley signed an act creating the self-proving provisions of § 21-7-615. See 1984 S.C. Acts 2149, No. 508. Although the provisions of that section had originally been a part of the entire SCPC then under consideration, the legislature separated that section from the rest of the Code and enacted it approximately two years before the Code's enactment. Since initially intended to be part of the overall Code, the self-proving forms and provisions exemplified by § 21-7-615 differed to some extent from the previous requirements for proper execution of a will in this state. In particular, these forms indicated space for only two witnesses to sign the self-proving section (since, unlike prior law, the SCPC requires only two witnesses for proper attestation of a will). Thus, from June 28, 1984, until the effective date of the remainder of the Code on July 1, 1987, this state had one statute, S.C. CODE ANN. § 21-7-50 (1976) (repealed by the SCPC), requiring three witnesses for a valid will and another statute, *id.* § 21-7-615, apparently requiring only two witnesses for self-proof. This possible disparity caused some confusion. Some attorneys may have doubted the validity of § 21-7-615; some may have concluded that § 21-7-615 somehow amended § 21-7-50 so that only two witnesses would be necessary for valid attestation; and some may have begun using self-proving wills pursuant to § 21-7-615 but by amending the forms shown therein. See Eubanks, *Comments on Self-Proving Wills*, 6 THE EST. PLANNER, at 5 (1985).

Consequently, the legislature, upon the adoption of the entire Code (including what then became essentially a recodification of § 21-7-615 as the originally intended S.C. CODE ANN. § 62-2-503 (1976)), applied the requirement of only two witnesses for a valid

law generally required the oath of one witness before the court at common form (uncontested probate) and of all witnesses at solemn form (contested probate).¹⁴⁶

4. *Choice of Law*

The SCPC provides that a written will is valid if, either at the time of execution or at the date of the testator's death, the execution complies with the requirements of section 62-2-502 or, at the time of execution, the law of the place of execution or the law of the place of decedent's domicile at execution or at death.¹⁴⁷

Prior South Carolina law provided that a written will was valid if it complied at the date of death with the law in effect in South Carolina or, if executed elsewhere, with the law in effect in the place of execution.¹⁴⁸ South Carolina accepted for probate a will previously probated in another state regardless of the manner of execution.¹⁴⁹

will retroactively to June 28, 1984, validating what might have been otherwise invalid "two-witness" wills made in reliance on the argument that § 21-7-615 somehow amended § 21-7-50 to require only two witnesses. See S.C. CODE ANN. § 62-2-502 (1976). Some further confusion may have arisen with respect to testators dying before July 1, 1987, who, subsequent to June 28, 1984, executed wills with only two attesting witnesses. Query: Was the savings provision of § 62-2-502 effective as to testators dying before July 1, 1987 (the general effective date of the Code)? One might have argued that § 5(b) of Act No. 539, 1986 S.C. Acts 3446 (the SCPC) did not accelerate the effective date of the savings provision of § 62-2-502. A more beneficial reading, and one probably more consistent with legislative intent, would have rendered the savings clause effective retroactively to June 28, 1984, even for testators dying prior to July 1, 1987. To clarify this issue, the General Assembly technically amended the effective date provision of the Code to ensure that the provision covered this window period. See 1987 S.C. Acts ___, No. 171 (S.530).

146. S.C. CODE ANN. § 21-7-620 (1976) (repealed by the SCPC) allowed the judge to prove the will at common form without notice to interested persons by (1) examining one or more of the witnesses; (2) in the event the witnesses were dead, outside the state, or unable to be found, taking proof of the handwriting of the testator and a witness; or (3) using any other secondary evidence admissible at common law. If an interested person contested the admission at common form, thereby requiring a solemn form probate, S.C. CODE ANN. § 21-7-640 (1976) (repealed by the SCPC) required the court to swear all the subscribing witnesses as well as take evidence available from other witnesses.

147. S.C. CODE ANN. § 62-2-505 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)).

148. *In re Elcock*, 14 S.C.L. (4 McCord) 39 (1826); S.C. CODE ANN. § 21-7-70 (1976) (repealed by the SCPC).

149. S.C. CODE ANN. § 21-7-910 (1976) (repealed by the SCPC).

B. Revocation

1. By Operation of Law

(a) Marriage

The SCPC provides for partial revocation of a will. The marriage of the testator subsequent to the execution of his will triggers this partial revocation.¹⁵⁰ If the testator marries after the execution of his will and fails to provide by will for his spouse, the Code revokes his will to the extent necessary to provide the omitted spouse with the same share of testator's estate as if the testator had died intestate. The omitted spouse will not receive the intestate share equivalent if the will indicates that the omission was intentional or if the testator provided for the spouse by nontestamentary transfer and indicated an intent that such transfer was in lieu of a testamentary transfer.¹⁵¹

Prior South Carolina law provided that marriage by the testator subsequent to the execution of his will entirely revoked his will if he died survived by his widow or issue of the marriage, unless the testator expressed on the face of the will that it was made in contemplation of marriage and he made provision therein for his future spouse and children.¹⁵²

(b) Divorce

The SCPC provides that, unless a will expressly indicates

150. S.C. CODE ANN. § 62-2-301 (1976).

151. *Id.* Query whether the testator can overcome the operation of S.C. CODE ANN. § 62-2-301 (1976) by making a nominal provision for the spouse, since the section applies "[i]f the testator fails to provide by will for his surviving spouse" *Id.* If a nominal provision were effective to avoid the operation of the statute, then the most that a spouse could demand presumably would be one-third of the testator's estate pursuant to the elective share. Because the omitted spouse share is equivalent to the intestate share, the least that a spouse could take under § 62-2-301 would be one-half of the estate. See *infra* text accompanying notes 225-32.

152. S.C. CODE ANN. § 21-7-220 (1976) (repealed by the SCPC). Although the statute refers to male testators, the courts have applied its provisions to female testators. See *Atkins v. Atkins*, 287 S.C. 584, 340 S.E.2d 537 (1986); *In re Roton*, 95 S.C. 118, 78 S.E. 711 (1913). In order to revoke, the subsequent marriage must be lawful. *Campbell v. Christian*, 235 S.C. 102, 110 S.E.2d 1 (1959). At least one respected commentator has suggested that provision for the future spouse and issue could be nominal, since the statute specifies no minimum share. See C. KARESH, *supra* note 84, at 49.

otherwise, the termination of a marriage subsequent to the execution of the testator's will partially revokes the will to the extent of devises to the ex-spouse or appointments of the ex-spouse to an office.¹⁵³ For these purposes the Code treats the spouse as having predeceased the testator. Any invalidated devise passes to other devisees or by partial intestacy, depending on the terms of the will.

Prior South Carolina law provided similarly, but was silent as to the treatment of the ex-spouse as predeceased.¹⁵⁴

(c) *Pretermitted Children*

Under the SCPC, a testator who fails to provide in his will for a child born or adopted after the execution thereof will have his will revoked to the extent necessary to provide the omitted child with the same share of testator's estate as if he had died intestate.¹⁵⁵ The omitted child will not receive the intestate share equivalent if the will indicates that (1) the omission was intentional, (2) the testator provided for that child by nontestamentary transfer and indicated an intent that such transfer was in lieu of a testamentary transfer, or (3) at the time of execution the testator had at least one other child and left at least fifty percent of his estate to the other parent of the omitted child.¹⁵⁶

153. S.C. CODE ANN. § 62-2-507 (1976). The termination of a marriage includes divorce, annulment, or the participation by the testator's spouse in ". . . a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between the spouses . . ." Section 62-2-507 specifically incorporates the following provisions of S.C. CODE ANN. § 62-2-802(b) and (c) (1976), which do not include as a surviving spouse: (1) A spouse who obtains or consents to a decree of divorce or annulment, even if not recognized in South Carolina (unless the couple subsequently lives together as husband and wife) and (2) a spouse who participates in a marriage ceremony (regardless of its validity) with a third party after the testator obtained a decree of divorce or annulment. The Code defines the noun "devise" as "a testamentary disposition of real or personal property, including both devise and bequest as formerly used." S.C. CODE ANN. § 62-1-201(7) (1976).

154. S.C. CODE ANN. § 21-7-230 (1976) (repealed by the SCPC). For an example of problems which can result when a statute which partially revokes a will because of divorce is silent as to the treatment of the ex-spouse as predeceased, see *Estate of Graef v. McQuillen*, 124 Wis. 2d 25, 368 N.W.2d 633 (1985).

155. S.C. CODE ANN. § 62-2-302 (1976).

156. *Id.* The Code recognizes that the testator may prefer to leave the estate to the surviving parent of the child rather than to the child, or to the child but by some means other than by will. The Code also allows intentional disinheritance of a child born after the execution of the will if the will so indicates. Under prior South Carolina law, depend-

In any event, a child who is not included in testator's will, because at the time of execution thereof the testator mistakenly believes the child to be dead, will receive an intestate share.¹⁵⁷ A statute of limitations applies. The child or his conservator must claim his share by the later of eight months after testator's death or six months after the probate of the will.¹⁵⁸

Prior South Carolina law gave a child born after the execution of his parent's will a share equal to those children provided for in the will, unless the will made provision for such afterborn children.¹⁵⁹ Thus, the determination of the omitted child's share resulted not from a comparison with the intestate share but rather from a pro rata contribution by those children who did take.¹⁶⁰

2. *By Act*

The SCPC allows the partial or complete revocation of a will by a subsequent will, which expressly or by implication (inconsistency) revokes, or by the physical act of burning, tearing, canceling, obliterating, or destroying the testamentary instrument, if accompanied by the intent to revoke.¹⁶¹

ing on the circumstances, a testator could either disinherit an afterborn child without the will so indicating, or not disinherit an afterborn child despite an attempt in the will to do so.

157. S.C. CODE ANN. § 62-2-302(c) (1976).

158. S.C. CODE ANN. § 62-2-302(d) (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). The child or conservator properly makes the claim by the filing thereof in court and the mailing or delivering thereof to the personal representative.

159. S.C. CODE ANN. §§ 21-7-450, -460 (1976) (repealed by the SCPC).

160. See, e.g., *Talbird v. Verdier*, 1 S.C. Eq. (1 Des.) 592 (1797). The share of the afterborn child would be subject to the same limitations and conditions as the devises and bequests to those children named in the will. *Ex parte Warren*, 25 S.C.L. (Chev.) 44 (1840).

Thus, under prior law, the testator could disinherit an afterborn child without expressing his intent, if the will left no gift to other children. If the will left gifts to other children, the testator could not disinherit the afterborn child. The child would share with his sibling devisees and legatees, unless the will made provision for him. Query whether a nominal provision would suffice.

161. S.C. CODE ANN. § 62-2-506 (1976). If revocation is by physical act, the testator, or his proxy in his presence and at his direction, must commit the act.

The prior South Carolina case law should continue to serve to construe the statutory requirements for effective revocation. See S.C. CODE ANN. § 62-1-103 (1976), which provides that, unless displaced by the provisions of the Code, the principles of law and equity supplement the Code.

Prior South Carolina law provided similarly.¹⁶²

C. Revival

If a subsequent will that revoked a prior will is itself revoked by physical act, the SCPC does not revive the prior will unless the intent of the testator to revive is proved by clear, cogent, and convincing evidence.¹⁶³ If a subsequent will which revoked a prior will is itself revoked by a third will, the Code does not revive the prior (first) will except to the extent indicated by the third will.¹⁶⁴

Example 12

Testator (T) executes Will #1 on June 1, 1988. On June 1, 1989, T executes Will #2, which expressly revokes Will #1. On June 1, 1990, T destroys Will #2 with the intent to revoke that will. Will #1 is not revived unless proof of T's intent to revive is clear, cogent, and convincing.

Example 13

Testator (T) executes Will #1 on June 1, 1988. On June 1, 1989, T executes Will #2, which expressly revokes Will #1. On June 1, 1990, T executes Will #3, which expressly revokes Will #2. Will #1 is revived only to the extent indicated by Will #3.

If a subsequent will which revoked a prior will was itself revoked, prior South Carolina law provided that the prior will was revived unless the testator intended otherwise.¹⁶⁵

162. S.C. CODE ANN. § 21-7-210 (1976) (repealed by the SCPC). Although that section listed only destroying and obliterating as permissible physical acts of revocation, cases have included burning, cancelling, and tearing as being within the definition of "destroying." See, e.g., *Johnson v. Brailsford*, 10 S.C.L. (2 Nott & McC.) 272 (1820).

163. S.C. CODE ANN. § 62-2-508 (1976).

164. *Id.* The difference in the required evidence necessary for revival depending on whether the revoking will is itself revoked by physical act or by subsequent will relates to the traditional reluctance of courts to consider extrinsic evidence when interpreting wills, yet recognizing the need to use extrinsic evidence in all revocations by physical act to determine that the requisite intent accompanied the act. See *In re Estate of Barker*, 448 So. 2d 28 (Fla. Dist. Ct. App. 1984).

165. See *Kollock v. Williams*, 131 S.C. 352, 127 S.E. 444 (1925); *Taylor v. Taylor*, 10 S.C.L. (2 Nott & McC.) 482 (1820). Actually, the use of the term revival is not com-

D. Incorporation by Reference

The SCPC allows a written document to be incorporated by reference if the document exists when the will is executed, the will indicates the intent to incorporate, and the will sufficiently identifies the document to be incorporated.¹⁶⁶

Prior South Carolina law allowed a written document to be incorporated by reference according to the same requirements imposed by the SCPC,¹⁶⁷ although perhaps with the additional requirement that the will refer to the document as being in existence.¹⁶⁸

E. Events of Independent Significance

The SCPC codifies the common-law doctrine allowing the will to refer to events of independent significance to affect the will's dispositions. The events must have other than purely testamentary significance, that is, some lifetime motive or purpose.¹⁶⁹ Wills may refer properly to qualifying events which occur even after the execution of the will.¹⁷⁰ The execution or

pletely accurate when used under prior law. Since a will is effective only upon the death of the testator, South Carolina treated the first will as merely being covered, rather than revoked, by the second will, until the testator died. Thus, upon revocation of the second will, the first will was uncovered.

166. S.C. CODE ANN. § 62-2-509 (1976). If a document attempting to effect a transfer at death is neither part of the will nor is incorporated therein by reference, then that document will have effect only if executed in compliance with the requisite formalities for testamentary documents. *See, e.g., Harris Trust and Sav. Bank v. Beach*, 145 Ill. App. 3d 682, 495 N.E.2d 1173 (1986).

167. *See, e.g., Richardson v. Byrd*, 166 S.C. 251, 164 S.E. 643 (1932).

168. Certain well-respected commentators cite this requirement. *See, e.g., C. KARESH, supra* note 84, at 36; T. ATKINSON, *supra* note 77 at 388-89. The South Carolina cases discussing incorporation by reference did not appear to require specifically that the will refer to the document to be incorporated as being in existence. *See South Carolina Nat'l Bank v. Copeland*, 248 S.C. 203, 149 S.E.2d 615 (1966); *Richardson v. Byrd*, 166 S.C. 251, 164 S.E. 643 (1932); *Johnson v. Clarkson*, 24 S.C. Eq. (3 Rich. Eq.) 305 (1851); *Milledge v. Lanor*, 4 S.C. Eq. (4 Des. Eq.) 617 (1817). A requirement that the will refer to the document to be incorporated as being in existence seems repetitious of the requirements that the document be in existence and properly identified.

169. S.C. CODE ANN. § 62-2-511 (1976). Events of independent significance are also known as facts, or acts, of independent significance. An attempt to affect dispositions effective at death must comply with the formality requirements for execution of a testamentary document. Rendering the attempt nontestamentary obviates the necessity for compliance therewith.

170. *Id.* These after-occurring events could not be incorporated by reference, since

revocation of the will of one other than the testator may qualify.¹⁷¹

Example 14

The will of Testator (T) provides that B shall inherit “the car that I own at my death.” At the time of execution, T owns a ten-year-old Chevrolet. Subsequently, T purchases a new Mercedes. If T dies owning the Mercedes, B should take. The act of purchasing the Mercedes most probably had lifetime significance (*i.e.*, T wanted to drive a Mercedes) and was not purely testamentary.

Example 15

The will of Testator (T) devises Blackacre to “the beneficiaries I name on a list I will hereinafter prepare.” After the execution of the will, T prepares a list naming B1 and B2 as beneficiaries. The list is unwitnessed and unsigned. The act probably has no lifetime significance independent from purely testamentary purposes. Because the “execution” of the list did not comply with the requirements for executing a valid will,¹⁷² the list cannot operate to affect the disposition of Blackacre at T’s death.¹⁷³

Prior South Carolina law recognized the common-law doctrine of acts of independent significance.¹⁷⁴

F. *Separate Writing Identifying Personal Property Bequest*

The SCPC allows the will to refer to a written list or state-

that doctrine requires existence at the time of execution.

171. *Id.*

172. See *supra* text accompanying notes 113-17.

173. Nor is incorporation by reference applicable to save the devise: the list was not in existence at the time of execution of the will. See *supra* text accompanying note 166.

174. See, *e.g.*, *South Carolina Nat’l Bank v. Copeland*, 248 S.C. 203, 149 S.E.2d 615 (1966). Although the court in *Copeland* recognized the doctrine, the doctrine was inapplicable because the testator’s will attempted to incorporate by reference the will of another, even if not yet executed. Note that the SCPC specifically allows reference to the will of another as an event of independent significance, thereby perhaps overruling and at least clarifying the ruling in *Copeland*. See *supra* text accompanying notes 170-71.

ment to dispose of certain tangible personal property, regardless of when the list is prepared or amended and even if the list is not executed in compliance with the requisite will formalities.¹⁷⁵ Without this specific statutory authorization, the list may not qualify as an act of independent significance since it lacked lifetime significance,¹⁷⁶ nor could it be incorporated by reference if not in existence at the time of execution of the will.¹⁷⁷ Section 62-2-512¹⁷⁸ admits the list into evidence, if signed by the testator or if in his handwriting, to the extent the list concerns qualifying property.

Prior South Carolina law did not authorize specifically a reference to a list. Estate planners who have nevertheless included such an attempt in certain estate plans¹⁷⁹ should be aware that the attempt may have been deemed an invalid testamentary transfer, since the list would not have been prepared in compliance with the requisite formalities for will execution and might not have been saved by the doctrines of incorporation by reference or acts of independent significance.

G. Construction

1. Rules of Construction

The SCPC provides that any rules of construction expressed in the Code apply unless the testator's will indicates a contrary intent.¹⁸⁰ Prior South Carolina law provided similarly: rules of construction apply secondarily to testator's intent.¹⁸¹

175. S.C. CODE ANN. § 62-2-512 (1976).

176. See *supra* text accompanying notes 169-74.

177. See *supra* text accompanying notes 166-68.

178. S.C. CODE ANN. § 62-2-512 (1976). The Code treats tangible personal property, except for money, evidences of debt, title documents, securities, and property used in a trade or business, as qualifying property.

179. See R. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS: A SYSTEMS APPROACH 317-18 (rev. ed. 1985).

180. S.C. CODE ANN. § 62-2-601 (1976).

181. See, e.g., *Rogers v. Rogers*, 221 S.C. 360, 70 S.E.2d 637 (1952). In *Rogers* the supreme court held that the goal of will interpretation is to determine the intent of the testator. Only if the intent is not ascertainable from the will should the court impose rules of construction on the interpretation process.

2. *Treatment of Half Bloods, Illegitimates, and Adopteds*

For testacy purposes the SCPC treats half-bloods, adopteds, and illegitimates the same as for intestacy purposes with one exception: The Code does not consider an illegitimate child to be the child of the father unless the father “openly and notoriously” treated the child as his own.¹⁸²

Prior South Carolina law did not prefer the whole blood to the half blood in any testacy situation.¹⁸³ The law considered adopted children as included within the term “children” for purposes of the wills of adoptive parents, but not for purposes of the wills of testators other than the adoptive parents.¹⁸⁴ The law was unclear as to whether illegitimates were included within certain terms of relationship for testacy purposes.¹⁸⁵

182. S.C. CODE ANN. § 62-2-609 (1976). The exception with respect to the treatment of the illegitimate child may affect the rights under S.C. CODE ANN. § 62-2-302 (1976) of a child born after the execution of the father’s will. *See supra* text accompanying notes 155-58.

Treatment for testacy purposes of half bloods as they are treated for intestacy purposes creates a preference for the whole blood over the half blood at the sibling level of relationship to the testator. *See supra* text accompanying notes 61-74.

183. *Greer v. Greer*, 138 S.C. 475, 136 S.E. 742 (1925); *Gist v. Gist*, 111 S.C. 184, 97 S.E. 240 (1918); *Lewis v. Executors of Vereen*, 3 S.C.L. (1 Brev.) 246 (1803). Note that the treatment of whole blood and half blood differed for intestacy purposes: the statute of descent and distribution preferred whole-blood brothers and sisters over half-blood brothers and sisters of the intestate. By dovetailing the treatment of half bloods for testacy and intestacy purposes, the SCPC thereby introduces a discrimination at the sibling level for testate estates which did not exist under prior law. *See supra* text accompanying notes 61-74.

184. *See, e.g., Bagwell v. Alexander*, 285 S.C. 331, 329 S.E.2d 771 (Ct. App. 1985) (recognizing this State’s adherence to the so-called stranger to the adoption rule); *see also Turner v. Turner*, 260 S.C. 439, 196 S.E.2d 498 (1973). By treating adopteds similarly for testate and intestate estates, the SCPC effectively reverses the stranger to the adoption rule.

185. *Smith v. Smith*, 93 S.C. 213, 76 S.E. 468 (1912); *Shearman v. Angel*, 8 S.C. Eq. (Bail. Eq.) 351 (1831); *Wish v. Kershaw*, 7 S.C. Eq. (Bail. Eq.) 353 (1827).

Prior law expressly attempted to limit the amount of an estate a testator could leave to illegitimate children. S.C. CODE ANN. §§ 21-7-480, 27-23-100 (1976), notorious as the Bastardy Statutes, operated to limit inter vivos and testamentary gifts to a paramour and illegitimate children to one-fourth of the estate after debts. In the case of *In re Estate of Mercer*, 288 S.C. 313, 342 S.E.2d 591 (1986), the South Carolina Supreme Court determined that § 21-7-480 applied to male testators only and therefore violated the equal protection clause of the United States Constitution. The court did not, however, address expressly § 27-23-100, which provisions are substantially analogous to § 21-7-480, except perhaps more broadly applicable with respect to the types of transfers limited. Apparently, § 27-23-100 could limit both inter vivos and testamentary transfers. The SCPC repeals both Bastardy Statutes, *see South Carolina Probate Code, 1986 Acts*

3. *Anti-Lapse*

The SCPC provides that if a beneficiary who is the testator's great-grandparent or lineal descendent thereof predeceases the testator, the gift to that beneficiary will not lapse, but will instead pass to the issue of that predeceased beneficiary.¹⁸⁶ The Code also specifically includes within the protection of the statute a predeceased member of a class who receives a class gift, regardless of that class member's date of death.¹⁸⁷ The prior South Carolina anti-lapse statute saved gifts only when the predeceased beneficiary was a child of the testator who left surviving issue.¹⁸⁸ The statute did not address specifically whether its provisions applied to predeceased class members.¹⁸⁹

4. *Lapsed Devises*

Upon the lapse of a devise under the SCPC, the subject property of a lapsed preresiduary devise passes to the residuary beneficiaries, of a partially lapsed residuary devise to the remaining residuary beneficiaries, and of a completely lapsed residuary devise to the testator's intestate heirs.¹⁹⁰

3446, No. 539, § 2.

186. S.C. CODE ANN. § 62-2-603 (1976). The contrary intent of the testator can supersede the operation of this section. For example, if Testator leaves Blackacre to his son, C1, but to his neighbor, N, if C1 predeceases Testator, the will expresses a substitutional preference. The anti-lapse statute does not apply.

187. *Id.* Obviously, for the statute to save the gift, the class member must be within the protected degree of relationship, i.e., testator's great-grandparent or lineal descendent thereof. When anti-lapse statutes do not deal specifically with the treatment afforded to predeceased class members, confusion may result. See T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 140-41 (2d ed. 1984). The anti-lapse statute does not apply to trust beneficiaries. S.C. CODE ANN. § 62-2-603 (1976) applies to gifts to devisees; in the case of a devise to a trust or trustee, S.C. CODE ANN. § 62-1-201(8) (1976) defines a devisee as the trust or trustee, not the beneficiary.

188. S.C. CODE ANN. § 21-7-470 (1976) (repealed by the SCPC).

189. *Id.*

190. S.C. CODE ANN. § 62-2-604 (1976) expressly covers the lapsed preresiduary and partially lapsed residuary situations. The common law would cover the completely lapsed residuary situation. See S.C. CODE ANN. § 62-1-103 (1976), which provides that, unless displaced by the provisions of the Code, the principles of law and equity supplement the Code.

Example 16

Testator (T) leaves Blackacre to his friend, F, and the residue of his estate to his grandsons GC1, and GC2, in equal shares. If F predeceases T, that devise lapses and falls into the residuary. If GC1 also predeceases T, GC2 takes the entire residuary.

Prior South Carolina law provided similarly with respect to lapsed preresiduary gifts.¹⁹¹ As to partially lapsed residuary gifts, this state followed the “no-residue-of-a-residue rule.” The lapsed gift passed by partial intestacy.¹⁹²

Example 17

Testator (T) left Blackacre to his friend, F, and the residue of his estate to his grandsons, GC1 and GC2, in equal shares. If F predeceased T, that devise lapsed and fell into the residuary. If GC1 predeceased T, that share passed to the heirs of T by partial intestacy.¹⁹³

5. *Satisfaction (Ademption by Satisfaction)*

Under the SCPC, a lifetime gift to a donee who is also a beneficiary under the donor’s will is not chargeable as a satisfaction against the donee’s devise under the donor’s will unless indicated otherwise by the will, by a writing executed by the donor contemporaneously with the gift, or by a written acknowledgement.¹⁹⁴

Under prior South Carolina law, the testator’s intent deter-

191. *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956); *Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946); *Cureton v. Massey*, 34 S.C. Eq. (13 Rich. Eq.) 104 (1866).

192. *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956). The rule applied unless the testator intended a joint tenancy with survivorship or a class gift. *See Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946); *Cureton v. Massey*, 34 S.C. Eq. (13 Rich. Eq.) 104 (1866).

193. Assuming that T did not intend the residuary gift “in equal shares” to create a joint tenancy with a right of survivorship and assuming T did not intend a class gift.

194. S.C. CODE ANN. § 62-2-610 (1976). For purposes of determining the reduction to be made from the donee’s devise under the will, a gift treated as a satisfaction is valued as of the date the donee took possession or enjoyment, or the date of the testator’s death, whichever is sooner.

mined whether a lifetime gift to his beneficiary was offset as a satisfaction against the beneficiary's ultimate share under the will.¹⁹⁵ The previous law did not require a writing expressing the testator's intent.¹⁹⁶ Certain rebuttable presumptions, however, aided in the interpretation of intent. The testator presumably intended the gift as a satisfaction if the donee was his child. A gift to a donee other than a child triggered the reverse presumption.¹⁹⁷

6. *Nonademption*

The SCPC provides that if specifically devised property is not owned by the testator at his death, then the devisee of that property is entitled to whatever remains of that property.¹⁹⁸ The specific devisee also takes any unpaid purchase price for that property (plus any security interest therefor), any unpaid condemnation award for that property, and any unpaid insurance proceeds resulting from a casualty to that property owed to the decedent at his death. The devisee also takes any property owned at death by the decedent that was acquired through a foreclosure, or the security for a specifically devised obligation in lieu of foreclosure.¹⁹⁹

Special rules apply in certain situations where the conservator of a testator sells the specifically devised property, or receives condemnation or insurance proceeds with respect to that property. The devisee is entitled to a general pecuniary devise equal to the sales price, condemnation award, or insurance proceeds reduced to the extent he has received other value for that property pursuant to the Code's nonademption provisions. The subsequent cessation of the testator's disability and his survival for at least one year thereafter render the special rules inapplicable.²⁰⁰ Other special rules apply if the testator specifically de-

195. *Allen v. Allen*, 13 S.C. 512 (1880).

196. *Id.* at 525-26.

197. *Id.* The latter presumption did not apply if its application would lead to the preference of a stranger (one not a child) to a child of the testator.

198. S.C. CODE ANN. § 62-2-606 (1976).

199. *Id.*

200. S.C. CODE ANN. § 62-1-201(6) (1976) defines conservator as a person appointed by a court to manage the estate of a protected person. S.C. CODE ANN. § 62-5-101 (1976), somewhat circuitously, defines a protected person as a minor or incompetent person for whom a conservator has been appointed or a protective order made.

vises securities. The devisee of that property is entitled to whatever remains of the securities plus any additional securities resulting from some action initiated by the entity in which the security indicates an ownership interest, a merger, a consolidation, a reorganization, or a dividend reinvestment plan of a regulated investment company.²⁰¹

Prior South Carolina law differed in that the proceeds and products of a specific bequest disposed of prior to the testator's death did not pass to the specific devisee.²⁰²

7. *Nonexoneration*

The SCPC provides that a specific devise passes subject to any security interest with no right of the specific devisee thereof to exoneration, unless the will indicates a contrary intention.²⁰³ Prior South Carolina law may have provided, absent an indication of the testator's intent otherwise, for exoneration of devisees subject to security interests.²⁰⁴

201. S.C. CODE ANN. § 62-2-605 (1976).

202. See *Taylor v. Goddard*, 265 S.C. 327, 218 S.E.2d 246 (1975); see also *Stanton v. David*, 193 S.C. 108, 7 S.E.2d 852 (1940). For a recent, brief discussion of ademption by extinction, see *Fenzel v. Floyd*, 289 S.C. 495, 347 S.E.2d 105 (1986). Nor did any South Carolina decision grant the specific devisee a substitutional general pecuniary bequest in the event specifically devised property was sold, condemned, or damaged while a guardian handled the testator's estate. At common law, whether the estate contained property which was the subject of a specific devise sometimes depended on the type of change effected on the property during the testator's lifetime. If the change were merely formal, the devisee would take the property in its new form; if the change were substantial, then the devisee did not take. See Means, *supra* note 107, at 491, 537.

203. S.C. CODE ANN. § 62-2-607 (1976). Exoneration allows the specific devisee of property subject to a lien to require the payment of the underlying debt from estate assets other than the specifically devised property. See T. ATKINSON, *supra* note 77, at 706-08, 764-66.

204. Pertinent cases decided under South Carolina law arguably provided for the right of exoneration. These cases may have turned, however, not on the general application of the doctrine of exoneration, but rather on either the particular order of abatement in South Carolina, generally protecting real estate over personal property for the payment of debts (except that specific legacies were more protected than intestate realty), or on the testator's expressed intent. The results apparently would have been the same regardless of which theory the court used. See C. KARESH, WILLS (1977); A. MOSES, SOUTH CAROLINA PROBATE PRACTICE MANUAL 13-17 (2d ed. 1983); see also *Ex parte Clark*, 130 S.C. 501, 126 S.E. 137 (1925); *Henagen v. Harlee*, 28 S.C. Eq. (10 Rich. Eq.) 285 (1858); *Watson v. Child*, 26 S.C. Eq. (9 Rich. Eq.) 129 (1856); *Lawton v. Hunt*, 25 S.C. Eq. (4 Rich. Eq.) 233 (1852); *Brown v. James*, 22 S.C. Eq. (3 Strob. Eq.) 24 (1849); *Ford v. Gaithur*, 19 S.C. Eq. (2 Rich. Eq.) 270 (1846). Note that the SCPC provision for nonexoneration applies specifically to testate estates and does not affect prior South Car-

8. *Exercise of Powers of Appointment*

Under the SCPC, a donee of a power of appointment can exercise the power by his will only if the will makes specific reference to the power or otherwise indicates the donor's intent.²⁰⁵ Under prior South Carolina law, a donee could exercise a power of appointment by indicating his intent,²⁰⁶ or, without evidencing his intent to exercise, by making a general devise of property (unless he indicated a contrary intent).²⁰⁷

H. Contracts Relating to Wills

The SCPC allows proof of a contract to make a will, not to make a will, or to revoke a will only if the will states the material provisions of the contract, if the will expressly refers to the contract and extrinsic proof of the terms of the contract exists, or if the decedent signs a writing that evidences the contract and extrinsic proof of the terms of the contract exists.²⁰⁸ The Code's provisions apply only to contracts made after July 1, 1987. The provisions affect only matters of proof. Prior South Carolina law remains determinative of the efficacy of the contracts.²⁰⁹

Prior South Carolina law recognized the ability of a decedent to contract with respect to the disposition of his estate. The cases required the contract to "be established by the most satisfactory proof and after the strictest and most thorough examination of all circumstances."²¹⁰

olina law with respect to intestate estates. See S.C. CODE ANN. § 62-1-103 (1976), which provides that unless displaced by the provisions of the Code, the principles of law and equity supplement the Code. See also *Ford v. Gaithur*, 19 S.C. Eq. (2 Rich. Eq.) 270 (1846).

205. S.C. CODE ANN. § 62-2-608 (1976).

206. *Boyd v. Satterwhite*, 10 S.C. 45 (1877).

207. S.C. CODE ANN. § 21-7-430 (1976) (repealed by the SCPC). This section definitely applied with respect to a general power, but its application to a special power was uncertain. See *Rogers v. Rogers*, 221 S.C. 360, 70 S.E.2d 637 (1952).

208. S.C. CODE ANN. § 62-2-701 (1976).

209. *Id.*

210. *McKeegan v. O'Neill*, 22 S.C. 454, 467 (1885); see also *Hayes v. Israel*, 242 S.C. 497, 131 S.E.2d 506 (1963); *Looper v. Whitaker*, 231 S.C. 219, 98 S.E.2d 266 (1957); *Wilson v. Gordon*, 73 S.C. 155, 53 S.E. 79 (1905); *Rivers v. Executors of Rivers*, 5 S.C.L. (3 Des.) 190 (1811); *Gary v. Executors of James*, 5 S.C.L. (4 Des.) 185 (1811); *Grimke v. Executors of Grimke*, 2 S.C. Eq. (1 Des.) 366 (1794); *Izard v. Middleton*, 1 S.C. Eq. (1 Des.) 116 (1785).

I. Limitation of Devises

1. Disclaimer

The SCPC allows any person, or one with authority to act on his behalf, to disclaim any interest in property transferred by any means whatsoever to the disclaimant.²¹¹ Upon an effective disclaimer, the disclaimed property is considered to have never been transferred to the disclaimant.²¹² The disclaimer relates back to the date when the transfer (by the transferor) of the interest became effective; for purposes of the disclaimed property interest, the disclaimant is deemed to have predeceased that date. For a future interest that takes possession or enjoyment after the disclaimed interest terminates, the disclaimant is deemed to have died before the disclaimant's interest in the disclaimed property vested indefeasibly and before the disclaimant was finally ascertained. An exception to the general rule that a disclaimant is treated as predeceased for all purposes applies if the disclaimant is a spouse of the transferor. Even though the spouse is deemed to have predeceased the effective date of the transfer for disclaimer purposes, the spouse is not deemed predeceased for other subsequent methods by which the property may be transferred to the spouse.²¹³

Example 18

Testator (T) leaves his entire estate to her husband (H). T's will does not name a contingent beneficiary. T and H have no issue. H disclaims the devise. For purposes of that disclaimer, the Code considers H predeceased, and the disclaimed property will now pass by intestacy. For purposes of the determination of T's intestate heirs, the Code does not consider H as having pre-

211. S.C. CODE ANN. § 62-2-801 (1976).

212. *Id.* § 62-2-801(a).

213. *Id.* § 62-2-801(d). The transferor can overcome the operation of § 62-2-801(d) by providing otherwise. Section 62-2-801(e) defines the date of the effectiveness of the transfer for disclaimer purposes as generally the date when the transfer itself becomes effective. Whether the disclaimer provisions of the SCPC can affect other than tax issues becomes problematic in light of a recent court of appeals ruling. See *Pate v. Ford*, No. 0935 (S.C. App. Apr. 13, 1987), *modified*, — S.C. —, 360 S.E.2d 145 (Ct. App. 1987), *petition for cert. filed*, No. 0935 (S.C. Sept. 21, 1987).

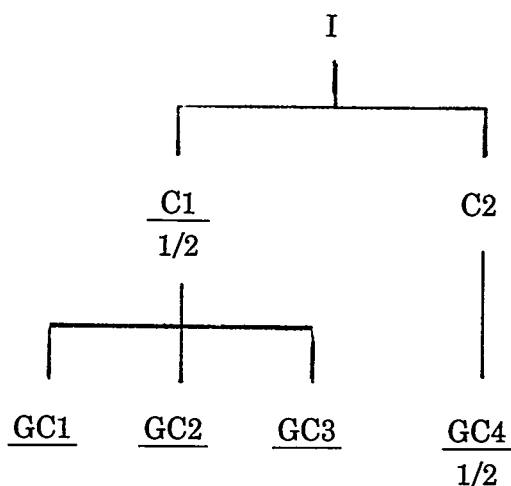
deceased T. H takes by intestacy.

The SCPC recognizes the right to disclaim despite any spendthrift or similar restriction imposed by the transferor.²¹⁴ The disclaimant can effectively waive the right to disclaim.²¹⁵

The operation of the representation rules of SCPC section 62-2-106²¹⁶ in conjunction with the disclaimer provisions of section 62-2-801²¹⁷ can create a trap for the unwary or an opportunity for the wary.

Example 19

Intestate (I) dies survived by one child (C1), three grandchildren (GC1, GC2, and GC3) by C1, and one grandchild (GC4) by his predeceased child C2. Under the SCPC rules of intestate distribution, GC4 and C1 each would take one-half of I's estate.



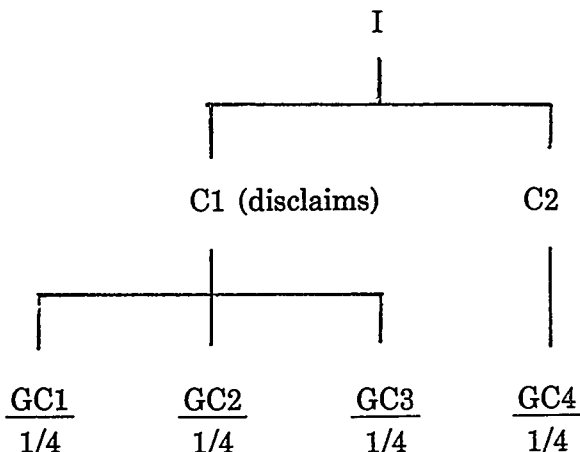
214. S.C. CODE ANN. § 62-2-801(b) (1976).

215. *Id.* § 62-2-801(c). To be effective, the waiver must be written.

216. S.C. CODE ANN. § 62-2-106 (1976); see *supra* text accompanying notes 53-60.

217. S.C. CODE ANN. § 62-2-801 (1976).

If, however, C1 disclaims, section 62-2-801 treats him as having predeceased I. In that event, GC1, GC2, GC3, and GC4 each take one-fourth of the estate, thereby allowing C1's "side" to take three-fourths of the total.



Prior South Carolina law provided similarly in many respects, but differed in several significant areas.²¹⁸ Prior law expressly precluded the operation of the anti-lapse statute with respect to disclaimed property interests.²¹⁹ Previous section 21-37-50 allowed the disclaimers of one or more transfers out of several successive transfers.²²⁰ Finally, prior law treated disclaimers as binding not only upon the disclaimant but also upon those claiming under or through the disclaimant.²²¹

2. Killer/Beneficiary

The SCPC prohibits inheritance from a decedent by one who feloniously and intentionally kills the decedent. Section 62-2-803²²² treats the killer as predeceased not only for purposes of

218. See generally S.C. CODE ANN. §§ 21-37-10 to -80 (1976) (repealed by the SCPC).

219. *Id.* § 21-37-50(a) (repealed by the SCPC).

220. *Id.* § 21-37-50(c) (repealed by the SCPC); see *id.* § 21-37-40(a)(5) (repealed by the SCPC).

221. S.C. CODE ANN. § 21-37-50 (1976) (repealed by the SCPC).

222. S.C. CODE ANN. § 62-2-803 (1976). The Code severs joint tenancies shared by the killer and the victim. The provisions of § 62-2-803 protect a bona fide purchaser for

testate and intestate property, but also for contracts payable on the death of the victim (including insurance contracts), joint tenancies, and for any other property that would have otherwise passed to the killer upon the death of the victim.

A conviction of felonious and intentional killing is conclusive to trigger the operation of section 62-2-803. Any other outcome of a criminal charge or trial is inapplicable to this section. In those cases, the court deciding whether to apply the provisions of this section must determine by the preponderance of the evidence that a felonious and intentional killing occurred.²²³

Prior South Carolina law provided similarly.²²⁴

J. Family Protection: Limitation of Testamentary Power

1. Elective Share

The SCPC introduces the concept of the elective share, or forced share, of the surviving spouse against the decedent spouse's probate estate.²²⁵ The surviving spouse of a domiciliary decedent may opt to take an elective share of one-third of the decedent's probate estate.²²⁶ The spouse may apply the elective share after reduction of the probate estate for proper claims and funeral and administrative expenses.²²⁷

The surviving spouse, his attorney in fact, or the court protecting him may exercise the right of election, but in no event later than the death of the surviving spouse.²²⁸ The spouse can

value from the killer. In addition, any insurance company or bank paying proceeds without written notice will not be liable. See LeBlanc, *supra* note 2, at 511, 523-24.

223. S.C. CODE ANN. § 62-2-803(e) (1976).

224. Both by case law and by statute, South Carolina prohibited one who unlawfully killed another from benefitting from his act. See S.C. Code Ann. § 21-1-50 (1976) (repealed by the SCPC); see also Leggett v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955).

225. See generally S.C. CODE ANN. §§ 62-2-201 to -207 (1976). For purposes of the Code's elective share provisions, "probate estate" means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy. S.C. CODE ANN. § 62-2-202 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)).

226. S.C. CODE ANN. § 62-2-201 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). The right to an elective share of a non-domiciliary is determined by the laws of the state of domicile at the time of death. Whether one qualifies as a surviving spouse is determined under S.C. CODE ANN. § 62-2-802 (1976).

227. S.C. CODE ANN. § 62-2-202 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)).

228. *Id.* § 62-2-203. S.C. CODE ANN. § 62-5-101(3) (1976) defines "protected person"

waive the right to elect, either before or after marriage, and in whole or in part, by a signed writing executed after a fair disclosure.²²⁹ The spouse must provide notice of the election by filing in the court and by mailing or delivering to the personal representative of the decedent's estate, by the later of eight months after the decedent's death or six months after probate of the decedent's will.²³⁰

The Code satisfies the elective share in two ways: First, by property of the decedent's probate estate that passes to the spouse (both testate and intestate) and second, by remaining property of the decedent's probate estate.²³¹ The surviving spouse may retain any property received outside the decedent's will, except by intestacy, without reducing the elective share.²³²

Prior South Carolina law did not recognize the concept of the elective share, but the former rights of the surviving spouse to dower and to curtesy, in order to prevent total disinheritance of a spouse, were similar in spirit to the elective share.²³³

as a minor or incapacitated person for whom a conservator has been appointed or protective order made.

229. S.C. CODE ANN. § 62-2-204 (1976). The spouse may also waive the homestead allowance and exempt property set-aside. See *infra* text accompanying notes 234-43.

230. S.C. CODE ANN. § 62-2-205 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). This section also requires the spouse to notify the personal representative and persons who were to receive from the estate (if their interests will be adversely affected) of the time and place for the hearing. The spouse can withdraw an election prior to final determination by the court.

231. S.C. CODE ANN. § 62-2-207 (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). The Code reduces the elective share by testate and intestate property that would have passed to the surviving spouse but which was disclaimed.

The Code values a beneficial interest left to a surviving spouse at the full value of the property subject to the beneficial interest provided that interest qualifies for the South Carolina estate tax marital deduction. Included is qualified terminable interest property, regardless of whether an election is made to treat it as such. See I.R.C. § 2056(b)(7)(B)(v); S.C. CODE ANN. § 12-15-60 (1976) (as effective January 1, 1986). The SCPC does not address, however, the valuation of a beneficial interest left to a spouse which would not qualify for the marital deduction.

If necessary to charge remaining property to satisfy the elective share, the Code selects such property in accordance with the SCPC order of abatement. See S.C. CODE ANN. § 62-3-902 (1976).

232. S.C. CODE ANN. § 62-2-206 (1976).

233. S.C. CODE ANN. § 21-3-10 (1976) (repealed by the SCPC). The rights to dower and curtesy, however, were inapplicable under the most current South Carolina law. See *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984); S.C. CODE ANN. § 21-5-10 (1976) (repealed by the SCPC).

2. *Exempt Property*

The SCPC entitles a domiciliary decedent's surviving spouse (or if none, then the decedent's minor or dependent children) to certain personal property of the estate not to exceed a value of five thousand dollars.²³⁴ Qualifying property includes household furniture, automobiles, furnishings, appliances, and personal effects. To the extent that the decedent's equity in qualifying property falls short of five thousand dollars, the spouse or children may claim other property of the estate.²³⁵

The exempt property passes free from the claims of most creditors²³⁶ and also from the claims of decedent's beneficiaries.²³⁷ The spouse, or children, must reduce the entitlement to exempt property by any amounts received under the decedent's will or through intestacy.²³⁸ Apparently, the decedent cannot overcome the exempt property entitlement by indicating an intent to the contrary; the set aside seems to be mandatory. The right to the exempt property entitlement exists in addition to any homestead and personal property exemptions otherwise granted by law.²³⁹

To qualify for the entitlement, a claimant must survive the decedent for at least 120 hours.²⁴⁰ The claimant must file his claim to the entitlement with the court and also mail or deliver

234. S.C. CODE ANN. § 62-2-401 (1976).

235. *Id.* The decedent's equity in assets is the value of the assets less the debts secured by security interests therein.

236. The exempt property is not free from administrative and funeral expenses. *Id.*; see S.C. CODE ANN. § 62-3-805(a)(1) (1976).

237. The concept of exempt property passing free from the claims of decedent's beneficiaries is novel to South Carolina law. S.C. CODE ANN. § 62-2-402 (1976) protects specific devises to the extent other estate assets exist to satisfy the exempt property entitlement, but does not address otherwise the order by which other beneficiaries may have to relinquish their devises in order to satisfy the exempt property entitlement. Presumably, the order of abatement set forth in S.C. CODE ANN. § 62-3-902 (1976) would control.

238. The decedent can overcome this offset requirement by providing otherwise in a will, *i.e.*, that the exempt property entitlement shall be in addition to any other property received from the estate by the spouse or children. S.C. CODE ANN. § 62-2-401 (1976).

239. *Id.* Prior law granted limited protection from the claims of decedent's creditors (but not other beneficiaries) for real property and perhaps certain personal property. The SCPC did not revoke or supersede the statutory provisions allowing these exemptions. See *infra* text accompanying notes 242-43.

240. S.C. CODE ANN. § 62-2-104 (1976). For another 120-hour survivorship requirement under the Code, see *supra* subpart II.B.

it to the personal representative of the decedent's estate by the later of eight months after decedent's death or six months after probate of the decedent's will.²⁴¹

Prior South Carolina law did not provide for an entitlement free from the claims of decedent's beneficiaries but did recognize the protection of certain property from the claims of decedent's creditors.²⁴² The statutory homestead allowance protected the decedent's real estate to the extent of one thousand dollars in value from the claims of creditors; the personal property allowance apparently protected five hundred dollars worth.²⁴³

IV. WILL SUBSTITUTES: NONPROBATE TRANSFERS

The SCPC codifies significant areas of law dealing with non-probate transfers. Nonprobate, or nontestamentary, transfers are transfers intended to pass possession or enjoyment at the transferor's death, but which pass independently of the will, if any, of the decedent, and outside the decedent's estate.²⁴⁴ Prior

241. S.C. CODE ANN. § 62-2-402(b) (1976) (as amended by 1987 S.C. Acts ___, No. 171 (S.530)).

242. *See generally* S.C. CODE ANN. §§ 15-41-100, -200, -310 (1976). The SCPC exempt property entitlement exists in addition to these exemption rights, which were not repealed by the Code.

243. S.C. CODE ANN. § 15-41-100 (1976) grants a homestead allowance in the amount of \$1,000 protecting the homestead real property of the "head of the household" from the claims of creditors during his lifetime. The exemption continues with respect to the estate of the decedent. S.C. CODE ANN. § 15-41-310 (1976) grants an exemption from the claims of creditors to personal property in the amount of \$500. Apparently, the personal property exemption also applies to the decedent's estate. In 1981 the South Carolina Exemption Reform Act, 1981 S.C. Acts 78, No. 53, added § 15-41-200, which significantly increases the lifetime protection of a property owner from the claims of creditors, both with respect to amount and to types of property protected. That section supersedes §§ 15-41-100 and -310 only to the extent their provisions conflict with the new section. Section 15-41-200 does not address expressly whether its protection applies to the decedent's estate. Consequently, its application to exempt property from the claims of estate creditors is problematic. Presumably, if § 15-41-200 does not apply to decedent's estates, then the provisions of § 15-41-100 and -310, since not in conflict and therefore not superseded to that extent, continue to apply.

244. *See generally* S.C. CODE ANN. tit. 62, art. 6 (1976). Although for purposes of article 6, a nonprobate transfer transfers possession or enjoyment at the death of the transferor, the rendering of a transfer as nontestamentary presupposes that some interest has presently transferred at the time the transfer became effective during the transferor's lifetime. The transferee of a nontestamentary transfer effected during the transferor's lifetime acquires a future interest, which enables that transferee to demand possession or enjoyment in the future (often upon the death of the transferor), but also to acquire certain rights contemporaneously with the transfer. The failure by a trans-

South Carolina law addressed some of the issues of testamentary versus nontestamentary transfers by statute, some by case law, and some not at all. The Code divides its consideration of non-probate transfers into two general areas—multiple-party accounts and other types of provisions dealing with transfer of possession or enjoyment (usually payment) at the death of the transferor.²⁴⁵

A. Multiple-Party Accounts

The Code recognizes multiple-party accounts²⁴⁶ as valid nontestamentary transfers based on the theory of a third party beneficiary contract to make a gift.²⁴⁷ Certain sections ascertain rights among the parties; other provisions protect financial institutions when they make payments in certain situations.²⁴⁸

Using various theories for support, prior South Carolina law recognized as nontestamentary and valid those accounts analogous under prior law to the multiple-party accounts of the new Code.²⁴⁹

feror to presently transfer some interest in addition to the future right of possession or enjoyment may render the transfer testamentary. A testamentary transfer not executed in compliance with the formalities necessary to create a valid will may be invalid. Unfortunately, a review of the case law indicates substantial confusion among the various courts as to when and whether a certain transfer presently transfers some interest to the transferee, thereby rendering the transfer nontestamentary and effective to pass possession or enjoyment upon the transferor's death, or fails to presently transfer some interest, thereby rendering the transfer testamentary and in violation of the statutory requirements for proper will execution. Indeed, to say that some present transfer of an interest is all that is needed to effectuate a nontestamentary transfer may be too simplistic. Some courts appear not to recognize this criterion in the determination of whether a transfer is testamentary.

245. S.C. CODE ANN. §§ 62-6-101, -102, -201 (1976).

246. S.C. CODE ANN. § 62-6-101(5) (1976) defines multiple-party account as either a joint account, a payable on death (POD) account, or a trust account.

247. S.C. CODE ANN. § 62-6-106 comment (1976).

248. S.C. CODE ANN. § 62-6-102 (1976). The SCPC provides that a creditor of a decedent may claim an interest in the account to the extent of the decedent's beneficial interest in the account before death. The Code limits the claim to the extent other assets of the estate are insufficient to pay the creditor. The creditor must serve written demand upon the personal representative and, if necessary, commence an action within two years after the decedent's death. *See id.* § 62-6-107 (as amended by 1987 S.C. Acts ___, No. 171 comment (S.530)).

249. Prior South Carolina law used contract, gift, and trust theories to support the nontestamentary validity of such accounts. *See Austin v. Summers*, 237 S.C. 613, 620, 118 S.E.2d 684, 687 (1961).

1. *Rights Among Parties*

The SCPC defines the term “party” to include a person who has a present right to demand payment.²⁵⁰ A payable on death (POD) payee is a party only after all original payees have died.²⁵¹ A beneficiary of a trust account is a party when that beneficiary acquires a present right of withdrawal.²⁵²

(a) *During Lifetime*

The SCPC provides that, while all are alive, joint account holders own in proportion to their net contributions to the account, unless there is clear and convincing evidence of intent to the contrary.²⁵³ A POD account with a single original payee belongs to that original payee to the exclusion of a POD payee; a POD account with more than one original payee belongs to those payees according to the net contribution rule governing the rights of joint account holders.²⁵⁴ Unless otherwise indicated, a trust account belongs to the trustee during his lifetime. If the account has more than one trustee, the net contribution rule used with respect to joint accounts is applicable.²⁵⁵

250. S.C. CODE ANN. § 62-6-101(7) (1976). For the definition of payment, see *id.* § 62-6-101(8) (1976). A guardian, conservator, personal representative, or assignee (including a creditor) is a party, unless otherwise indicated by context. *Id.* § 62-6-101(7).

251. S.C. CODE ANN. § 62-6-101(7) (1976). A POD payee is a person designated on a POD account who may request payment from the account after the death of a named person (who typically will be known as an original payee). A POD account is payable to a person (original payee) during his lifetime, but upon the death of that person the account is payable to the POD payee. Note that the SCPC uses “P.O.D.” to describe payable on death accounts and payees. See *id.* § 62-6-101(10), (11).

252. S.C. CODE ANN. § 62-6-101(7) (1976). A beneficiary of a trust account acquires a present right of withdrawal upon the death of all trustees, by a designation on the account contract, or by “clear and convincing evidence” of an irrevocable trust. See, e.g., *id.* § 62-6-103(c) (as amended by 1987 S.C. Acts ___, No. 171 comment (S.530)).

253. S.C. CODE ANN. § 62-6-103(a) (1976). The net contribution of a party consists of all deposits made by or for that party, less all withdrawals made by or for him, plus a pro-rated share of all interest accruing on that account. *Id.* § 62-6-101(6).

254. S.C. CODE ANN. § 62-6-103(b) (1976).

255. *Id.* § 62-6-103(c). The terms of the account contract or clear and convincing evidence of an irrevocable trust can serve to indicate a contrary intent overriding the operation of this section. The SCPC, as originally enacted, may have failed to consider clearly a type of trust account sometimes offered by financial institutions. In these accounts, the grantor creates the account and names a different person or entity as the trustee. The intention of the grantor may be to retain the right to withdraw all or part of these funds during his lifetime, with the beneficiary to acquire the right to withdraw

Prior South Carolina law may have been in accord with respect to joint account holders generally,²⁵⁶ but considered married account holders as each owning one-half of the account, regardless of the contribution ratio.²⁵⁷

(b) *At Death*

The SCPC presumes a right of survivorship for a joint account unless a party files with the financial institution a writing which indicates a contrary intent.²⁵⁸ If more than one party survives the decedent party, then the share in the account of each survivor equals the share each owned when all parties were alive plus an equal portion of the decedent's remaining share as constituted immediately before his death. The right of survivorship continues among the surviving parties.²⁵⁹

Upon the death of an original payee of a POD account, if one or more other original payees survive, the rules with respect to the death of a party to a joint account apply.²⁶⁰ Upon the death of the sole or last surviving original payee, the account belongs to the surviving POD payee. If more than one POD

upon the grantor's death (and perhaps upon the satisfaction of additional conditions precedent, such as requiring the beneficiary to reach a certain age). The grantor would not intend the trustee to have a right to withdraw, but would want him to serve only nominally as the caretaker of the account. As noted above, however, § 62-6-103(c), in its original version, gave the trustee a beneficial interest in the account "[u]nless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an *irrevocable* trust" *Id.* (emphasis added). Arguably, by referring to "other" evidence of an "irrevocable" trust, the Code restricted the grantor's ability to prevent the trustee from obtaining a right to withdraw to those limited situations where the contrary intent is manifested by an account contract that refers to the trust as irrevocable. If so, then the grantor may not have been able to prevent the trustee from acquiring a right to withdraw in revocable trust accounts. To clarify this issue, the General Assembly technically amended § 62-6-103(e) to include those trust accounts in which the grantor does not serve as trustee. *Id.* (as amended by 1987 S.C. Acts ___, No. 171 (S.530)).

256. See *Austin v. Summers*, 237 S.C. 613, 118 S.E.2d 684 (1961); Karesh, *Wills and Trusts, Annual Survey of South Carolina Law*, 14 S.C.L.Q. 227, 228-44 (1961).

257. *Clinkscales v. Clinkscales*, 275 S.C. 308, 270 S.E.2d 715 (1980); *Langston v. Langston*, 250 S.C. 363, 157 S.E. 2d 858 (1967).

258. S.C. CODE ANN. § 62-6-104 (1976). The party may file this writing either at the time of the creation of the account or thereafter. The Code considers as nontestamentary those transfers resulting from the application of § 62-6-104. See S.C. CODE ANN. § 62-6-106 (1976).

259. S.C. CODE ANN. § 62-6-104(a) (1976).

260. *Id.* § 62-6-104(b)(1).

payee survive, each takes an equal share, but without a right of survivorship among them.²⁶¹

Upon the death of a trustee of a trust account, if one or more other trustees survive, the rules regarding the death of a party to a joint account apply.²⁶² Upon the death of the sole or last surviving trustee, the account belongs to the surviving beneficiary.²⁶³ If more than one beneficiary survive, each takes an equal share, but without a right of survivorship among them.²⁶⁴ All other accounts do not pass to the surviving party, but rather pass as part of the decedent's estate.²⁶⁵

A party cannot change by will the trust beneficiary designation for a trust account or the POD payee designation for a POD account. Nor can a party change by will the effect of a right of survivorship which arises pursuant to the account agreement or the Code, except to the extent a party owns an interest in a joint account during his lifetime.²⁶⁶

Prior South Carolina law presumed a right of survivorship for joint accounts unless there was evidence of a different intent.²⁶⁷

2. *Protection of Financial Institutions*

Under the SCPC, a financial institution may pay without liability to any party with certain exceptions.²⁶⁸ The Code does

261. *Id.* § 62-6-104(b)(2). The account or deposit agreement, however, can provide for a right of survivorship.

262. *Id.* § 62-6-104(c)(1).

263. *Id.* § 62-6-104(c)(2). The indication of a contrary intent can overcome the right of the beneficiary to take the account upon the death of the last surviving trustee.

264. *Id.* § 62-6-104(c)(2). The account or deposit agreement, however, can provide for a right of survivorship.

265. *Id.* § 62-6-104(d).

266. *Id.* § 62-6-104(e). The proof of intent to change a right of survivorship, where allowed, must be clear and convincing.

267. The presumption arose from the statutory sections protecting a bank from liability for payment to a joint account holder. *See Johnson v. Herrin*, 272 S.C. 224, 227-28, 250 S.E.2d 334, 336 (1978).

268. S.C. CODE ANN. § 62-6-108 (1976). Caveat: The definition of party. Payment may be made to any of the parties to the account without inquiry as to the source of the funds or as to the intended application of the funds. Note that under the originally enacted version of § 62-6-108, an issue may have arisen regarding the ability to create an account which requires more than one signature of a party to withdraw. To clarify this issue, the General Assembly technically amended § 62-6-108 to recognize accounts requiring more than one signature. S.C. CODE ANN. § 62-6-108 (1976) (as amended by 1987

not protect the financial institution when it knew or should have known that payment might be improper. Thus, the Code affords no protection if the financial institution pays to the personal representative of a deceased party to a joint account, unless the financial institution receives proof that the deceased party was the last survivor among the parties to the account or unless the account did not provide for a right of survivorship.²⁶⁹ Nor may the financial institution pay the proceeds of a POD account, without liability, to a POD payee or his personal representative without proof that the POD payee survived all original payees.²⁷⁰ The Code does not protect the financial institution for payments made to the personal representative of a deceased original payee without proof that the deceased original payee survived all other original and POD payees.²⁷¹ The financial institution also may not pay, without liability, to the personal representative of a deceased trustee of a trust account, unless it receives proof that the deceased trustee survived all other trustees and beneficiaries.²⁷² Finally, the Code does not protect a financial institution which pays to a beneficiary, or to the personal representative of a deceased beneficiary, without proof that the beneficiary survived all trustees.²⁷³

Prior law provided for a presumption of a right of survivor-

S.C. Acts ___, No. 171 (S. 530)). S.C. CODE ANN. § 62-6-105 (1976) deals only with rights of survivorship and apparently not with lifetime rights.

269. *Id.* § 62-6-109 (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). Unless the deposit agreement indicates otherwise, the financial institution may, without liability, make payment to a party regardless of whether any other party is deceased or incapacitated.

270. *Id.* § 62-6-110 (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). The Code allows the financial institution to pay to a POD payee who survives all original payees regardless of whether other POD payees survive. This is consistent with the ability of the financial institution to pay to any party without regard to the rights of others, *see supra* note 268, even though as between the parties (since no right of survivorship exists), other POD payees, or their estates, may have rights in the account.

271. *Id.*

272. *Id.* § 62-6-111 (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). This restriction does not apply if the beneficiary was not required to survive by the terms of the agreement or otherwise.

273. *Id.* § 62-6-111 (as amended by 1987 S.C. Acts ___, No. 171 (S.530)). The Code allows the financial institution to pay to a beneficiary who survives all trustees regardless of whether other beneficiaries survive. This is consistent with the ability of the financial institution to pay to any party without regard to the rights of others, *see supra* note 268, even though as between the parties (since no right of survivorship exists), other beneficiaries, or their estates, may have rights in the account.

ship for joint accounts and for the protection of financial institutions that made payments to a party to a joint account.²⁷⁴ The law did not address specifically the treatment of POD accounts and trust accounts.

B. Nontestamentary Transfers Other than Multiple-Party Accounts

The SCPC recognizes any written instrument that otherwise qualifies as either a contract, a gift, a conveyance, or a trust.²⁷⁵ Prior South Carolina law varied in its recognition of different types of will substitutes as nontestamentary or testamentary.²⁷⁶

V. CONCLUSION

One of the stated purposes of the SCPC is “to simplify and clarify the law concerning the affairs of decedents.”²⁷⁷ Whether the Code accomplishes this objective should not be answered now, but rather in the future, after due time for the consideration of its provisions as applied to the South Carolina practice of trusts and estates. In the interim, lawyers should recognize the changes effected by the Code with respect both to the immediate

274. The South Carolina cases based the presumption of the right of survivorship for joint accounts on the statutory sections protecting financial institutions for payment to a party. *See Johnson v. Herrin*, 272 S.C. 224, 250 S.E.2d 334 (1978). The presumption of the right of survivorship could be overcome by evidence of contrary intent.

275. S.C. CODE ANN. § 62-6-201 (1976). Note that this section does not automatically render nontestamentary all written instruments which attempt to warrant nontestamentary status. To be considered nontestamentary, the written instrument must qualify on its own as a valid contract, gift, conveyance, or trust. Presumably, prior South Carolina law would control the determination of such validity. *See S.C. CODE ANN. § 62-1-103* (1976) which provides that, unless displaced by the provisions of the Code, the principles of law and equity supplement the Code. *See also supra* note 244.

276. *See, e.g., Carolina Prod. Credit Ass'n v. Rogers*, 282 S.C. 184, 318 S.E.2d 357 (1984); *Johnson v. Herrin*, 272 S.C. 224, 250 S.E.2d 334 (1978); *Gilford v. South Carolina Nat'l Bank*, 257 S.C. 374, 186 S.E.2d 258 (1972); *Judson v. Solomons*, 257 S.C. 343, 185 S.E.2d 821 (1971); *Austin v. Summers*, 237 S.C. 613, 118 S.E.2d 684 (1961); *Watkins v. Hodge*, 232 S.C. 245, 101 S.E.2d 657 (1958); *Swygert v. Durham Life Ins. Co.*, 229 S.C. 199, 92 S.E.2d 478 (1956); *Babb v. Paul Revere Life Ins. Co.*, 224 S.C. 1, 77 S.E.2d 267 (1953); *Hydrick v. Hydrick*, 142 S.C. 531, 551-55, 141 S.E. 156 (1927); *Jaggers v. Estes*, 21 S.C. Eq. (2 Strob. Eq.) 181 (1847); *M'Ginney v. Wallace*, 21 S.C.L. (3 Hill) 127 (1837); *Singleton v. Administratrix of Bremar*, 15 S.C.L. (4 McCord) 5 (1826); *see also S.C. CODE ANN. § 33-11-280* (1976); Karesh, *Wills and Trusts, Annual Survey of South Carolina Law*, 18 S.C.L. Rev. 165, 209-10 (1966).

277. S.C. CODE ANN. § 62-1-102(b)(1) (1976).

practice and to the contemplation of additional refinement to the law as may be necessary. Perhaps the greatest accomplishment of the SCPC is to provide an impetus to recognize the need for constant review and for the implementation of the changes needed to render more effective the law of trusts and estates, meeting more effectively the requirements and the expectations of the citizens governed by it.

