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RESULT-ORIENTED INTERPRETATIONS OF THE SOUTH CAROLINA PROBATE CODE CREATE ESTATE OF CONFUSION

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I. INTRODUCTION

Yea, all which it inherit, shall dissolve.
—WILLIAM SHAKESPEARE, THE TEMPEST act 4, sc. 1.

The enactment of the South Carolina Probate Code (SCPC)[1] wrought the most pervasive single modification of estate and probate law in the history of the state. Based on the 1983 version of the Uniform Probate Code (UPC),[2] the SCPC retained some aspects of prior South Carolina law, but reversed a number of entrenched principles and introduced various jurisprudential concepts previously unaddressed by South Carolina law.[3] As with any omnibus legislation, the SCPC required some time after its effective date before it could be assimilated into the local practice, which provided both a prelude to and an integral component of the statute's interpretation.[4]

1. Act of June 9, 1986, No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C. CODE ANN. §§ 62-1-100 to -7-709 (Law. Co-op. 1987 & Supp. 1992)). The SCPC became effective on July 1, 1987. S.C. CODE ANN. § 62-1-100(a) (Law. Co-op. Supp. 1992). For a discussion of the substantive changes that the SCPC had on South Carolina law, see S. Alan Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C. L. REV. 611 (1987).

2. UNIF. PROB. CODE, 8 U.L.A. 1 (1983). The UPC was promulgated in 1969 by the National Conference of Commissioners on Uniform State Laws, *id.* at III, and was last amended in 1990, *id.* at III (Supp. 1993).

3. *See generally* Medlin, *supra* note 1 (discussing the effect of the SCPC on previous South Carolina law).

4. Since the enactment of the SCPC in 1986, the South Carolina General Assembly has been receptive to concerns about perceived technical and substantive problems with

Litigation involving SCPC issues began to reach the appellate level several years ago, allowing the state appellate courts to participate in the development of the new law. Because the incorporation of a judicial gloss is important to the interpretation of any substantial legislation, the South Carolina appellate courts have had, and will continue to have, unique opportunities to influence the evolution of estate and probate jurisprudence under the SCPC. Unfortunately, through either misinterpretation of the policies underlying various SCPC-related issues or publication of ambiguous opinions, in a number of recent decisions the South Carolina appellate courts may have circumvented legislative intent and undermined rights established under the SCPC. Paradoxically, each of these decisions may have unobjectionably resolved the immediate conflict *sub judice* while simultaneously creating ominous precedent for the improper determination of future cases with similar issues.

This Article examines recent appellate court decisions involving the elective share, the vesting of substantive rights, and the enforcement of contracts concerning succession as examples of decisions that potentially threaten broader legal concepts in apparent attempts to obtain particular results.

II. THE ELECTIVE SHARE

Virtually every state imposes on a testator limitations designed to ensure that a surviving spouse may share to some extent in the property titled in the testator's name.[5] Most common among these spousal protection laws are

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the Act and has amended the SCPC several times. *E.g.*, Act of June 30, 1987, No. 171, §§ 1-84, 1987 S.C. Acts 2004, 2005-62 (codified as amended in scattered sections of S.C. CODE ANN. tit. 62 (Law. Co-op. Supp. 1992)); Act of July 13, 1988, No. 659, §§ 1-12, 14-17, 19-21, 1988 S.C. Acts 6111, 6113-31 (codified as amended in scattered sections of S.C. CODE ANN. tit. 62); Act of June 5, 1990, No. 521, pt. I, 1990 S.C. Acts 2273, 2274-325 (codified as amended in scattered sections of S.C. CODE ANN. tit. 62); Act of June 12, 1991, No. 143, 1991 S.C. Acts 519 (codified as amended at S.C. CODE ANN. § 62-3-1001); Act of June 12, 1991, No. 158, 1991 S.C. Acts 553 (codified as amended at S.C. CODE ANN. § 62-7-302); Act of April 8, 1992, No. 306, §§ 1, 5-6, 1992 S.C. Acts 1881, 1883-900 (codified as amended in scattered sections of S.C. CODE ANN. tit. 62); Act of June 23, 1992, No. 475, §§ 2-3, 1992 S.C. Acts 2461, 2463-64 (codified as amended at S.C. CODE ANN. §§ 62-1-302(b), 62-7-112). The 1987 and 1990 amendments were extensive. *See* S. Alan Medlin, *Recent Amendments to the South Carolina Probate Code*, S.C. LAW. Nov.-Dec. 1990, at 37.

5. Methods for ensuring spousal protection include dower, *see infra* note 7, homestead exemptions, *see, e.g.*, UNIF. PROB. CODE § 2-402, 8 U.L.A. 108 (Supp. 1993), personal property set-asides, *see, e.g.*, S.C. CODE ANN. § 62-2-401 (Law. Co-op. Supp. 1992), family allowances, *see, e.g.*, UNIF. PROB. CODE § 2-404, 8 U.L.A. 110 (Supp. 1993), treatment of marital property as community property, *see, e.g.*, *id.* § 2-

those that grant to the surviving spouse an elective or forced share against the testator's property.[6] Elective share statutes vary in operation, but share common purposes. They are intended not only to ensure the surviving spouse some minimum claim in the testator's estate, but also to induce the testator, aware of the possibility of an elective share claim, to make fair provision for the spouse in the testamentary plan. The SCPC introduced the elective share[7] into South Carolina law.

A. The Revocable Trust as an Avoidance Technique

Married testators may want to avoid the elective share for a variety of reasons. For example, a testator who has entered into a subsequent marriage but has children from a previous marriage may be more concerned with transferring assets at death to the testator's children rather than to the surviving spouse.[8] In other cases, the testator may have less appealing reasons for attempting to circumvent the spousal share, such as a desire to leave property to a paramour or to disinherit the surviving spouse out of malice.[9]

Regardless of the underlying reason, married testators have employed

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102A, 8 U.L.A. 77 (Supp. 1993), and elective or forced share statutes, *see, e.g.*, S.C. CODE ANN. §§ 62-2-201 to -207 (Law. Co-op. 1987 & Supp. 1992).

6. Every separate-property state except Georgia provides an elective share right to the surviving spouse. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 377 & n.2 (4th ed. 1990).

7. S.C. CODE ANN. §§ 62-2-201 to -207. The elective share is the most recent form of spousal protection imposed by South Carolina law. Formerly, a husband was entitled to the common-law right of curtesy, a life estate in one-third of the wife's real property if children were born of that marriage. A wife was entitled to the common-law right of dower, a life estate in one-third of the husband's real property, regardless of whether they had any children. In 1883, the South Carolina Supreme Court ruled that curtesy had been impliedly abolished by statute. *See* Gaffney v. Peeler, 21 S.C. 55, 62 (1883). A hundred years later, the court ruled dower unconstitutional, Boan v. Watson, 281 S.C. 516, 519, 316 S.E.2d 401, 403 (1984), and the legislature subsequently abolished the right, Act of May 31, 1985, No. 120, 1985 S.C. Acts 367. From May 22, 1984, the effective date of the *Boan* decision, until July 1, 1987, the effective date of the SCPC with its elective share provisions, South Carolina law provided no significant spousal protection rights. *See* Medlin, *supra* note 1, at 662.

8. For an interesting explanation of the problems inherent in subsequent marriages, see generally Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683 (1992).

9. Obviously, innumerable other reasons falling between the two extremes may exist. For instance, the testator may prefer to transfer assets to the testator's needy kin rather than to an otherwise independently wealthy spouse.

a variety of devices to avoid the elective share.[10] Although these elective share avoidance schemes vary in specific design, they fall into general patterns. These schemes are typically concocted with a view of the particular loopholes available under applicable state law. Most state elective share statutes exclude some type of nonprobate transfer from the reach of the spousal share.[11]

Testators prefer to retain, if possible, a lifetime right to revoke nonprobate transfers, thereby allowing them potentially to avoid the elective share while reserving lifetime control of the transferred property.[12] The vehicle of choice is the funded revocable inter vivos trust, often designed with a retained life interest in the testator and a remainder interest in the intended beneficiary. By retaining the right to revoke, a testator maintains effective lifetime control over the property. The objective is to avoid the elective share by rendering the transfer nontestamentary while accomplishing the testator's ultimate dispositive goals at death.

Testators attempting to skirt the elective share have not always been successful, even when the applicable state law seems to allow the particular avoidance device.[13] The South Carolina elective share provisions[14] appear to allow avoidance of the elective share through nonprobate transfers, including revocable trusts. However, in *Seifert v. Southern National Bank*,[15] the South Carolina Supreme Court refused to allow a revocable trust to successfully avoid the reach of the surviving spouse.

In *Seifert* the decedent attempted to transfer most of his assets into a revocable inter vivos trust. In addition to the right to revoke, the decedent retained other "extensive" powers over the trust: the trustee was prohibited from transferring any of the trust assets without the decedent's permission, unless the decedent became incompetent or died.[16] At the time of the decedent's death, the value of the trust was approximately $800,000. The trust provided that, upon the decedent's death, the trustee was to apportion $150,000 into a separate trust, known as the Agnes T. Seifert Trust, for the

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10. *See infra* part II.C.4.a.-g.

11. Prior to its amendment in 1990, the UPC did not subject to the elective share certain types of nonprobate transfers received by the surviving spouse, such as life insurance. *See* UNIF. PROB. CODE § 2-201, 8 U.L.A. 74 (1983); *id.* § 2-202 & cmt., 8 U.L.A. 74-80. For purposes of this Article, a "nonprobate transfer" is a transfer with lifetime significance that is not controlled by will or intestacy.

12. Although the nonprobate transfer technically occurs during the testator's lifetime, the testator avoids relinquishing control until death, practically rendering the nonprobate transfer as much like a testamentary transfer as possible.

13. *See infra* part II.C.4.a.-g.

14. S.C. CODE ANN. §§ 62-2-201 to -207 (Law. Co-op. 1987 & Supp. 1992).

15. 305 S.C. 353, 409 S.E.2d 337 (1991).

16. *Id.* at 355, 409 S.E.2d at 338.

decedent's widow. The widow's rights in that trust were limited to income for life and principal for medical purposes only.[17] Upon the widow's death, the trustee was to distribute the remainder of the Agnes T. Seifert Trust to the decedent's two daughters from a previous marriage.[18] In addition, the decedent's will granted the widow a life interest in the decedent's half of the marital home and poured over the residue of the decedent's estate into the daughters' trust.[19]

The widow filed a claim against the decedent's estate, asserting that the property in the revocable trust should be subject to her elective share.[20] The decedent's daughters contended that the assets of the revocable trust were excluded from the widow's elective share claim. They referred in particular to an amendment to the SCPC[21] that changed the property subject to the elective share from simply the "estate,"[22] defined broadly by statute,[23] to the "probate estate,"[24] apparently defined to exclude non-probate assets.[25]

The *Seifert* court recognized that the elective share statutes subject only

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17. *Id.* at 354-55, 409 S.E.2d at 338.

18. *See id.* at 355, 409 S.E.2d at 338. Thus, the daughters were to receive two distributions under the trust. The first was to occur at the decedent's death and would consist of those assets not placed in trust for the decedent's widow or otherwise specifically distributed. The second was to occur at the widow's death and would consist of the remainder of the $150,000 held in trust for the widow's life. *See* Record at 16-18.

19. *Seifert*, 305 S.C. at 355, 409 S.E.2d at 338. Because the decedent had funded the revocable trust during his lifetime, most of his assets were already in the revocable trust. *Id.*

20. Section 62-2-201(a) of the SCPC provides, in relevant part, that "the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate, as computed under § 62-2-202." S.C. CODE ANN. § 62-2-201(a) (Law. Co-op. Supp. 1992).

21. Act of June 30, 1987, No. 171, § 5, 1987 S.C. Acts 2004, 2007-08 (codified as amended at S.C. CODE ANN. § 62-2-201 (Law. Co-op. Supp. 1992)). The amendments to the elective share statute are discussed *infra* note 58.

22. S.C. CODE ANN. § 62-2-201(a) (Law. Co-op. 1987) (amended 1987).

23. *See id.* S.C. CODE ANN. § 62-2-202 (Law. Co-op. 1987) ("Estate means the estate reduced by funeral and administrative expenses and enforceable claims.") (amended 1987). Section 62-1-201(11) provides the following definition: "'Estate' includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration." *Id.* § 62-1-201(11).

24. *Id.* § 62-2-201(a) (Law. Co-op. Supp. 1992).

25. *See id.* § 62-2-202 ("For purposes of this Part, probate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administrative expenses and enforceable claims.").

probate assets to the elective share.[26] However, the court held that the SCPC does not preclude the assets in a revocable trust declared invalid as illusory from becoming part of the decedent's probate estate.[27] The court fashioned its conclusion by using bootstrap logic to obtain the apparently desired result: allowing the widow to claim her elective share against the assets in the revocable trust. Furthermore, the occasionally ambiguous, confusing, and contradictory wording of the opinion creates doubt about the wisdom of the court's reasoning. Perhaps more egregiously, the court opened a veritable Pandora's box of basic issues, such as the continued validity of revocable trusts in South Carolina.[28]

B. Extensive/Substantial Control = Illusory = Invalid

The court began its tautologous exercise by determining that the *Seifert* trust was "illusory"[29] because—depending on the section of the opinion referred to—the decedent had either *retained* "*extensive* control"[30] or *exercised* "*substantial* control"[31] over the trust. The court stated that "extensive control" was the retention by the settlor of "the same rights" over the trust assets that he had before creating the trust.[32] Furthermore, in a footnote to the opinion, the court declared: "Substantial control means that a settlor has *retained* such extensive powers over the assets of the trust that he has until death the same rights in the assets after creation of the trust that he had before its creation."[33] Although the footnote definition speaks

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26. Seifert v. Southern Nat'l Bank, 305 S.C. 353, 356, 409 S.E.2d 337, 339 (1991).

27. *Id.*

28. The revocable trust is a device commonly used by estate planners. *See, e.g.*, 1 ROBERT P. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS 3-27 to -28 (2d ed. 1991). Doubts about the validity of revocable trusts would create unprecedented concern in the field of estate planning, in which certainty is a desired commodity because the client may not be around if a change in the plan becomes necessary. *See infra* part II.D.1. A recent amendment to the SCPC attempted to undo the damage *Seifert* may have done to the validity of revocable trusts in South Carolina. *See* S.C. CODE ANN. § 62-7-112 (Law. Co-op. Supp. 1992), *discussed infra* part II.E.

29. *Seifert*, 305 S.C. at 356, 409 S.E.2d at 338.

30. *Id.* at 355-56, 409 S.E.2d at 338 (emphasis added).

31. *Id.* at 357, 409 S.E.2d at 339 (emphasis added).

32. *Id.* at 355, 409 S.E.2d at 338 (citing Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937); Moore v. Jones, 261 S.E.2d 289 (N.C. Ct. App. 1980)). The *Newman* court described extensive control as the retention by the settlor of "*substantially* the same rights." *Newman*, 9 N.E.2d at 968 (emphasis added). In addition, the *Moore* court defined extensive power as "in a real sense . . . the same rights [existing] after creating the trust as [existed] before its creation." *Moore*, 261 S.E.2d at 292. For a criticism of the *Seifert* court's reliance on *Newman* and *Moore*, see *infra* part II.C.4.h.

33. *Seifert*, 305 S.C. at 357 n.2, 409 S.E.2d at 339 n.2 (emphasis added).

only of the "retention" of substantial powers, the text of the opinion refers to the "exercise" of substantial control.[34] Obviously, retention of control and exercise of control are entirely distinct concepts—a settlor can retain control without ever exercising it. Yet, the court failed to distinguish between the two concepts.[35]

It is unclear whether the court based its determination that the trust was invalid as illusory on the decedent's mere retention of extensive or substantial control, or on the decedent's actual exercise of that control. Also unclear is whether the court determined that the decedent had extensive or substantial control solely because he retained the right to revoke, or rather because he retained "additional" extensive powers, including the right to forbid the trustee from exercising its power of sale.[36]

Nevertheless, the court determined that the trust was illusory and, therefore, invalid.[37] By ruling that the trust was "illusory," the court invoked a buzzword that has served as a talisman in a number of opinions from other jurisdictions—albeit with different elective share statutes—that have invalidated various attempts to avoid the elective share through the use of revocable trusts.[38] Apparently, the *Seifert* court invalidated the trust to justify including the trust assets in the "probate estate,"[39] thereby subject-

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34. *Id.* at 357, 409 S.E.2d at 339 ("[W]e hold that, where a spouse seeks to avoid payment of the elective share by creating a trust over which he or she *exercises* substantial control, the trust may be declared invalid as illusory . . . .") (emphasis added).

35. *Cf. In re* Estate of Puetz, 521 N.E.2d 1277, 1281 (Ill. App. Ct. 1988) (stating that the extent to which retained powers are exercised is a material question of fact). Nothing in the *Seifert* opinion, briefs, or record indicates that the decedent ever exercised his retained control.

36. *See supra* note 18 and accompanying text; *infra* notes 76-77 and accompanying text. The opinion also notes that the original trust agreement and a subsequent amendment refer to the arrangement as "custodial." *Seifert*, 305 S.C. at 355, 409 S.E.2d at 338. However, the opinion failed to mention that a second amendment to the trust deleted any reference to the bank serving in a "custodial capacity" and clarified that the bank served as trustee. *See* Record at 31-32.

37. *Seifert*, 305 S.C. at 356-57, 409 S.E.2d at 338-39. Indeed, the opinion treats the terms "illusory" and "invalid" as synonymous. *See id.* at 356, 409 S.E.2d at 339 ("[N]othing in the Probate Code prohibits a trust, declared *invalid as illusory*, from reverting to the probate estate . . . .") (emphasis added); *id.* at 357, 409 S.E.2d at 339 ("[T]he trust may be declared *invalid as illusory* . . . .") (emphasis added); *id.* ("[N]othing . . . prohibits the proceeds of a trust, once declared *invalid or illusory*[,] from being included in the probate estate . . . .") (emphasis added).

38. *See infra* part II.C.4.a.-g.

39. S.C. CODE ANN. § 62-2-202 (Law. Co-op. Supp. 1992). The relevant text of this section is set out *supra* note 25.

ing them to the elective share.[40]

The court analogized Seifert's "illusory" trust to the failure of "an otherwise valid trust," and observed that "[t]he proceeds of the failed trust would revert back to the settlor's estate and become part of the residue."[41] This comparison provided the court a reason for including the revocable trust assets in the decedent's probate estate.[42] Thus, the trust property became "part of the *estate* for elective share purposes."[43]

The court further supported its decision by referring to the SCPC statute that allows a waiver of the elective share.[44] The court attempted to construct another tautology by reasoning that, because the statute permits a waiver, the elective share right must be substantial, and that because the elective share right is substantial, it cannot be circumvented as urged by the respondents.[45] The opinion concluded: "[W]here a spouse seeks to avoid payment of the elective share by creating a trust over which he or she exercises substantial control, the trust may be declared invalid as illusory, and the trust assets will be included in the decedent's estate for calculation of the elective share."[46] Accordingly, the court remanded the case for determination of the wife's elective share.[47]

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40. *See Seifert*, 305 S.C. at 357, 409 S.E.2d at 339.

41. *Id.* at 356, 409 S.E.2d at 339 ("We see very little difference between this situation and one in which an otherwise valid trust fails.").

42. Whether the failure of the trust is total or only for elective share purposes is problematic. *See infra* part II.C.3.a.

43. *Seifert*, 305 S.C. at 356, 409 S.E.2d at 339 (emphasis added). The court's use of the term "estate" instead of "probate estate" to refer to the collection of assets against which the elective share could be charged is perhaps a Freudian slip. The court creatively devised a method by which the trust assets could be included in the "probate estate"—by express statutory definition the only assets of a decedent chargeable with the elective share; yet, the opinion described the assets subject to spousal election as simply the "estate," a much broader and more ambiguous term.

Concern that the original version of the elective share statutes, which calculated the elective share from the decedent's "estate," would be misinterpreted to subject non-probate assets to election prompted the amendment to the SCPC that clarified the intent to subject only probate assets to the elective share. *See infra* note 58 and accompanying text. By using the term "estate," however, the *Seifert* court not only exposed its disregard of legislative intent, but also foreshadowed the likely progeny of its decision. *See infra* part II.C.3-3.a.; part II.D.3.

44. *Seifert*, 305 S.C. at 357, 409 S.E.2d at 339. The elective share waiver statute provides: "The right of election of a surviving spouse . . . may be waived . . . by a written contract, agreement, or waiver signed by the party waiving after fair disclosure." S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

45. *Seifert*, 305 S.C. at 357, 409 S.E.2d at 339.

46. *Id.* (footnote omitted).

47. *Id.*

C. *A Critique of* Seifert

Perhaps the most difficult aspect of criticizing the *Seifert* opinion is deciding where to begin. The questionable reasoning used by the court in its apparent obsession to obtain a result[48] left in its wake the potential for enervation of clear legislative intent[49] and the portent of a possible far-reaching disruption of time-honored concepts of trust law.[50] The problems with the opinion, both in concept and presentation, are numerous.

1. *History of the Elective Share in South Carolina*

As discussed previously, no elective share right existed in South Carolina before the general assembly enacted the SCPC.[51] One preliminary version of the SCPC bill contained an elective share provision, similar to the UPC version,[52] that allowed a surviving spouse to claim the elective share against the "augmented estate," which included nonprobate assets such as revocable inter vivos trusts.[53] The general assembly rejected the "augmented estate" concept as too complex and instead adopted a "simpler" version of the elective share calculated against the "estate" of the decedent.[54] As the *Seifert* court admitted, the legislature's intent in rejecting the "augmented estate" was to avoid the "elaborate system of incorporating various non-probate assets into the estate."[55]

However, the term "estate," defined in SCPC section 62-1-201(11), "includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration."[56] Because the definition of "estate"

48. Why the court might have felt compelled to obtain a result in favor of the widow is another question. Equitable considerations were not necessarily in her favor. She had income benefits from the most recent of her four previous marriages. Record at 115, 118-19. In addition, she knew about the trust several months before the decedent began funding it. *Id.* at 120-22, 132. Finally, she received the income from the $150,000 trust for life, *id.* at 16-17, and some property interests under the will, *id.* at 35-36. For examples of how the elective share can render unfair results, see Waggoner, *supra* note 8, at 715-48.

49. *See infra* part II.C.4.h.

50. *See infra* part II.D.2.

51. *See supra* note 7.

52. *See* UNIF. PROB. CODE §§ 2-201 to -202, 8 U.L.A. 74-77 (1983).

53. *See infra* note 58.

54. *See Seifert*, 305 S.C. at 356-57, 409 S.E.2d at 339 (citing S.C. CODE ANN. § 62-2-202 cmt. (Law. Co-op. 1987) (amended 1987)).

55. *Id.* at 356, 409 S.E.2d at 339.

56. S.C. CODE ANN. § 62-1-201(11) (Law. Co-op. 1987).

arguably might have subjected nonprobate assets to the elective share, the general assembly amended sections 62-2-201 and 62-2-202 to provide that the elective share may be enforced against *only* probate assets,[57] which the SCPC defines as the property passing under a decedent's will or by intestacy.[58]

Consequently, nonprobate or nontestamentary assets,[59] by definition, should not be subject to the elective share. A transfer is nontestamentary if the transferor affords lifetime significance to the transfer by presently transferring some interest to the transferee.[60] Although courts and com-

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57. Act of June 30, 1987, No. 171, §§ 5-6, 1987 S.C. Acts 2004, 2007-08 (codified as amended at S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. Supp. 1992)).

58. S.C. CODE ANN. §§ 62-2-201 to -202. At the request of the South Carolina Senate Judiciary Committee, the author served as chair of a committee convened to suggest technical corrections to the original version of the SCPC. The committee met during November and December of 1986 and formulated a number of technical corrections, which the author presented in bill form to the Senate Judiciary Committee in January 1987. The bill included the language amending SCPC §§ 62-2-201 and 62-2-202, which was enacted verbatim by the general assembly. The report accompanying the draft bill explained that the purpose of these proposed amendments was to clarify the elective share provisions, thereby making them conform to the general assembly's original intent to limit the elective share to probate assets. The general assembly enacted the bill to be effective July 1, 1987, the same effective date as the original version of the SCPC. Act of June 30, 1987, § 91, 1987 S.C. Acts at 2070.

In 1989 both Judiciary Committees of the general assembly retained the author to form a committee to study and propose technical and substantive changes to the SCPC. As a result, the Joint Study Committee for the SCPC was formed. Its members included several estate planning and probate practitioners, two probate judges, one state senator, and one state representative. After soliciting proposals for amendments to the SCPC from interested persons and studying the various suggestions, the Committee presented two proposed bills and an accompanying report to the Judiciary Committees. The general assembly enacted the first proposed bill, which contained numerous amendments. Act of June 5, 1990, No. 521, 1990 S.C. Acts 2273 (codified as amended in scattered sections of S.C. CODE ANN. tit. 62 (Law. Co-op. Supp. 1992)). The second bill proposed an amendment to the elective share which would have provided that the elective share be charged against an augmented estate containing nonprobate assets, such as revocable inter vivos trusts. H.R. 4956, 108th Leg., 2d Sess. (1990). The general assembly failed to enact this elective share amendment.

59. For purposes of this Article, the terms "nonprobate" and "nontestamentary" are synonymous.

60. *See* Medlin, *supra* note 1, at 664 n.244; *cf.* Randler v. Ogburn (*In re* Estate of Ogburn), 406 P.2d 655, 660 (Wyo. 1965) (discussing the distinction between gross estate and probate estate). *See generally* Carolyn B. Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 CUMB. L. REV. 1, 2-5 (1990-1991) (explaining the difference between probate and nonprobate assets).

For example, if *A* retains a life estate in Greenacre, but transfers the remainder interest to *B*, *B* has immediately received an interest in property. *B* can sell, mortgage,

mentators may have some difficulty describing the interest immediately transferred to a beneficiary upon the creation of a revocable inter vivos trust,[61] it is well established that a settlor's retention of the power to revoke does not render a trust testamentary.[62]

2. *The Revocable Trust in South Carolina*

The common law of South Carolina has long regarded a revocable trust as a valid method of nontestamentary transfer.[63] Furthermore, South Carolina has several statutes recognizing the validity of revocable trusts as nontestamentary. Section 62-6-201(a) of the SCPC acknowledges that a transfer "otherwise effective as a . . . trust" is nontestamentary.[64] Because a revocable trust is "otherwise valid" under South Carolina common law, section 62-6-201(a) implicitly validates this nontestamentary device. In addition, section 62-7-603(A)(3) confirms the validity of a trust in which the same person holds both legal and equitable title unless the sole fiduciary is also the sole beneficiary, even if the trust is revocable.[65] Thus, a revocable

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assign, or gift the remainder interest and can enjoin *A* from committing waste to the property. *B* obtains these immediate rights even though *B*'s possession or enjoyment is delayed until the future—at *A*'s death. Thus, *B* has a future interest, as compared to a present interest for which the right to possess or enjoy is immediate. The transmission of these immediate rights to *B* constitutes a nontestamentary transfer. *See* S.C. CODE ANN. § 62-6-201(a) (Law. Co-op. 1987). Therefore, the remainder interest in Greenacre does not pass by will or intestacy at *A*'s death because *A* has already given it away during *A*'s lifetime.

61. *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955).

62. *E.g.*, 1A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 57.1, at 125 (4th ed. 1987).

63. *See, e.g.*, Chiles v. Chiles, 270 S.C. 379, 242 S.E.2d 426 (1978) (recognizing the ability of a settlor to create a revocable trust by retaining a right to revoke). *See generally* Steven E. Williford, Survey, *Probate Law*—Seifert v. Southern National Bank, 44 S.C. L. REV. 137, 141 & n.31 (1992).

64. S.C. CODE ANN. § 62-6-201(a) (Law. Co-op. 1987).

65. *See* S.C. CODE ANN. § 62-7-603(A)(3) (Law. Co-op. Supp. 1992). The history of this section helps to support the validity of revocable trusts. In 1988, the general assembly enacted § 62-7-603 in its original version to accomplish two purposes: (1) to confirm that no merger of legal and equitable title occurs unless the same person alone holds both legal and equitable title; and (2) to confirm the common-law rule that a co-trustee cannot participate in a decision that would benefit the co-trustee as beneficiary of the trust because of the inherent conflict of interest. *See* Act of June 1, 1988, No. 596, § 1, 1988 S.C. Acts 5006, 5007-08. Subsection (B) of the original version of the statute applied an exception to both purposes: "Subsection (A) of this section does not apply to revocable trusts in which the fiduciary of the trust is also the creator of the trust and is living." *Id.* § 2, 1988 S.C. Acts at 5009.

Estate planners believed that the application of the exception to both purposes of

trust may be valid in South Carolina even if the settlor both serves as trustee and is the life beneficiary.[66] Finally, SCPC section 62-2-510, South Carolina's version of the Uniform Testamentary Additions to Trusts Act,[67] recognizes the validity of a testamentary pour-over into a revocable trust, similar to the plan intended by the decedent in *Seifert*. Section 62-2-510 provides, in part: "A devise or bequest . . . may be made by a will to the trustee of a trust . . . . The devise is not invalid because the trust is amendable or revocable . . . ."[68]

3. *Invalidation of the Revocable Trust*

To subject the assets of the trust to the elective share, the *Seifert* court had to create a stratagem to make the trust property part of the probate estate, despite the historical treatment of revocable trusts as nonprobate assets. The court adopted the conceit of having the trust fail completely as illusory.[69] Although it is difficult to tell from the opinion, the court apparently considered the trust to be illusory because the decedent retained the right to revoke in combination with other "extensive powers."[70] The court observed that "[t]he role of the trustee was described in the trust agreement and in a subsequent amendment as 'custodial.'"[71] In referring to the subsequent amendment to the trust, the court was either careless in its research or careful in its language to obfuscate the facts: the subsequent amendment expressly deleted the language that described the trustee's role as custodial.[72]

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the statute was unintended, and that the exception was supposed to apply only to the conflict of interest purpose. Consequently, in 1990 the general assembly amended § 62-7-603(B), which currently provides: "Items (1) and (2) of subsection (A) of this section do not apply to revocable trusts in which the fiduciary of the trust is also the creator of the trust and is living." Act of June 5, 1990, No. 521, § 94, 1990 S.C. Acts 2273, 2319-20 (codified as amended at S.C. CODE ANN. § 62-7-603(B) (Law. Co-op. Supp. 1992)). Because the no-merger purpose of the statute is found in subsection (A)(3), the amendment operates to confirm the no-merger rule even if the trust is revocable. Thus, the legislature implicitly recognized the validity of revocable trusts.

66. In *Seifert* the settlor did not serve as trustee. *See* Seifert v. Southern Nat'l Bank, 305 S.C. 353, 355, 409 S.E.2d 337, 338 (1991).

67. UNIF. PROB. CODE § 2-511, 8 U.L.A. 122 (Supp. 1993).

68. S.C. CODE ANN. § 62-2-510(a) (Law. Co-op. 1987).

69. *See supra* part II.B.

70. *See supra* notes 29-36 and accompanying text.

71. *Seifert*, 305 S.C. at 355, 409 S.E.2d at 338.

72. *See* Record at 31. The first amendment to the trust agreement expressly omitted the clause in the original trust agreement that referred to the trustee's role as "custodial":

> Article II is amended by striking out the clause reading "the Trustee shall serve essentially in a custodial capacity and its fees and commissions shall be

The only other "extensive retained power" mentioned in the opinion was the decedent's lifetime right to veto the sale, investment, or reinvestment of any trust asset by the trustee.[73] The court failed to mention, however, that the trust specifically provided an additional fee to the trustee if the decedent withdrew any principal.[74] Obviously, the provision of such a fee to a trustee indicates that the decedent did not retain the "same rights" he had before creating the trust.[75]

However, any discussion by the court about retained rights other than the power to revoke is superfluous. The right to revoke is the ultimate right that a settlor can retain; all other rights are incidental.[76] A settlor retaining the right to revoke can effectively control the trustee in every aspect of the trust administration: if the trustee fails to obey the directions of the settlor, the settlor can simply revoke the trust. Moreover, the settlor of a revocable trust does not retain the same rights after creation of the trust as before creation because the settlor must at least exercise the right of revocation before reasserting absolute ownership of the trust property.[77] Thus, if a trust is valid despite the retained right to revoke, it should be valid despite the retention of any additional incidental rights. In fact, virtually every court has recognized revocable trusts as valid nontestamentary transfers.[78]

> limited to the commissions for custodial services stipulated in its regularly published Schedule of Compensation in effect at the time such compensation may become payable and at the time said services are rendered" . . . .

Id. The decedent executed the original trust on August 5, 1987, *id.* at 13, and the first amendment to the trust on July 7, 1988, *id.* at 33.

73. *See Seifert*, 305 S.C. at 355, 409 S.E.2d at 338.

74. *See* Record at 134.

75. *See supra* notes 29-36 and accompanying text.

76. *See* WILLIAM D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 90 (1960) ("[I]t is the power to revoke that gives the settlor the greatest substantial control."); Van F. McClellan, Note, *Inter Vivos Transfers: Will They Stand up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY U. L. REV. 605, 623 (1989). Actually, the retained right to amend is commensurate with the retained right to revoke. A settlor who retains only a right to revoke can nevertheless effectively amend the trust by revoking the original and creating a new trust with the desired terms. Similarly, a settlor who retains only a right to amend can nevertheless effectively revoke the trust by amending the original to include a right to revoke and then exercising the right to revoke. Under South Carolina law, the general rule is that a settlor retains neither the right to revoke nor the right to amend unless specifically provided in the trust. *See* Chiles v. Chiles, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978).

77. For example, an absolute owner may sell Blackacre without further action. If, however, the owner had previously transferred Blackacre into a revocable trust, the owner must first revoke the trust, by whatever method is required, before selling Blackacre. To sell Blackacre, the settlor of the revocable trust must take at least one more step than the absolute owner.

78. *See infra* note 210 and accompanying text. Statutes have also recognized the

Some courts in other jurisdictions have weighed equitable factors to invalidate trusts not *completely*, but rather for elective share purposes *only*, when the decedent retained excessive control over the trust.[79] However, the *Seifert* court had to invalidate the trust completely to create a resulting trust so that the trust assets would be included in the decedent's probate estate.[80] In so doing, the court not only ignored pertinent South Carolina statutes and common law, but also misread or misapplied the cited case law from other jurisdictions.[81]

a. The Resulting Trust Theory

Because the SCPC subjects only probate assets to the elective share,[82] the *Seifert* court had to invalidate the revocable inter vivos trust, thereby causing the assets[83] of the failed trust to "revert back to the settlor's *estate*."[84] The court equated the invalidation of the illusory trust with the failure of a trust: "We see very little difference between this situation and one in which an otherwise valid trust fails."[85] Without citing authority, the court cursorily stated that the assets of a failed trust "revert" to the settlor's estate,[86] so that absolute ownership of the assets is maintained by the person who attempted to create the failed trust and intended the assets to be subject to the trust.

The court's discussion of the trust's failure was superficial because the

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validity of a trust in which the settlor retains the right to revoke. *See supra* notes 64-68 and accompanying text.

79. *See, e.g.*, Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937); Johnson v. Farmers & Merchants Bank, 379 S.E.2d 752, 757 (W. Va. 1989); *see also* Taliaferro v. Taliaferro, 843 P.2d 240 (Kan. 1992) (discussing the difference between total invalidation and partial contribution from a revocable inter vivos trust for spousal share purposes only).

80. *See infra* part II.C.3.a.

81. *See infra* part II.C.4.h.

82. *See* S.C. CODE ANN. § 62-2-201(a) (Law. Co-op. Supp. 1992); *see also supra* note 58 (discussing the history of South Carolina's elective share statutes and the probate estate).

83. The court actually used the term "proceeds," Seifert v. Southern Nat'l Bank, 305 S.C. 353, 356, 409 S.E.2d 337, 339 (1991), which is usually intended to define earnings and income from trust assets. Apparently, the court meant to use the term "assets." If the court meant to use "proceeds" in its usual sense, then only the earnings from the failed trust, rather than the entire trust property, would revert to the settlor's estate and thus be subject to the elective share.

84. *Id.* (emphasis added). Again, despite the casual use of the term "estate," the court must have intended to use the term "probate estate," which by statutory directive is the only part of the decedent's property subject to the elective share. *See supra* note 43.

85. *Seifert*, 305 S.C. at 356, 409 S.E.2d at 339.

86. *Id.*

court failed to distinguish the two times at which a trust can fail: (1) upon the attempt to create the trust;[87] or (2) at some time after the trust has obtained validity.[88] In the former situation, the trust fails because it was never created. In the latter, the trust is created, but subsequently fails. Upon a trust's failure, the trustee[89] must return the property to the settlor, unless the settlor has evidenced a contrary intent.[90] To allow the trustee to retain title to the property would result in a windfall to the trustee. The so-called "resulting trust" is the equitable remedy that arises automatically by operation of law and, absent the settlor's contrary intent, requires the return of the property to the settlor.[91]

The *Seifert* court did not even mention the term "resulting trust," let alone that the resulting trust theory does not require a return of the property to the settlor if the settlor indicated a contrary intent. However, the court implicitly relied on a resulting trust theory in effect to return the trust assets to the decedent to become part of his probate estate. Although the court did not specify when the trust failed, the trust had to fail either upon the decedent's attempt to create it or at some time after it became valid.[92] In either situation, under the applicable law, a resulting trust would not necessarily ensue from the failure of the trust if the decedent evidenced a

87. A trust's failure upon its attempted creation typically occurs when there is no trust beneficiary, thus preventing the division of legal and equitable title essential to the creation of a trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 411 cmt. g (1957); GEORGE T. BOGERT, TRUSTS § 75 (6th ed. 1987); AUSTIN W. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 411.1 (1960).

88. The subsequent failure of an initially valid trust usually occurs when the purpose of the trust becomes illegal or impossible to accomplish, or when the purpose is completed without exhausting all of the trust property. *See* RESTATEMENT (SECOND) OF TRUSTS § 411; BOGERT, *supra* note 87, §§ 75, 150; SCOTT, *supra* note 87, §§ 335, 404.1.

89. The use of the term "trustee" may be technically imprecise in the first situation because, if a trust was never created, then there is no trustee.

90. *See* Pate v. Ford, 293 S.C. 268, 280-81, 360 S.E.2d 145, 152-53 (Ct. App. 1987), *rev'd on other grounds*, 297 S.C. 294, 376 S.E.2d 775 (1989); RESTATEMENT (SECOND) OF TRUSTS §§ 411-12; BOGERT, *supra* note 87, §§ 75, 150; SCOTT, *supra* note 87, §§ 345.3, 411-411.1.

91. *See* authorities cited *supra* note 90.

92. *See supra* notes 87-88. The spouse's elective share right did not arise until the decedent died. Presumably, if the trust failed after it became valid, the failure occurred at or after the decedent's death because only then did the trust interfere with the spouse's elective share right. In that event, three likely possibilities exist concerning when the trust failed: (1) at the moment of the decedent's death; (2) when the spouse presented her elective share claim; or (3) at the time of the court's ruling. By relying on any of these three theories, the court would essentially be ruling that the trust was valid during the decedent's lifetime, but failed at the specified time because the trust interfered with the surviving spouse's elective share right.

contrary intent.[93] The court's reasoning is faulty regardless of when the trust failed.

If the trust failed at the time of its attempted creation, then a resulting trust arose and the putative trustee should have returned to the settlor the assets intended for the trust.[94] Because the assets did not belong to the failed trust, but rather to the settlor, they were by definition included in his probate estate and subject to the elective share. By finding that the revocable trust was entirely invalid because the settlor retained or exercised too much control, the court either ignored or intended to change dramatically basic South Carolina trust law, which had recognized the validity of a revocable inter vivos trust despite the settlor's retention of ultimate control—the right to revoke.[95]

One could argue that the court did not intend to invalidate the trust entirely, particularly because the *Seifert* opinion repeatedly describes the failure of the trust with qualifying language.[96] However, this argument is

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93. Arguably, the decedent in *Seifert* evidenced an intent that the trust assets not return to him if the trust failed both by providing for distribution of the trust assets to his daughters at the anticipated termination of the trust and by his general dispositive plan, which indicated his desire to avoid subjecting the trust assets to the elective share. *See supra* notes 18-19 and accompanying text.

94. *See supra* note 90 and accompanying text.

95. *See supra* part II.C.2.

96. *See Seifert*, 305 S.C. at 355-56, 409 S.E.2d at 338-39. At several places in the opinion, the court seemed to limit its holding to an invalidation of the trust for elective share purposes only. *See, e.g.*, *id.* at 355, 409 S.E.2d at 338 ("Widow contends . . . that the trust assets should be included in Husband's estate for purposes of valuing her elective share."); *id.* at 356, 409 S.E.2d at 339 ("The trust property would then be part of the estate for elective share purposes."); *id.* ("Similarly, nothing in the Probate Code prohibits a trust, declared invalid as illusory, from reverting to the probate estate and being included in it for elective share purposes."); *id.* ("[W]e hold that the proceeds of the trust should be included in Husband's estate for the purpose of calculating Widow's elective share.").

Elsewhere, however, the court's language indicates that the invalidation of the trust was absolute. *See, e.g.*, *id.* at 355-56, 409 S.E.2d at 338 ("In light of the evidence . . . we find that the trust is illusory and, thus, invalid."). The court used perhaps its most inconsistent language in the sentence that purports to announce its holding:

> "[W]e hold that, where a spouse seeks to avoid payment of the elective share by creating a trust over which he or she exercises substantial control, the *trust may be declared invalid as illusory,* and the *trust assets will be included in the decedent's estate for calculation of the elective share.*"

Id. at 357, 409 S.E.2d at 339 (emphasis added) (footnote omitted). This sentence could support an argument that the court invalidated the trust either absolutely or for elective share purposes only.

However, the court's inconsistent use of language does not affect whether the court intended to invalidate the trust entirely. Even if the court meant to state consistently that

without merit. The trust assets could be included in the decedent's probate estate under the resulting trust theory only if the trust failed completely. If the trust did not fail completely, then there could be no resulting trust.[97] In that event, the assets would not revert to the settlor, would not be included in his probate assets, and, by definition, would not be subject to the elective share.[98] Because the court implicitly relied on the resulting trust theory to include the assets in the decedent's probate estate, the trust must fail completely.[99]

Cases from other jurisdictions that subject the assets of revocable trusts to the elective share do not totally invalidate these trusts. Rather, the trusts are considered generally valid and are invalidated only for the purpose of subjecting the assets to the elective share.[100] The difference between using a resulting trust and invalidating an illusory trust only for elective share purposes is considerable: a resulting trust generally occurs when a trust fails ever to obtain validity or, after obtaining validity, fails entirely; however, a trust considered "illusory" for elective share purposes only is considered valid for all other purposes.[101]

Unlike other jurisdictions that limit the invalidation of a revocable trust only for the purpose of calculating the elective share, the *Seifert* court invalidated the trust entirely. Anything short of an absolute and complete invalidation would fail to obtain the court's desired result: including in the

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the trust was invalid for elective share purposes only, that result is untenable. Because the court used the resulting trust theory to invalidate the trust, it necessarily invalidated the trust in its entirety; otherwise, the resulting trust theory would be inapplicable. The resulting trust theory would not operate to invalidate the trust for elective share purposes only. *See supra* notes 87-91 and accompanying text.

97. *See supra* notes 90-91 and accompanying text.

98. *See* S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. Supp. 1992).

99. Whether the court could have chosen another theory to subject the trust assets to the elective share is problematic. Other jurisdictions have used various theories to invalidate revocable trusts for elective share purposes only. *See infra* part II.C.4.a.-g. The basic premise of such decisions is that, even though the applicable statutes appeared to allow avoidance of the elective share through the use of a revocable trust, the court can use its equitable powers to disallow an attempted avoidance in certain situations. *See infra* part II.C.4.a.-g. Presumably, the *Seifert* court was reluctant to choose such a path because of the clear and narrow language of the South Carolina elective share statutes. *See* S.C. CODE ANN. §§ 62-2-201 to -202; *supra* note 58. Admitting to an equitable nullification of the revocable trust avoidance technique would indicate a deliberate disregard for the express intent of the general assembly, whereas using the resulting trust theory to include the trust assets in the decedent's probate estate obscured the court's end-run around the statute.

100. *See infra* part II.C.4.a.-g.

101. *E.g.*, Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937) ("We assume . . . that except for the [elective share provision] the trust would be valid.").

decedent's probate estate the assets slated for the trust.[102] If the invalidation of the trust were limited so that the trust assets did not "revert" to the decedent, then the assets would not be included in his probate estate and, thus, would not be subject to the elective share.

Moreover, the *Seifert* court could not have used some theory other than the resulting trust theory to partially invalidate the trust for elective share purposes only. The court expressly claimed that it was not violating the general assembly's express intent to limit the elective share to probate assets:[103] "[N]othing in the Probate Code prohibits a trust, declared invalid as illusory, from reverting to the probate estate and being included in it for elective share purposes."[104] If the general assembly meant what it said in amending the SCPC to limit the elective share to the probate estate,[105] then the trust assets in *Seifert* could have been subject to the elective share under only two possibilities: (1) the trust assets were part of the probate estate under the resulting trust theory because the trust failed entirely; or (2) the trust assets became part of the probate estate for some equitable reason.[106]

If the court used the resulting trust theory to invalidate the trust entirely, it at least had some legal precedent to argue that the intended trust assets became probate assets.[107] If the court silently relied on some other theory, however, it acted as a super-legislature, merely paying lip service to the legislative intent to limit the elective share to probate assets. Allowing the court to decide what constitutes the probate estate for elective share purposes—despite the court's recognition that the legislature intended to limit the elective share to only the probate estate—would render meaningless the express language of the statute.

If the court meant instead that the trust failed at or after the decedent's death, then the court apparently acted even more like a super-legislature, disregarding the clear language of the elective share statutes while professing to observe the legislature's intent. If the trust failed at or after the decedent's death, then the trust was valid from the time of its execution until the time of its failure. Thus, the assets were subject to the trust during the decedent's lifetime and could not be considered part of his probate estate simply because he owned them at his death. Rather, the nonprobate trust assets

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102. *See supra* text accompanying note 97.

103. *See supra* note 58.

104. Seifert v. Southern Nat'l Bank, 305 S.C. 353, 357, 409 S.E.2d 337, 339 (1991).

105. *See* S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. Supp. 1992).

106. *See infra* part II.C.4.a.-g.

107. *See supra* notes 90-93 and accompanying text. The court nevertheless disregarded any evidence that the decedent may have intended to avoid the usual outcome of the resulting trust—reversion to the decedent. *See supra* note 93.

South Carolina Law Review, Vol. 44, Iss. 2 [2020], Art. 3

became probate assets only after the court declared the trust invalid as illusory because the court decided that the assets should be subject to the elective share. If the court can make any asset a nonprobate asset merely because it wants to, then it has eviscerated both the language of the elective share statutes and the express purpose of the general assembly.

Thus, the court either used the right theory (complete invalidation/resulting trust) for the wrong reason (retention or exercise of substantial or extensive control), or it used the wrong theory (partial invalidation) for perhaps the right reason (equitable factors). Either way, the *ratio decidendi* of the *Seifert* opinion is flawed.

b. Waiver = Substantial Right = Unavoidable

The *Seifert* court buttressed its finding that the trust was subject to the elective share by observing that SCPC section 62-2-204, which requires a waiver of the elective share to be in writing,[108] indicates that the legislature intended the right to receive the elective share to be "substantial."[109] From this assumption the court simply presumed that the legislature did not "inten[d] to allow this substantial right to be circumvented as respondents urge."[110] Although the court recognized that the elective share statute clearly limits the elective share to probate assets, it determined in effect that, because the elective share right is substantial, the general assembly did not really intend to limit the elective share only to probate assets.

The requirement in section 62-2-204 that an effective waiver of the elective share be in writing does not itself render the right "substantial." Rather, the requirement was intended merely to simplify problems of proof, much in the spirit of other SCPC provisions that attempt to avoid oral claims, which are more difficult to prove or disprove.[111]

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108. S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

109. *Seifert*, 305 S.C. at 357, 409 S.E.2d at 339.

110. *Id.*

111. *E.g.*, S.C. CODE ANN. § 62-2-110 (Law. Co-op. 1987) (requiring a writing to treat property given during lifetime as an advancement); *id.* § 62-2-701 (Law. Co-op. Supp. 1992) (requiring that contracts concerning wills be in writing). Whether a spouse has waived the elective share can be a hotly disputed issue. For example, a husband and wife may enter into a prenuptial agreement, with each generally waiving any interest in the other's estate. The usual catalyst for the prenuptial agreement is the fear of divorce, yet the agreement is typically broad enough to include rights in the deceased spouse's estate. If the marriage ends because of a spouse's death rather than by divorce, the surviving spouse may claim an elective share in the estate. The estate of the deceased spouse will raise the prenuptial waiver as a defense to the surviving spouse's elective share claim. The surviving spouse will contend that the prenuptial agreement was not intended to waive elective share rights, especially if the prenuptial agreement does not

Few would disagree that the elective share right is substantial, but whether the elective share right is substantial has no rational connection to the question of what property may be subject to the elective share.[112] To extend the *Seifert* court's logic, if the assets of a revocable trust are subject to the elective share merely because the elective share right is substantial, then arguably all other nonprobate assets must similarly be subject to the elective share.[113] Certainly, nonprobate assets including revocable trusts could be outside the reach of the elective share without rendering the right insubstantial. Therefore, the court's supporting thesis is a *non sequitur*.

c. *Freedom of Testation*

By invalidating the revocable trust, the *Seifert* court failed to consider the significant body of law that supports the freedom of a testator to alienate property during the testator's lifetime.[114] The court in *Newman v. Dore*[115] admitted that the surviving spouse's interest in the elective share

> is only an expectant interest dependent upon the contingency that the property to which the interest attaches becomes part of a decedent's estate. The contingency does not occur, and the expectant property right does not ripen into a property right in possession, if the owner sells or gives away the property.[116]

In addition, the court in *Moore v. Jones*[117] observed that "'[i]n a broad sense, the problem presents a conflict between the public policy considerations favoring protection of a surviving spouse against disinheritance, and those policy considerations favoring the free alienability of property inter vivos.'"[118] Although the *Seifert* opinion cited both *Newman* and *Moore*, the

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specifically refer to the elective share. In such cases, the court often makes its decision after considering equitable factors. *See generally* S. Alan Medlin, *Waiving the Elective Share*, PROB. PRAC. REP., Apr. 1989, at 1 (discussing factors courts use to determine whether elective share waiver is valid).

112. This is especially true in view of the legislature's special attention to the definition of what assets are subject to the elective share. *See supra* note 58.

113. *See infra* part II.D.3.

114. *See, e.g.*, Payne v. River Forest State Bank & Trust Co., 401 N.E.2d 1229, 1231 (Ill. App. Ct. 1980); RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. c (1957); SCOTT & FRATCHER, *supra* note 62, § 57.2, at 140.

115. 9 N.E.2d 966 (N.Y. 1937).

116. *Id.* at 967.

117. 261 S.E.2d 289 (N.C. Ct. App. 1980).

118. *Id.* at 292 (quoting J.R. Kemper, Annotation, *Validity of Inter Vivos Trust Established by One Spouse Which Impairs the Other Spouse's Distributive Share or Other*

Seifert court did not even discuss the conflicting right of the decedent to freely alienate property inter vivos.

4. Alternative Theories

Other jurisdictions have addressed the issue of whether testators may circumvent the spousal elective share by employing various avoidance techniques. A review of other jurisdictions' treatment of revocable trusts as avoidance techniques is instructive for two reasons: First, it highlights the *Seifert* court's misapprehension of and misreliance on the resulting trust theory; second, it provides sound alternative theories for the *Seifert* court's result.[119]

Because most forced share statutes calculate the survivor's claim based on the size of the decedent's probate estate,[120] augmented in a number of states by certain nonprobate assets,[121] most avoidance devices involve reducing the probate estate through inter vivos transfers that allow the testator to retain some benefits of ownership. Like *Seifert*, a number of cases have involved attempts by the surviving spouse to invalidate these inter vivos avoidance devices, thereby increasing the size of the probate estate and, consequently, the elective share entitlement. In deciding whether to invalidate these transfers, the courts have invoked a number of theories and tests, some distinct and some overlapping.

a. General Theories of Invalidation

In *Johnson v. Farmers & Merchants Bank*[122] the West Virginia Supreme Court provided a concise summary of the various theories courts have used in considering the efficacy of these ploys for avoiding the elective share. In *Johnson* the testator and his wife were married in 1963, and each had children from a previous marriage. The testator's net worth at the time of his death exceeded $1 million, including real estate, cash, and substantial ownership of three closely-held corporations. Despite his wealth, the testator was parsimonious about giving his wife money for her personal use. During his lifetime he maintained title to the vast majority of his assets, giving his

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Statutory Rights in Property, 39 A.L.R.3D 14, 18 (1971)).

119. Because of the specificity of the South Carolina elective share statutes, however, even these other theories may be inappropriate to a case considering the South Carolina elective share.

120. *See, e.g.*, N.H. REV. STAT. ANN. § 560:10 (1974); S.C. CODE ANN. § 62-2-201 (Law. Co-op. Supp. 1992).

121. *E.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).

122. 379 S.E.2d 752 (W. Va. 1989).

wife only a one-half interest in their home, a car, and a checking account for household expenses.[123]

The testator in *Johnson* created and funded a revocable inter vivos trust with retained lifetime benefits and powers similar to the trust in *Seifert*. By the terms of the trust and by an accompanying letter, the testator retained the exclusive right to sell his stock in the closely-held companies without the usual trustee's commission. After the testator's death, his widow was to receive the income from a portion of the trust assets, and his children were to take the remaining income. After the widow died and the children attained a certain age, the children were to receive all of the principal.[124]

The *Johnson* court aligned itself with other courts by recognizing that a testator may permissibly employ a number of devices to circumvent the elective share, including the creation of a funded inter vivos trust with retained rights.[125] Courts have allowed these transfers, even if the testator's sole purpose in making the transfer was to avoid the statutory share.[126] However, a court might find the transfer illusory or testamentary if the transfer effectively reduced the estate subject to the elective share but allowed the testator to retain lifetime control over the trust property.[127] In such a situation, a court may invalidate, for elective share purposes, an otherwise valid nontestamentary transfer that would cause the surviving spouse to receive less than a fair share of the testator's property.[128]

The theories employed by courts to test the validity of avoidance attempts vary in nomenclature and design. However, many of these theories would apparently yield similar results because they share similar elements and uphold the underlying policies of fairness and equity. The opinions have variously categorized the tests using terms such as "illusory," "intent to defraud," "present donative intent," "colorable," and "flexible standard."

b. The Illusory Transfer Doctrine

The New York case of *Newman v. Dore*,[129] one of the two cases cited by *Seifert*, utilized the illusory transfer test. In *Newman* the testator made a deathbed transfer of all of his assets into a revocable trust three days before his death, but reserved the right to receive income.[130] Rather than

123. *Id.* at 754.
124. *Id.* at 755.
125. *Id.* at 756-57.
126. *Id.* at 756.
127. *Id.* at 757.
128. *Id.*; *see infra* part II.C.4.g.
129. 9 N.E.2d 966 (N.Y. 1937).
130. *Id.* at 967.

examining the testator's intent in disposing of his property, the court focused on whether the transfer was real or illusory, a distinction determined by the amount of control retained by the testator.[131] Thus, the illusory transfer test scrutinizes the intent of the testator to relinquish ownership of the property instead of the testator's possible intent to defraud the surviving spouse.[132]

c. The Intent to Defraud Test

A test employed by a minority of jurisdictions examines the testator's intent to deprive the surviving spouse of the elective share. The case most cited to illustrate the *subjective* intent to defraud test is *Rose v. St. Louis Union Trust Co.*[133] In *Rose* the court found the inter vivos trust valid, but remanded the case and suggested that the lower court use the following factors to determine whether the decedent had a fraudulent intent: (1) whether the settlor intended to deprive the surviving spouse of the elective share; (2) whether the settlor's death was imminent at the time of the trust's creation; (3) the proportion of the decedent's property placed in the trust; (4) the estate otherwise left to the spouse; (5) lack of consideration for the creation of the trust; and (6) the spouse's lack of knowledge about the trust.[134]

The subjective intent to defraud test has not fared well in the courts. As one commentator noted:

> [T]he intent-to-defraud test is a virtual playground of difficulties and weaknesses. Neither the courts nor the commentators speak kindly of it. . . . [S]ubjective intent to defraud is extremely difficult to prove, especially when the settlor is deceased. Good evidence is hard to come by, and the parties to the dispute are long past the point of being objective or unbiased.[135]

The *objective* intent to defraud test is an alternative test that seeks to avoid the uncertainties of the subjective intent to defraud test. In *Hanke v. Hanke*[136] the court held that the well-established rule in New Hampshire is: "If the spouse makes the transfer for the purpose of depriving the

131. *Id.* at 968-69.

132. Because the *Seifert* court relied on the illusory transfer doctrine espoused in *Newman*, this Article more completely considers the application of this theory *infra* part II.C.4.h.

133. 253 N.E.2d 417 (Ill. 1969) (relying on Missouri law).

134. *See id.* at 419-20.

135. McClellan, *supra* note 76, at 619 (footnotes omitted).

136. 459 A.2d 246 (N.H. 1983).

surviving spouse of his or her rights, the transfer is invalid."[137] By focusing on the "objective manifestation of the transferor's intent,"[138] the court sought to avoid the tendency of the subjective intent test to "create doubt about all transfers made by a spouse."[139] The objective manifestation of the transferor's intent is to be determined by a consideration of "the circumstances surrounding the transfer, 'including the pecuniary circumstances of the parties when the conveyance is made, the consideration received[,] . . . the relationship of the parties to the transaction, and other relevant facts.'"[140] The *Hanke* court adopted the objective test because the court believed that the test best reconciles the competing policies of protecting surviving spouses and maintaining freedom of testation.[141]

d. The Present Donative Intent Test

The present donative intent test appears in *Johnson v. La Grange State Bank*.[142] In *La Grange* the testator and her husband had been married for 36 years. The testator's husband was a millionaire, but he had been generous to her and had provided her with shrewd investment advice. After discovering that she had cancer, the testator created an inter vivos trust and funded it with virtually all of her assets. She named herself as trustee, reserved the lifetime rights to receive income and to invade principal, and maintained the right to revoke the trust. Upon the testator's death, the successor trustee was to distribute the corpus to the testator's side of the family.[143] Although the testator apparently retained about as much control and ownership over the property as possible, the court found that she did not defraud her surviving husband, from whom she had separated, of his marital share.[144] The *La Grange* court held "that an *inter vivos* transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed."[145]

Unlike the illusory transfer test, the *La Grange* test considers the degree

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137. *Id.* at 248.

138. *Id.*

139. *Id.*

140. *Id.* (quoting Hamm v. Piper, 201 A.2d 125, 127 (N.H. 1964) (omission in original)).

141. *Id.* The court expressly rejected the illusory transfer test enunciated in *Newman*, but invited the legislature, if dissatisfied, to adopt another test. *Id.* at 248-49.

142. 383 N.E.2d 185 (Ill. 1978).

143. *Id.* at 188-89.

144. *See id.* at 195.

145. *Id.* at 194.

of the transferor's retained powers to be "'far from controlling on [the] issue'" of present donative intent.[146] The present donative intent test focuses not on what the transferor retained, but instead on the settlor's intent "'to presently part with some of the incidents of ownership in the [property].'"[147] Although it may be difficult to name the interest that passed when the settlor established the trust, there is no "'reason for so doing so long as it passed . . . immediately upon the creation of the trust.'"[148] The court stated:

> The fact cannot be denied that as trustee of a revocable trust [the testator] retained a significant degree of control over the trust assets. However, the form of control which the donor retains over the trust does not make it invalid. In addition, it is well established that the retention by the settlor of the power to revoke, even when coupled with the reservation of a life interest in the trust property, does not render the trust inoperative.[149]

Because the testator had retained a life interest in the trust, the court considered other equitable factors to determine whether the testator had the requisite donative intent to transfer a present interest to the remaindermen.[150] For example, the surviving spouse knew that his wife had contacted her attorneys to prepare a trust and a will.[151] In addition, the testator knew that the surviving spouse had considerable independent means of support.[152] The court also noted the testator's concern for the welfare of the remaindermen of the trust. Significantly, the court observed:

> The declaration of trust immediately created an equitable interest in the beneficiaries, although the enjoyment of the interest was postponed until [the testator's] death and subject to her power of revocation. This, however, did not make the transfer illusory. And the power of control that she had as trustee was not an irresponsible power; she was charged with a fiduciary duty in respect to the beneficiaries' interest, and her

146. *Id.* at 193 (quoting Toman v. Svoboda, 349 N.E.2d 668, 675 (Ill. App. Ct. 1976)).

147. *Id.* at 194 (quoting Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955)).

148. *Id.* (quoting *Farkas*, 125 N.E.2d at 603).

149. *Id.* at 195 (citations omitted).

150. The factors were delineated in *Toman*, 349 N.E.2d at 673. *See infra* notes 161-163 and accompanying text. In addition, these factors are similar to those used in the *Hanke* court's objective intent to defraud test. *See supra* note 140 and accompanying text.

151. *La Grange*, 383 N.E.2d at 195 (discussing the related issue of whether grounds existed for imposition of a constructive trust).

152. *Id.*

> management and administration of the assets in trust could only be exercised in accordance with the terms of the trust.[153]

Furthermore, the court found that the testator had parted with an interest during her life because the trust provided a complete scheme in the event the testator became disabled.[154] Finally, the court determined that the testator never "exercised any of her reserved powers to deplete the trust assets."[155] Thus, the court concluded that the testator did not intend to defraud her surviving husband of his marital share by establishing the trust.[156]

Unlike the illusory transfer test, the present donative intent test does not place other nonprobate transfers in jeopardy. As one commentator stated:

> The present-donative intent test emphasizes the donor's intent to make a real and present gift. The key is to determine whether any real interest passed to the transferee at the time of the transfer. If the transfer was by a valid deed it would easily pass the test and be able to resist the claims of the elective share. In applying this test to joint bank accounts the Illinois Supreme Court . . . said that the mere creation of a joint tenant account was sufficient evidence of the donative intent of the donor to make the transfer legitimate.[157]

This commentator also indicated that POD accounts[158] and Totten trusts[159] would be upheld under the present donative intent test if they were legitimate nonprobate transfers under state law.[160]

In *Toman v. Svoboda*[161] the Illinois Court of Appeals considered a number of factors to determined whether the testator intended to defraud the surviving spouse of the marital share. Those factors included: the secretive manner of the testator, the temporal proximity of the gift to the testator's death, the comparative values of the testator's estate and the surviving

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153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.*

157. McClellan, *supra* note 76, at 627 (citations omitted).

158. A POD account is an account that is payable on the death of an account holder. *E.g.*, UNIF. PROB. CODE § 6-201, 8 U.L.A. 308 (Supp. 1993).

159. A Totten trust is commonly defined as a bank account payable to a beneficiary upon the death of the account holder-trustee, who retains until his or her death the right to revoke the account in whole or in part by withdrawing funds from the account. *See In re* Totten, 71 N.E. 748 (N.Y. 1904). South Carolina recognizes the Totten trust by statute. *See* S.C. CODE ANN. §§ 62-6-103 to -104 (Law. Co-op. 1987 & Supp. 1992).

160. *See* McClellan, *supra* note 76, at 627.

161. 349 N.E.2d 668 (Ill. App. Ct. 1976).

spouse's net worth, and any other factor indicative of the testator's intent.[162] To ensure that the testator's donative intent was not merely testamentary, the *Toman* court imposed special scrutiny for transfers in which the testator reserved a life estate.[163] Similarly, in *In re Estate of Puetz*[164] the court cited *Toman* and employed special scrutiny for reserved life estates to determine whether the testator lacked present donative intent.[165]

e. The Colorable Transfer Test

In both *La Grange* and *Puetz* the court described the colorable standard by distinguishing it from the illusory test. An illusory transfer is one in which the transferor takes back all that was given.[166] In contrast, a colorable transfer appears absolute, but is not because of some secret or tacit underlying agreement between the transferor and the transferee.[167]

f. The Flexible Standard Test

In *Johnson v. Farmers & Merchants Bank*[168] the court utilized a flexible standard test that considered all of the pertinent factors in weighing the equities of each individual case.[169] The court noted that the widow's estate was modest and that she was unaware of her husband's dispositive scheme.[170] Also important was the understanding between the testator and his trustee that allowed the testator to dispose of the assets in his trust

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162. *See id.* at 673.

163. *Id.* at 677.

164. 521 N.E.2d 1277 (Ill. App. Ct. 1988).

165. *See id.* at 1280-82. The *Puetz* court examined the *Toman* factors, as well as whether the testator actually exercised any of his retained lifetime rights. The court remanded the case for a determination of these questions of fact. *See id.* Although claiming to use the older Illinois retention-of-ownership test, the court in Johnson v. La Grange State Bank, 383 N.E.2d 185 (Ill. 1978), also relied on the *Toman* factors in determining the validity of an inter vivos trust. *Id.* at 193-94.

166. *Puetz*, 521 N.E.2d at 1280 (quoting *La Grange*, 383 N.E.2d at 193); *see* Edward A. Smith, Comment, *The Present Status of "Illusory" Trusts—The Doctrine of* Newman v. Dore *Brought Down to Date*, 44 MICH. L. REV. 151, 155 (1945).

167. *Puetz*, 521 N.E.2d at 1280 (quoting *La Grange*, 383 N.E.2d at 193); Smith, *supra* note 166, at 153.

168. 379 S.E.2d 752 (W. Va. 1989).

169. *Id.* at 759. The facts of *Johnson* are discussed *supra* text accompanying notes 122-124.

170. *Johnson*, 379 S.E.2d at 759-60.

without incurring the usual trustee's commission.[171] The testator had executed, concurrently with the trust agreement, a letter that indicated an independent agreement to create a condition precedent to the trust.[172] The court found that the letter, coupled with the deposition testimony of the testator's attorney, demonstrated the testator's intent to retain control over the assets in the trust because the testator refused to execute the trust agreement until he received assurance about the trustee's waiver of commissions.[173]

The *Johnson* court recognized the rule that mere retention of the right to revoke does not create a presumption that the transfer was illusory.[174] However, the absence of a presumption does not prevent the ultimate finding that the transfer was illusory. The court noted that the testator "was able to enjoy the benefits of his trust arrangement without any apparent constraints or burdens."[175] Accordingly, the court found that the testator "transferred virtually all of his property into an inter vivos trust with full knowledge of the fact that such a transfer would substantially diminish the share of his estate that his wife could receive upon his death."[176] Although the court acknowledged the ability of a testator to effectively avoid the elective share through a transfer made solely for that purpose,[177] the *Johnson* decision appeared to rest ultimately on the court's conclusion about the testator's knowledge of the results of his transfer.[178]

Perhaps *Seifert* is most like *Johnson*. Arguably, the *Seifert* court could have used the *Johnson* flexible standard test to include the trust assets for elective share purposes. However, the South Carolina statute specifically limiting the elective share to probate assets may have forced the court to use the resulting trust theory to obtain its desired result.[179]

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171. *Id.* at 760.

172. *See id.*

173. *Id.* at 760. The control retained in *Johnson* is reminiscent of *Seifert*. *See* Seifert v. Southern Nat'l Bank, 305 S.C. 353, 355, 409 S.E.2d 337, 338 (1991).

174. *See Johnson*, 379 S.E.2d at 761 (citing Davis v. KB & T Co., 309 S.E.2d 45, 46 (W. Va. 1983)). Unlike the *Seifert* court, which did not even expressly recognize that a revocable trust may be valid, the *Johnson* court admitted that a presumption exists in favor of validity. *See id.*

175. *Id.* at 762. The court noted that the testator's control over the trust was so complete that he attempted to negotiate the sale of the trust's single largest asset without the trustee's participation or knowledge. *Id.*

176. *Id.*

177. *See id.* at 756-57.

178. *See id.* at 762.

179. *See supra* note 99.

g. Is There a Bright Line?

The decisions discussed above profess to use different tests that seem to incorporate similar elements.[180] For example, in reciting the factors of the *Toman* present donative intent test, the *Johnson* opinion recognized that these are essentially the same factors that may be relevant in an application of the intent to defraud test.[181] The influence of the illusory trust doctrine is also evident in the present donative intent test. Like the illusory trust doctrine, the present donative intent test focuses upon "real" gifts—those made without improper retention of control by the donor that could render an otherwise valid inter vivos transfer "quasi-testamentary" and justify a surviving spouse's claim upon the property. Moreover, *Puetz* equated the lack of present donative intent with an illusory or colorable transaction that was a fraud on the marital share.[182]

Despite the use of comparable tests, courts have reached disparate results when faced with analogous fact situations. For instance, both *La Grange* and *Johnson* involved the creation of inter vivos trusts in which the testators retained substantial, if not absolute, control and ownership rights. Yet, the *Johnson* court found fraud on the marital share,[183] but the *La Grange* court did not.[184] *La Grange* employed the present donative intent test,[185] while *Johnson* incorporated that consideration into its flexible standard approach.[186] The different results in these opinions could be explained, however, by the wealth of the surviving spouse in *La Grange* coupled with the testator's failure actually to exert control over the trust assets despite her retention of control.[187]

Although discrepancies will arise whenever courts make decisions on a case-by-case basis, certain constants exist. In the decisions discussed above, each of the courts looked at the testator's intent either to defraud the spouse or to retain excessive control, or both. Furthermore, each court

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180. All of the decisions acknowledge the ability of a testator to avoid the elective share, yet warn that the ability is not unfettered. One problem that quickly emerges from a comparison of these cases and theories is the lack of a safe harbor, either for those wishing to circumvent the elective share or for those attempting to invalidate transfers intended to bypass that entitlement.

181. *Johnson*, 379 S.E.2d at 758-59 (citing Toman v. Svoboda, 349 N.E.2d 668, 673 (Ill. App. Ct. 1976)).

182. *See In re* Estate of Puetz, 521 N.E.2d 1277, 1280 (Ill. App. Ct. 1988).

183. *Johnson*, 379 S.E.2d at 761-62.

184. Johnson v. La Grange State Bank, 383 N.E.2d 185, 195 (Ill. 1978).

185. *La Grange*, 383 N.E.2d at 194.

186. *See Johnson*, 379 S.E.2d at 759-60.

187. *See La Grange*, 383 N.E.2d at 195. Nevertheless, the facts of these two cases are sufficiently similar to confuse anyone searching for a safe harbor.

considered fairness and equity to some extent, regardless of whether the court admitted to it.[188] Thus, the validity of an individual transaction may rest upon the interrelation of the facts involved. A court may invalidate an inter vivos trust if the testator retaining the benefits has a less-wealthy spouse; yet, the same court may uphold a trust created by a testator for the sole purpose of avoiding the elective share if the testator does not actually exercise any of the retained control. Accordingly, the establishment of a bright-line test is unlikely.

h. Seifert *Under the Illusory Transfer Test*

The *Seifert* court relied on only two cases to support its use of the illusory transfer test: the North Carolina case of *Moore v. Jones*[189] and the New York case of *Newman v. Dore*.[190] The court's reliance on these cases may not have been justified because the applicable elective share statutes in North Carolina and New York did not specifically limit the elective share to probate assets.[191] By contrast, however, the SCPC specifically limits the elective share to the "probate estate."[192] Even if the specific restrictive language of the South Carolina elective share statutes does not render the use of the illusory transfer test inadvisable, the test may be an inappropriate way to determine the viability of any elective share avoidance technique.

The *Newman* test to establish whether an otherwise valid inter vivos transfer is void for the purposes of the elective share examines whether the challenged transfer is "real or illusory."[193] As applied, it "is essentially the test of whether the [testator] has in good faith divested himself of ownership of his property or has made an illusory transfer."[194] In *Newman* the testator created, from his deathbed three days before his death, a revocable trust in which he retained a life interest in the entire income. The trust made the trustee's powers "'subject to the settlor's control during his life,'" and exercisable "'in such manner only as the settlor shall from time

188. For example, even the *Hanke* court, which followed the strict intent to defraud test, contemplated such equitable circumstances as the relative wealth of the parties in determining the testator's intent. *See* Hanke v. Hanke, 459 A.2d 246, 248 (N.H. 1983).

189. 261 S.E.2d 289 (N.C. Ct. App. 1980), *cited in Seifert*, 305 S.C. at 355, 409 S.E.2d at 338.

190. 9 N.E.2d 966 (N.Y. 1937), *cited in Seifert*, 305 S.C. at 355, 409 S.E.2d at 338.

191. *See Moore*, 261 S.E.2d at 291 (discussing North Carolina's elective share statute); *Newman*, 9 N.E.2d at 966-67 (discussing New York elective share statute in effect at time of decision).

192. *See* S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. Supp. 1992), *discussed supra* note 58.

193. *Newman*, 9 N.E.2d at 969.

194. *Id.*

to time direct in writing.'"[195] The New York court applied the illusory transfer test to void the trust only for the purpose of determining the surviving spouse's elective share.[196]

Other states have refused to apply the *Newman* illusory transfer test to invalidate, for elective share purposes, a trust otherwise valid under the state's law of trusts or contracts.[197] For example, Ohio, which previously advocated the illusory transfer test,[198] rejected the test in *Smyth v. Cleveland Trust Co.*[199] The court acknowledged that the illusory transfer test was illogical:

> "It seems incongruous indeed that a trust may be valid giving the trustee title to and a vested interest in the trust property and yet the settlor's widow, upon electing not to take under his will, may be accorded the right by judicial fiat to claim a 'distributive share' of the trust property under the statutes of descent and distribution."[200]

Similarly, in *Leazenby v. Clinton County Bank & Trust Co.*[201] the Indiana Court of Appeals adopted the *Smyth* court's reasoning and rejected the *Newman* illusory transfer concept.[202] The *Leazenby* court stated that its main reason for rejecting *Newman* was the lack of clarity concerning the "degree of dominion and control . . . necessary to partially invalidate the trust in this way."[203] The court complained that while

> [t]he present vagueness in the law in regard to inter vivos transactions gives latitude to judges in finding a result beneficial to the particular surviving spouse consonant with that state's policy[,] . . . uncertainty imposes a hardship on conscientious settlors and beneficiaries who cannot be certain which good faith arrangements will be upheld.[204]

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195. *Id.* at 968 (quoting trust agreements).

196. *Id.* at 969-70.

197. *See supra* part II.C.4.a.-g.

198. Bolles v. Toledo Trust Co., 58 N.E.2d 381, 390-91 (Ohio 1944) (adopting the illusory transfer test of *Newman* to void, for the purposes of the elective share statute, two inter vivos trusts in which the testator retained a life interest and the power to withdraw principal, as well as the power to alter, amend, or revoke), *overruled by* Smyth v. Cleveland Trust Co., 179 N.E.2d 60 (Ohio 1961).

199. 179 N.E.2d 60 (Ohio 1961).

200. *Id.* at 68 (quoting Harris v. Harris, 72 N.E.2d 378, 383 (Ohio 1947) (Zimmerman, J., dissenting)).

201. 355 N.E.2d 861 (Ind. Ct. App. 1976).

202. *Id.* at 865 (citing *Smyth*, 179 N.E.2d at 68).

203. *Id.* at 864.

204. *Id.*

In fact, the *Newman* court explicitly declined "to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory."[205]

The *Newman* illusory transfer test has also been attacked by scholars. As Professor Macdonald noted:

> [T]here is another unfortunate aspect of the illusory transfer doctrine. . . . The ensuing confusion in the case-law [under the illusory transfer test] certainly does nothing to further the basic legislative policy. If anything, it constitutes a hazard for the husband who attempts to make an equitable inter vivos distribution to his children, particularly if the children are of a prior marriage. In other words, the estate planner cannot rely on the courts to say what they mean, or to mean what they say.[206]

Furthermore, commentators have criticized the *Newman* test "as being illogical because most courts have held that the retention of the power to revoke a trust, when the spouse has made a transfer in trust, is not generally excessive control so as to make the transfer illusory."[207] This reproach of the logic of the illusory transfer test has arisen because the illusory transfer test "effect[s] an unrealistic deëmphasis of the power to revoke."[208]

The illusory transfer test voids a trust for the purpose of the elective share if "the power to revoke and the retention of income for life are combined with extreme control over administration."[209] Although the power to revoke gives the settlor the ultimate power to control the trustee, the power to revoke by itself should not void the trust for the purposes of the elective share statute.[210] If the power to revoke—the ultimate retained power—is insufficient to invalidate a revocable inter vivos trust, then any

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205. Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937).

206. MACDONALD, *supra* note 76, at 93-94.

207. Hanke v. Hanke, 459 A.2d 246, 248-49 (N.H. 1983) (citing MACDONALD, *supra* note 76, at 90).

208. MACDONALD, *supra* note 76, at 90.

209. *Id.*

210. *See* RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. c (1957).

> Thus, if it is provided by statute that the wife of a testator shall be entitled to a certain portion of his estate of which she cannot be deprived by will . . . a married man can nevertheless transfer his property inter vivos in trust and his widow will not be entitled on his death to a share of the property so transferred, even though he reserves a life estate and power to revoke or modify the trust.

Id. (citation omitted); *see also* SCOTT & FRATCHER, *supra* note 62, § 57.2, at 140 ("The trend of the modern authorities is to uphold an inter vivos trust no matter how extensive may be the powers over the administration of the trust reserved by the settlor.").

South Carolina Law Review, Vol. 44, Iss. 2 [2020]

secondary powers retained by the testator likewise should not invalidate the trust.[211]

D. Problems in the Wake of Seifert

1. Destruction of Dispositive Scheme

Arguably, the *Seifert* court destroyed the decedent's entire dispositive scheme by completely invalidating the revocable trust instead of merely requiring the inclusion of the trust assets to the extent necessary to calculate the spouse's elective share.[212] The decedent's clear intent was to limit his spouse to a life interest in any assets that she would receive[213] and to provide for any other assets to pass equally to his two daughters.[214] He attempted to accomplish his dispositive plan by executing a revocable trust and a will, which poured over the residue of his probate estate into the trust.[215]

If, as the court insisted, the revocable trust failed, then the residue of his probate estate would lapse because the residuary clause attempted to pour the probate estate over into the revocable trust, which, having failed, did not exist. The residuary clause did not name an alternative devisee in the event the revocable trust failed;[216] consequently, the residuary devise would lapse,[217] and the decedent's probate estate would pass by partial intestacy to his heirs.[218] Because the failure of the revocable trust would cause the assets intended for the trust to be included in the decedent's probate estate,[219] the assets of the failed trust would be included in the property passing by partial intestacy because of the lapse.[220] Under the applicable South Carolina intestacy statutes, the widow would take half of

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211. *See supra* notes 76-78 and accompanying text.

212. *See* Seifert v. Southern Nat'l Bank, 305 S.C. 353, 357, 409 S.E.2d 337, 339 (1991). A revocable inter vivos trust is often an integral part of a testator's total estate plan. *See, e.g.*, Miller v. First Nat'l Bank & Trust Co., 637 P.2d 75 (Okla. 1981).

213. The decedent's intent to limit his spouse to a life interest in any assets that she received was so strong that he took the unusual step of granting only a life interest in the personal property transferred to her. *See* Record at 35.

214. *See id.* at 16-18.

215. *Id.* at 36.

216. *See id.*

217. *See* S.C. CODE ANN. § 62-2-510(a) (Law. Co-op. 1987) (providing that the revocation or termination of a trust before the testator's death causes the devise to lapse).

218. *See id.* § 62-2-604.

219. *See Seifert*, 305 S.C. at 357, 409 S.E.2d at 339.

220. Except, of course, to the extent they are used to satisfy the spouse's elective share claim.

the property passing by partial intestacy, and the daughters would divide the other half equally.[221] Thus, under this scenario, the widow would receive more than her one-third elective share.[222]

Moreover, because the trust had failed, the widow would take her share outright, rather than in trust for life as intended by the decedent's estate plan. This result would also contradict the legislature, which clearly intended that the minimum elective share may be satisfied by limiting the surviving spouse to a life estate in one-third of the probate estate.[223] Section 62-2-207 of the SCPC provides that the elective share amount is offset by any interest in probate assets received by the surviving spouse if that interest qualifies for the federal estate tax marital deduction.[224] Section 62-2-207 further provides that, in valuing interests for purposes of offsetting the elective share, a beneficial interest[225] to the surviving spouse that qualifies for the marital deduction is offset against the elective share at the full value of the trust.[226]

For example, a decedent who dies with a probate estate valued at $300,000, after deducting expenses and claims,[227] can satisfy the elective share by devising to the surviving spouse a life interest in a trust containing $100,000. The life estate interest qualifies for the federal estate tax marital deduction and triggers the offset provision of SCPC section 62-2-207. The elective share for a $300,000 probate estate is $100,000.[228] Under section 62-2-207, the elective share amount is offset by the value of the life estate in trust, which is equal to the value of the trust itself (*i.e.*, $100,000) because the life interest is not actuarially valued.[229]

Obviously, a life interest in property is not worth the same as a fee

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221. *See* S.C. CODE ANN. §§ 62-2-101 to -103 (Law. Co-op. 1987 & Supp. 1992).

222. The lapse may not occur if a court applies the theory of incorporation by reference. *See id.* § 62-2-509 (Law. Co-op. 1987).

223. *See id.* § 62-2-207 (Law. Co-op. Supp. 1992).

224. *Id.* Generally, a life estate passing from the decedent to the surviving spouse outright or in trust qualifies for the federal estate tax marital deduction, even if the spouse cannot control the disposition of the remainder interest. *See* I.R.C. § 2056 (1988 & Supp. III 1991).

225. *I.e.*, an interest in trust.

226. S.C. CODE ANN. § 62-2-207(a) ("For purposes of this subsection, the value of the electing spouse's beneficial interest in any property which would qualify for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, shall be computed at the full value of any such qualifying property . . . ."). The legislature chose a fixed method of valuing the offset rather than relying on an actuarial value on a case-by-case basis.

227. *See id.* § 62-2-202.

228. *See id.* §§ 62-2-201 to -202.

229. *See supra* note 226.

simple absolute in the same property. Thus, SCPC section 62-2-207 provides one method of partially avoiding payment of the full elective share amount. By devising to the surviving spouse only a life interest in one-third of the probate estate, the decedent can satisfy the elective share with something actually worth less than one-third of the probate estate while retaining control over the disposition of the remainder interest.[230] However, by invalidating the revocable trust, the *Seifert* court ignored the decedent's intent to limit his surviving spouse's interest to a life estate.[231]

2. *Jeopardizing Revocable Trust Validity*

From a broader perspective, *Seifert* may jeopardize the validity of revocable trusts created by married settlors. Even if *Seifert* is limited to a narrow application—an "illusory" revocable inter vivos trust is subject to invalidation if the settlor is married at death—whether a revocable trust is illusory is a factual determination to be decided on a case-by-case basis.[232] If the court decides that the trust is illusory, then the trust fails. If the court relies on the resulting trust theory, the better-reasoned view is that the trust is invalid from the moment the settlor attempts to create it, and, thus, the trust never attains validity.[233] Yet, this determination is not made until the settlor dies and the surviving spouse brings an elective share claim. Consequently, any married settlor who attempts to create a revocable inter vivos trust faces the possibility that an elective share dispute will cause the trust to be invalidated retroactively after the settlor's death.[234]

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230. *See id.* § 62-2-207.

231. Complete invalidation of a revocable trust can render examples even worse than *Seifert*. For example, Testator, *T*, creates a revocable inter vivos trust, funded with most of his assets, approximately $1.5 million. Upon *T*'s death, the trust provides for distribution of the trust property to *T*'s sister, who could use the assets for medical care. *T*'s will contains a pour-over residuary clause similar to the will in *Seifert*. *T* dies survived by a spouse and no issue. If the court followed *Seifert* and determined that the trust failed so that the trust assets were included in *T*'s probate estate, the residuary devise would lapse and pass by partial intestacy. Under the SCPC, *T*'s spouse would be the sole heir and would take the entire estate, while *T*'s sister would take nothing. *See id.* §§ 62-2-102 to -103 (Law. Co-op. 1987 & Supp. 1992). This would be the result even if *T*'s spouse were independently wealthy.

232. *See* Seifert v. Southern Nat'l Bank, 305 S.C. 353, 355-56, 409 S.E.2d 337, 338 (1991). According to the *Seifert* court, the "illusoriness" of a trust depends upon the amount of control the decedent evidenced while alive. *See id.* Hence, the determination that a trust is illusory can only be made on a case-by-case basis.

233. *See supra* note 87 and accompanying text.

234. This uncertainty exists even if the settlor's estate plan at the time of the trust's attempted creation leaves the surviving spouse at least the minimum elective share amount because subsequent events may render the amount insufficient to satisfy the

The possible retroactive invalidation of a revocable inter vivos trust causes concern not only for the settlor and the intended beneficiaries of the trust, but also for the trustee. If a trustee has been administering a trust that is later invalidated, questions may arise about the propriety of the putative trustee acting without the authority of a valid trust. The putative trustee could be held liable as a *trustee de son tort* for acting as if it had authority to administer the trust even though a court subsequently determined that the trustee did not.[235]

3. *Invalidation of Other Nonprobate Transfers*

The rationale of the *Seifert* opinion could be used to invalidate other, similar nonprobate transfers. Precedent for such a claim occurred in North Carolina in the wake of *Moore v. Jones*.[236] In *In re Estate of Francis*[237] the North Carolina Court of Appeals found that the value of two bank accounts held by the testatrix and her sister as joint tenants with right of survivorship were properly included in the decedent's "net estate" for purposes of determining the surviving spouse's right to elect against the will.

The court relied upon the broad language of *Moore* to find that "the testatrix retained complete control over the assets of the bank account until the moment of her death."[238] The *Francis* court also observed that "the public policy expressed in the dissent statutes [would] be served by including in the net estate for purposes of the dissent statute the value of the bank accounts with right of survivorship in appellant."[239] The Supreme Court of North Carolina reversed, declining "to extend the rationale of *Moore* to bank accounts with right of survivorship."[240] The court rejected the inclusion of joint bank accounts in the decedent's net estate to avoid "an expansive interpretation of the dissent statutes."[241]

In *Seifert* the South Carolina Supreme Court adopted the broad reasoning of *Moore*;[242] however, the language of the *Seifert* opinion offers

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elective share. Accordingly, if the surviving spouse pursues an elective share claim after the settlor's death, a court might examine the validity of the revocable trust. *See supra* part II.C.2.

235. *See, e.g.*, Sandpiper N. Apts., Ltd. v. American Nat'l Bank & Trust Co., 680 P.2d 983, 988 (Okla. 1984).

236. 261 S.E.2d 289 (N.C. Ct. App. 1980).

237. 381 S.E.2d 484 (N.C. Ct. App. 1989), *rev'd*, 394 S.E.2d 150 (N.C. 1990).

238. *Id.* at 487 (citing *Moore*, 261 S.E.2d 289).

239. *Id.*

240. *In re* Estate of Francis, 394 S.E.2d 150, 157 (N.C. 1990), *rev'g* 381 S.E.2d 484 (N.C. Ct. App. 1989).

241. *Id.*

242. Seifert v. Southern Nat'l Bank, 305 S.C. 353, 355, 409 S.E.2d 337, 338 (1991)

no rational prospect for distinguishing revocable trusts from other nonprobate assets. By holding that "nothing in §§ 62-2-201 and 62-2-202 prohibits the proceeds of a trust, once declared invalid or illusory from being included in the probate estate,"[243] the court opened the door for the argument that nothing in those sections prohibits other nonprobate transfers from being included in the probate estate if such attempted transfers are determined to be illusory. The exception stated in *Seifert* is so broad that it renders meaningless the word "probate" in sections 62-2-210 and 62-2-202.

The court's determination that there is "very little difference between [the] situation [in *Seifert*] and one in which an otherwise valid trust fails"[244] can apply equally to joint tenancies with right of survivorship, life insurance policies if the insured predeceases the beneficiary, and other nonprobate transfers. A recent article acknowledges the potentially broad applicability of the "illusory transfer" test:

> If property is transferred by deed there is normally a total loss of legal control. Thus, one would expect the transfer to pass the test and stand up against the claims of the surviving spouse's elective share. At the other end of the spectrum are the revocable inter vivos trust, the P.O.D account, and the Totten trust. These can be grouped together because the one thing they all share is their total revocability. *If the illusory transfer test is logically applied, one would expect all three to fail the test.* Thus, a transfer made by any of these three methods would be subject to the claims of the surviving spouse's elective share. Somewhere in between are the joint tenancies in land and joint tenancy bank accounts. In each of these the grantor has divested himself of some of his power and control over the assets, but he has also retained some. The funds in a joint account are relatively easy to draw out and dispose of, but the joint interest in a piece of real property is much less so. The outcome here would depend on the supporting facts and on the jurisdiction.[245]

Unfortunately, the *Seifert* court neglected to consider the effect its decision might have on other types of nonprobate transfers.

4. Increased Litigation

The *Seifert* decision creates the potential for a tsunami of litigation to determine not only whether every revocable trust is subject to the elective share, but also whether other nonprobate assets similarly are. The *Seifert*

(citing *Moore*, 261 S.E.2d 289).

243. *Id.*

244. *Id.* at 356, 409 S.E.2d at 339.

245. McClellan, *supra* note 76, at 626-27 (emphasis added).

court held that a "trust, once declared invalid or illusory," may be included in the probate estate for purposes of the elective share.[246] Courts will now have to determine whether a trust is invalid or illusory in every future case in which a surviving spouse claims that a trust's assets should be subject to the elective share. Moreover, courts will have to apply the *Seifert* analysis to determine on a case-by-case basis whether other nonprobate assets are also subject to the elective share.[247] This potential flood of litigation could be avoided by honoring the legislature's clear intent to subject only probate assets to the elective share and not to include otherwise valid nonprobate transfers such as revocable trusts.

E. Section 62-7-112: A Cure for Seifert*?*

South Carolina estate planning and probate practitioners expressed considerable concern about the implications of the *Seifert* decision. In response to these concerns, the general assembly enacted a statute in 1992 with the purpose of at least clarifying that revocable trusts are otherwise valid despite being "invalidated" only for purposes of calculating the elective share.[248] The statute, codified as SCPC section 62-7-112, provides:

> A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid because the trust creator retains substantial control over the trust including, but not limited to, (1) a right of revocation, (2) substantial beneficial interests in the trust, or (3) the power to control investments or reinvestments. Nothing herein, however, shall prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. shall not render that revocable inter vivos trust invalid, but would allow inclusion of the trust assets as part of the probate estate of the trust creator only for the purpose of calculating the elective share and would make available the trust assets for satisfaction of the elective share only to the extent necessary under Section 62-2-207.[249]

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246. *Seifert*, 305 S.C. at 357, 409 S.E.2d at 339.

247. *See supra* part II.D.3.

248. *See* Act of June 23, 1992, No. 475, § 3, 1992 S.C. Acts 2461, 2464 (codified at S.C. CODE ANN. § 62-7-112 (Law. Co-op. Supp. 1992)).

249. S.C. CODE. ANN. § 62-7-112 (Law. Co-op. Supp. 1992).

The effect of the new statute is uncertain. In one sense, it could confirm *Seifert*'s invalidation of the revocable trust as an elective share avoidance technique. In such cases, however, the statute may force the courts away from the resulting-trust/complete-invalidation theory,[250] and towards the more equity-oriented theories used by other jurisdictions, which invalidate the trust only for elective share calculation, but otherwise retain the validity of the trust.[251]

Alternatively, the statute may be interpreted to overrule *Seifert*. Despite its apparent recognition of a court's ability to invalidate an illusory trust, the statute could eviscerate the underlying premise of the *Seifert* opinion by prohibiting a finding that a revocable trust is entirely invalid.[252] The *Seifert* court managed to move the decedent's assets into his probate estate by implicitly employing the resulting trust theory to invalidate the entire trust.[253] If, however, the trust were not completely invalid, it would not fail, and the court could not use the resulting trust theory to include those assets in the probate estate.

Although the statute does not appear to preclude reliance on other theories to include revocable trust assets in the probate estate, any theory that does not completely invalidate the trust would not cause the assets to be included within the probate estate; thus, by definition, those nonprobate assets would not be subject to the elective share.[254] A court wanting to preclude the use of revocable trusts as an elective share avoidance device would have to resort to one of the equity-oriented theories used by other jurisdictions.[255] However, the use of one of those theories may not be appropriate because the narrow language of the South Carolina statutes expressly limits the elective share to probate assets.[256] Perhaps the narrow language of the statute forced the *Seifert* court to use the resulting trust theory to prevent elective share avoidance with a revocable trust. If section 62-7-112 prevents such a finding in the future, then the revocable trust may henceforth be a valid elective share avoidance device.[257]

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250. *See supra* part II.3.a.

251. *See supra* part II.C.4.a.-g. Thus, except to the extent necessary to fulfill the decedent's elective share obligations, these theories keep intact the rest of the decedent's dispositive scheme. *See supra* part II.D.1.

252. *See* S.C. CODE ANN. § 62-7-112.

253. *See supra* part II.C.3.a.

254. *See* S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. Supp. 1992).

255. *See supra* part II.C.4.a.-g.

256. *See* S.C. CODE ANN. §§ 62-2-210 to -202.

257. Other questions about the effect of § 62-7-112 persist. For example, does that statute prevent a court from finding that nonprobate transfers other than revocable trusts can be invalidated? *See supra* part II.D.3. Also, does the statute apply retroactively to "save" revocable trusts created before its enactment? *Cf.* Patrick v. Parris (*In re* Patrick),

Until the holding of *Seifert* and the effect of section 62-7-112 are clarified, estate planners in South Carolina must be careful in using any type of nonprobate transfer that might eventually become the subject of an elective share dispute. The mindful planner should not advise a client that any elective share avoidance technique is guaranteed to work.[258] Moreover, any will that pours over probate assets into a revocable inter vivos trust that might be invalidated should contain an alternative provision that expressly recreates the terms of the inter vivos trust as a testamentary trust. Although a testamentary trust, by definition, is not an elective share avoidance technique because it will be funded with probate assets that are subject to the elective share, at least the rest of the testator's estate plan will remain intact.[259] To avoid liability as a *trustee de son tort*, trustees of revocable trusts should insist on the inclusion of a provision in the pertinent documents granting them authority as agents in case the trusts are later invalidated.

F. Waiving the Elective Share

In *Patrick v. Parris (In re Patrick)*[260] the South Carolina Supreme Court addressed some other elective share issues of first impression. The decedent in *Patrick* married her husband in 1971, after the order granting her husband a divorce from his previous wife was filed in the family court, but before the order was filed in the circuit court.[261] In 1983 the decedent and her husband separated for a year. During the separation, her husband transferred to her his half-interest in their marital home in exchange for cash and a note. He later wrote the decedent, indicating that he would "sign everything over to her if she would take him back," and, upon their reconciliation, he returned the cash.[262] The decedent died in 1988,[263] after the effective date of the SCPC,[264] which provides for elective share

303 S.C. 559, 402 S.E.2d 664 (1991) (discussing whether the SCPC affects rights before its effective date).

258. Except, perhaps, the "semi-avoidance" technique of limiting the spouse to a life interest. *See supra* notes 223-231 and accompanying text.

259. *See supra* notes 217-220 and accompanying text.

260. 303 S.C. 559, 402 S.E.2d 664 (1991).

261. *Id.* at 561, 402 S.E.2d at 665. The family court order was signed by the family court judge and filed in the family court on April 30, 1971. The order was filed on May 10, 1971 in the circuit court, which had transferred jurisdiction to the family court. Apparently, the decedent married her husband between those dates. *Id.*

262. *Id.* at 562, 402 S.E.2d at 665. The opinion does not indicate whether the husband regained his half-interest in the house or forgave the note at that time.

263. *Id.* at 560, 402 S.E.2d at 664.

264. S.C. CODE ANN. § 62-1-100(a) (Law. Co-op. Supp. 1992).

rights.[265] In her will, executed in 1984, the decedent attempted to disinherit her husband, expressly limiting him to a devise of one dollar and leaving the residue of her estate to her children. The husband timely filed an elective share claim, which the children contested.[266] The court disposed of the children's several arguments and upheld the husband's right to the elective share.[267]

The children in *Patrick* contended that the husband was not the decedent's surviving spouse for elective share purposes, arguing that the attempted marriage was invalid because it occurred before the husband's divorce from his previous wife was effective. The court ruled, however, that the husband's divorce was final upon the filing of the decree in the family court, even though the marriage apparently occurred before the filing of the decree in the circuit court.[268]

In addition, the court quickly disposed of the children's contention that the grant of elective share rights to the husband contradicted the testator's intent. The court recognized that the general assembly did not intend that the SCPC impair any right accruing before its effective date.[269] The court also noted that the SCPC is intended to "mak[e] effective the intent of a decedent in the distribution of his property."[270] Nevertheless, the SCPC does impose restrictions on a decedent's right to make testamentary dispositions. A decedent does not enjoy the unfettered right to dispose of probate assets. As the court observed, the elective share provisions do not recognize any exception for a testator's contrary intent.[271] Furthermore, the court

265. *Id.* § 62-2-201 to -207 (Law. Co-op. 1987 & Supp. 1992).

266. *Patrick*, 303 S.C. at 560-61, 402 S.E.2d at 664-65.

267. *Id.* at 561-64, 402 S.E.2d at 665-66.

268. *Id.* at 561, 402 S.E.2d at 665 (distinguishing Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964)). The court's determination that the surviving spouse's prior marriage was terminated upon the filing of the decree in family court agrees with the policy of SCPC § 62-2-802, which requires that a divorce decree be filed to preclude a person's qualification as a surviving spouse. *See* S.C. CODE ANN. § 62-2-802 (Law. Co-op. 1987). Even if the court had ruled that the marriage was terminated only upon the filing of the decree in circuit court, the husband could have argued that he was entitled to treatment as a surviving spouse because he and the decedent entered into a common-law marriage after the decree was filed. *See id.* § 62-2-802(b)(1).

269. *Patrick*, 303 S.C. at 562-63, 402 S.E.2d at 665-66. Although the court's view seems to conform with the general common-law and statutory rule that substantive rights are determined by the law in effect at the decedent's death, it directly contradicts the results in White v. Wilbanks, 301 S.C. 560, 393 S.E.2d 182 (1990), and McDaniel v. Gregory, 303 S.C. 500, 401 S.E.2d 863 (1990). *See infra* part III.A.-B.

270. *Patrick*, 303 S.C. at 562, 402 S.E.2d at 665 (citing S.C. CODE ANN. § 62-1-102(b)(2) (Law. Co-op. 1987)).

271. *Id.* at 562, 402 S.E.2d at 666.

concluded that the elective share provisions apply to any decedent dying after the effective date of the SCPC.[272]

1. Constitutionality of the Elective Share

Perhaps most importantly, the *Patrick* court dealt with a constitutional challenge to the elective share statutes. The children argued that the elective share provisions violated the South Carolina Constitution, which prohibits treating a married woman's property differently from a single woman's.[273] They claimed that the elective share violates this constitutional provision by imposing property restrictions on a married woman that are not imposed on a single woman. A married woman cannot devise her property with complete freedom because one-third of her probate estate is subject to the elective share, but a single woman suffers from no such restriction.

The *Patrick* court admitted that the elective share statutes violate the South Carolina Constitution.[274] However, the court determined that the "married woman's property" provision of the South Carolina Constitution violates the Equal Protection Clause of the Fourteenth Amendment[275] and is itself unconstitutional because the South Carolina Constitution does not similarly prohibit the restriction of a married man's rights.[276] The court

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272. *Id.* at 562-63, 402 S.E.2d at 666 (citing S.C. CODE ANN. § 62-1-100(1) (Law. Co-op. 1987) (amended 1987)).

273. *Id.* at 563, 402 S.E.2d at 666. Article XVII, § 9 of the South Carolina Constitution provides:

> The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.

S.C. CONST. art. XVII, § 9. This provision was apparently a response to the former restrictions on married women's property rights.

274. *Patrick*, 303 S.C. at 563, 402 S.E.2d at 666.

275. U.S. CONST. amend. XIV, § 1.

276. *See Patrick*, 303 S.C. at 563, 402 S.E.2d at 666 (observing that a state constitution cannot violate the United States Constitution). The *Patrick* decision continued the interesting correlation between federal equal protection and the property rights of surviving spouses in South Carolina. The supreme court had previously held that a surviving wife's common-law dower rights violated state and federal equal protection provisions. *See* Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984). The elective share provisions were enacted partly as a response to *Boan*, which allowed a married man to disinherit completely his spouse, an option already enjoyed by a married woman. *See supra* note 7. As the *Patrick* court concluded, the elective share statutes facially violate the "married woman's property" provision of the South Carolina Constitution.

noted that the elective share provisions satisfy the requirements of equal protection because they apply equally to both men and women.[277] Thus, the court held that the South Carolina elective share provisions are valid, even though they violate the South Carolina Constitution.[278]

2. *Pre-SCPC Waivers*

Although the *Patrick* court effectively disposed of several elective share arguments, it may have left open the issue of when a surviving spouse can waive the elective share. The SCPC expressly recognizes that a spouse may partially or completely waive elective share rights.[279] The children in *Patrick* claimed that the decedent's husband waived his elective share rights by virtue of his actions during his separation from his wife. The court disagreed: "There is nothing in the record to indicate that [the husband] knew he was waiving his right to the elective share. Furthermore, the elective share provision was not in existence when [the husband] wrote the letter in 1984 and the parties reconciled after the alleged waiver occurred."[280]

This language deserves close scrutiny. The first sentence simply states the obvious: unless the husband was psychic, he could not have known that he was waiving his elective share rights in 1984, because the elective share statute was not effective until 1987. From the quoted portion of the opinion, however, it is not possible to determine whether the court rejected the waiver argument because the decedent's acts simply failed to constitute a waiver, or because the attempted waiver was made before the elective share statutes became effective. The language is at least susceptible to the inference that a waiver attempted before the SCPC's effective date is ineffective to waive the elective share.

If this interpretation is accurate, the result seems to contradict authority from other jurisdictions[281] and may make it impossible to waive the elec-

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Patrick, 303 S.C. at 563, 402 S.E.2d at 666. Thus, the elective share, which originated from a due concern for constitutional rights, violated another provision of the state constitution. The court resolved the dilemma by holding the South Carolina constitutional provision in violation of federal equal protection. *See id.*

277. *Patrick*, 303 S.C. at 563-64, 402 S.E.2d at 666.

278. *Id. See generally* S. Alan Medlin, *An Overview of the Statutory Elective Share*, S.C. LAW., Nov.-Dec. 1989, at 32, 34.

279. *See* S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

280. *Patrick*, 303 S.C. at 562, 402 S.E.2d at 665.

281. *Cf.* Sogg v. Nevada State Bank, 832 P.2d 781 (Nev. 1992) (per curiam) (holding that premarital agreement adopted prior to the state's premarital agreements act would be enforceable if it conformed either to the requirements of the act or to the common law). The validity of any waiver of property rights rests partly on the risk assumed by

tive share with a general waiver made before the effective date of the SCPC.[282] The *Patrick* court could have based its ruling on the less disruptive and more obvious theory that the deed was not intended to be a waiver.

III. SUBSTANTIVE RIGHTS UPROOTED

A. White v. Wilbanks *and Revival*

The general rule governing the determination of substantive rights obtained from a decedent applies the law in effect at the date of the decedent's death.[283] This rule furthers the policies that the decedent's will speaks as of the date of death and that substantive rights should be determined with certainty and not later rescinded. South Carolina has recognized this rule both in case law[284] and by statute.[285] However, the South Carolina appellate courts may have severely eroded, if not overturned, this rule in the *White v. Wilbanks* cases.[286]

In *White* the appellant was named executor under the decedent's 1980 will. In 1982 the decedent apparently executed a subsequent will naming another executor. The decedent died in 1985, before the 1987 effective date

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the waiving party that the waiver may include subsequently acquired property. If a court could overturn a waiver simply because the nonwaiving party acquired property after the waiver, so that the waiving party could claim lack of knowledge of the after-acquired property at the time of the waiver, parties could never rely on the validity of any waiver. If a court requires the waiving party to have actual knowledge of every asset waived, few, if any, waivers would ever have future significance. Prenuptial agreements would be rendered virtually meaningless.

The same logic should apply to the issue of whether a party can waive after-acquired legal rights. For a waiver to be effective, the waiving party must take the risk that the waiver includes rights that have not yet arisen, assuming that the waiver was intended to cover all rights that the waiving party may have in the nonwaiving party's property. A rule to the contrary would effectively prevent the future significance of any waiver because the parties could never be certain that all rights in the property had been waived.

282. If this is true, attorneys who have relied on pre-SCPC waivers to include elective share rights should strongly consider advising their clients to obtain new waivers.

283. *E.g.*, 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 3.10 (4th ed. 1960).

284. *See, e.g.*, Boan v. Watson, 281 S.C. 516, 519, 316 S.E.2d 401, 403 (1984); Wilson v. Jones, 281 S.C. 230, 233, 314 S.E.2d 341, 343 (1984).

285. *See, e.g.*, S.C. CODE ANN. § 62-1-100(b) (Law. Co-op. Supp. 1992).

286. White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989) (*White I*), *rev'd*, 301 S.C. 560, 393 S.E.2d 182 (1990); White v. Wilbanks, 301 S.C. 560, 393 S.E.2d 182 (1990) (*White II*).

of the SCPC,[287] and both the original 1980 will and a copy of the 1982 will were presented to the probate court.[288] Because the original 1982 will was never found, the probate court presumed that the decedent destroyed the 1982 will with the intent to revoke it.[289] Furthermore, the probate court held that the evidence failed to establish that the testator intended to revive the prior will by revoking the subsequent will.[290] On appeal, the circuit court conducted a de novo trial before a jury,[291] and the jury's special verdict affirmed the decision of the probate court.[292]

The court of appeals first considered "whether the new Probate Code should have been applied to the proceeding before the circuit court."[293] The *White I* court cited section 62-1-100(2) in ruling that the SCPC applies

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287. *See* S.C. CODE ANN. § 62-1-100(a) (Law. Co-op. Supp. 1992).

288. *White II*, 301 S.C. at 561, 393 S.E.2d at 183.

289. *Id.* Although it is possible to probate a copy of a will when the original is missing, the will's proponent must overcome the presumption that the testator revoked the will by adducing sufficient evidence to demonstrate that the will was destroyed or lost accidentally without an accompanying intent by the testator to revoke. Davis v. Davis, 214 S.C. 247, 255-56, 52 S.E.2d 192, 195-96 (1949). To revoke a will by physical act, the testator must intend to revoke the will at the time the physical act of revocation is committed. Without the requisite intent, the physical act alone will not suffice to revoke the will. *Id.* at 261-62, 52 S.E.2d at 198-99.

290. *White II*, 301 S.C. at 561, 393 S.E.2d at 183. Revival involves the situation in which a testator executes a later will that expressly revokes an earlier will. If the testator subsequently revokes the later will, a question about the status of the earlier will may arise. Under pre-SCPC common law, South Carolina followed a minority rule that revocation of the later will revives the earlier will absent some contrary intent by the testator. *See, e.g.*, Kollock v. Williams, 131 S.C. 352, 127 S.E. 444 (1925), *superseded by statute as stated in White I*, 298 S.C. at 228, 379 S.E.2d 299. The SCPC reversed the common-law rule:

> The revocation by acts under § 62-2-506(2) of a will made subsequent to a former will, where the subsequent will would have revoked the former will if the subsequent will had remained effective at the death of the testator, shall not revive or make effective any former will unless it appears by clear, cogent, and convincing evidence that the testator intended to revive or make effective the former will.

S.C. CODE ANN. § 62-2-508(a) (Law. Co-op. 1987); *see also White II*, 301 S.C. at 561, 393 S.E.2d at 183 (applying S.C. CODE ANN. § 62-2-508). *See generally* Medlin, *supra* note 1, at 648 (discussing revival under the SCPC and the pre-SCPC common law).

291. *White II*, 301 S.C. at 561, 393 S.E.2d at 183. As the court of appeals noted, the SCPC does not permit a jury trial upon an appeal to the circuit court. *White I*, 298 S.C. at 227 n.1, 379 S.E.2d at 299 n.1 (citing S.C. CODE ANN. § 62-1-308(d) (Law. Co-op. 1987)). Although not noted by the court, the SCPC does not authorize a de novo hearing by the circuit court upon an appeal. *See* S.C. CODE ANN. § 62-1-308(d).

292. *See White I*, 298 S.C. at 226-27, 379 S.E.2d at 299. The jury charge concerning the issue of revival referred to the SCPC. *See id.* at 227, 379 S.E.2d at 299.

293. *Id.*

to all proceedings pending on the effective date of the SCPC unless the "interest of justice" requires the application of former procedure.[294] The trial judge applied the SCPC procedure despite the previous ruling of another circuit judge allowing, apparently in the "interest of justice," a de novo trial before a jury on the appeal to the circuit court.[295] Thus, the circuit court employed pre-SCPC law to determine the method of hearing the appeal, but applied SCPC procedure to otherwise govern the proceedings.

The court of appeals disagreed with the circuit court's inconsistent ruling and opined that the subsequent circuit court judge abused his discretion by applying SCPC procedure to the trial after the first judge had determined that the "interest of justice" mandated application of pre-SCPC procedure. The court of appeals reasoned that, if the "interest of justice" test required application of pre-SCPC rules to determine the right to a de novo jury trial, then pre-SCPC law should have applied to all aspects of the proceeding.[296]

The court added that *White* presented "a unique factual situation where it would be unfair to employ a presumption not in effect at the time of the act of destruction."[297] The law in effect at the time the testator presumably revoked his subsequent will would have revived the prior will.[298] Under pre-SCPC case law, the revocation of a subsequent will that had revoked a previous will had the effect of reviving the previous will, unless a court found clear evidence of a contrary intent.[299] The SCPC effectively reversed this presumption by providing that the revocation of a subsequent will does not revive a prior will unless the court finds "clear, cogent, and convincing evidence" of the testator's intent to revive.[300] The *White I* court held that the trial judge erred in charging the jury with the SCPC revival provisions rather than with the pre-SCPC law.[301]

The executor of the first will also argued that statutory construction should preclude a retroactive application of the SCPC. The court of appeals rejected this contention, noting that section 62-1-100 expressly provides for

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294. *Id.*

295. *See id.* at 227-28, 379 S.E.2d at 299.

296. *Id.*

297. *Id.* at 228, 379 S.E.2d at 299. In offering support for its decision, the court strayed from the generally accepted rule that the decedent's will speaks as of the date of death, *e.g.*, First Nat'l Bank v. Bennett, 206 S.C. 402, 34 S.E.2d 678 (1945). In effect, the decedent is deemed to know about any changes in the law that occur between the time of execution of the will and the time of death. *See id.*

298. *See White I*, 298 S.C. at 228, 379 S.E.2d at 299.

299. *See supra* note 290.

300. S.C. CODE ANN. § 62-2-508(a) (Law. Co-op. 1987).

301. *White I*, 298 S.C. at 228, 379 S.E.2d at 300.

the retroactive application of the Code unless the "interest of justice" dictates otherwise.[302]

The court did not need to address the other issues presented because it found error in the trial court's application of the SCPC provisions. Nevertheless, the court considered the appellant's contention that the trial judge committed error by ignoring a proposed charge containing the presumption against intestacy—"that a person would not die without a will."[303] The court of appeals noted the lack of authority for using the presumption when the validity of a will is the issue. The court distinguished prior cases that have used the presumption against intestacy to uphold "descent of specific property under a will as opposed to intestate distribution."[304] However, the court did not believe that the presumption against intestacy went so far as to create a presumption that a valid will existed.[305]

In *White II* the supreme court reversed the court of appeals concerning the application of the SCPC to revival.[306] The supreme court observed that, although section 62-1-100(b)(2) allows the court to consider the "interest of justice" in determining whether to apply pre-SCPC law, this section applies only to procedural issues.[307] The court ruled that the decision of the court of appeals overlooked the applicability of SCPC section 62-1-100(b)(5), which provides that any SCPC presumption or rule of construction applies to instruments executed before the effective date of the SCPC, absent a clear indication of a contrary intent.[308] The *White II* court

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302. *Id.* The opinion did not expressly distinguish the difference in application of § 62-1-100 to procedural rules and to substantive rights. Presumably, the traditional rule should apply to substantive matters: the law in effect at the decedent's death generally governs the determination of substantive rights. *See supra* note 283 and accompanying text. The accrual of rights in the decedent's estate by the heirs or devisees should be treated as a substantive rights issue, which, according to both the general common-law rule and SCPC § 62-1-100(b)(4) as amended after *White I*, should be determined according to the law in effect at the decedent's death. *See* S.C. CODE ANN. § 62-1-100(b) (Law. Co-op. Supp. 1992). The *White I* court's treatment of the issue as procedural rather than substantive did not affect the result because the decedent died before the effective date of the SCPC. Even if the court had properly considered the issue as substantive, it should have applied the pre-SCPC law in effect on the decedent's death, which would have rendered the same result.

303. *White I*, 298 S.C. at 229, 379 S.E.2d at 300.

304. *Id.*

305. *Id.* The court apparently chose to ignore SCPC § 62-2-602, which provides that a will should be construed to pass all property that the testator owned at death. *See* S.C. CODE ANN. § 62-2-602 (Law. Co-op. 1987).

306. White v. Wilbanks, 301 S.C. 560, 560-61, 393 S.E.2d 182, 183 (1990) (*White II*), *rev'g* 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989).

307. *Id.* at 562, 393 S.E.2d at 183.

308. *Id.*

held that SCPC section 62-2-508 governing revival of wills clearly involves a presumption or a rule of construction and that, because there was no indication of contrary intent, the SCPC rule concerning revival should apply.[309]

Shortly after the *White II* decision, the general assembly clarified section 62-1-100 by adding a sentence to subsection (b)(4): "Unless otherwise provided in the Code, a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death."[310] The purpose of the amendment was to clarify further the distinction between substantive rights and procedural issues affected by the SCPC.[311]

The supreme court's *White II* decision overlooked the policy underlying both the common-law rule and the new clarifying statutory amendment: the decedent's will is deemed to speak at the time of the decedent's death, and the decedent is thus presumed to know the substantive law in effect at that time. Because virtually every decision involving a substantive rights issue involves a rule of construction, by relying on the "construction" provision of section 62-1-100(b)(5),[312] the court opened the door for application of SCPC law in virtually every probate case, even if the decedent died before the SCPC's effective date. Consequently, the *White II* opinion goes the *White I* opinion one worse: it reaches the wrong result for the wrong reason. The fallacy of the supreme court's rationale is demonstrated by the result in the following case.

B. McDaniel v. Gregory *and Lapsed Residues*

In *McDaniel v. Gregory*[313] the decedent died on June 18, 1986. Two of the residuary devisees under the decedent's will commenced an action to

309. *Id.*; *see supra* note 290.

310. Act of June 5, 1990, No. 521, pt. I, § 1, 1990 S.C. Acts 2273, 2274 (codified as amended at S.C. CODE ANN. § 62-1-100 (Law. Co-op. Supp. 1992)).

311. The amendment was enacted as part of the bill proposed by the Joint Study Committee for the SCPC. *See supra* note 58. The Committee recommended the amendment to clarify that § 62-1-100 codified the common-law rule that substantive rights should be determined by the law in effect at the date of death. Although the supreme court's opinion in *White II* was filed on May 29, 1990, just prior to the amendment's effective date, the amendment was partly precipitated by the desire to clarify the court of appeals decision in *White I*, which reached the right result for the wrong reason. Had the court of appeals treated the issue as one of substantive rights and used the common-law (and new statutory) rule, it would have reached the right result for the right reason.

312. S.C. CODE ANN. § 62-1-100(b)(5) (Law. Co-op. Supp. 1992).

313. 303 S.C. 500, 401 S.E.2d 863 (1990).

construe the will under the Uniform Declaratory Judgments Act[314] after the effective date of the SCPC.[315] A central issue was whether the SCPC statute concerning lapsed residuary devises would apply.[316] Citing *White II*, the supreme court held that the SCPC lapse statute is a rule of construction and, thus, pursuant to section 62-1-100(b)(5), applies to a will executed before the effective date of the SCPC.[317] By relying on section 62-1-100(b)(5) and refusing to recognize the clarifying amendment to SCPC section 62-1-100(b)(4), which codifies the common-law rule,[318] the court adversely affected substantive rights.

The right to take property by will or intestacy is certainly substantive and should accrue as of the decedent's death.[319] However, the *McDaniel* court effectively took away the vested property rights of the beneficiaries by applying a law enacted after the decedent's death. The law in effect at the time of the decedent's death provided that the intestate heirs would take the lapsed share of the residue.[320] Consequently, from the decedent's death on June 18, 1986 until the date of the court's opinion on November 26, 1990, the decedent's intestate heirs owned the lapsed property. The court's decision effectively confiscated the property from the decedent's heirs and substituted the surviving residuary devisees as owners as of the date of the opinion.

McDaniel not only disrupted established ownership of property, it contradicted the decedent's intent. A decedent's will is deemed to speak as of the time of the decedent's death, and, because the general rule applies the law in effect at the time of death, the decedent is presumed to know the extant law.[321] A testator who relies on the law in effect at death presumably intends for that law to apply. Thus, in *McDaniel* the decedent was charged with knowledge of the then-applicable "no-residue-of-a-residue"

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314. S.C. CODE ANN. §§ 15-53-10 to -140 (Law. Co-op. 1976).

315. *McDaniel*, 303 S.C. at 500-01, 401 S.E.2d at 863.

316. *Id.* at 501-02, 401 S.E.2d at 863-64. The SCPC section governing lapsed residuary devises presumes that the surviving residuary devisees take the share of a lapsed residuary devisee. S.C. CODE ANN. § 62-2-604(b) (Law. Co-op. 1987). The pre-SCPC rule—the "no-residue-of-a-residue" rule—generally passed the lapsed residuary devisee's share to the testator's heirs under partial intestacy. *See* Padgett v. Black, 229 S.C. 142, 154, 92 S.E.2d 153, 159 (1956). *See generally* Medlin, *supra* note 1, at 654 (discussing lapsed devises).

317. *McDaniel*, 303 S.C. at 502, 401 S.E.2d at 864.

318. *See supra* note 311.

319. This is especially true for real property, for which not only the right, but also the title generally devolves to the heirs and devisees immediately upon the decedent's death. *See* S.C. CODE ANN. § 62-3-101 (Law. Co-op. Supp. 1992).

320. *See supra* note 316.

321. *See supra* note 297.

rule;[322] because he did not indicate an intent to the contrary, he must have intended for that rule to apply. The court, however, fashioned a different result.

C. *Undermining Title*

The *White* and *McDaniel* decisions undermine any certainty about the status of title in South Carolina. Under the rule espoused in those cases, substantive rights that presumably accrued to heirs and devisees of decedents who died before the SCPC became effective will be disregarded if: (1) an action is brought after the effective date of the SCPC and (2) the SCPC would reach a different substantive result.

For example, if a decedent died in 1960, leaving a will devising the entire estate to the decedent's "heirs as if the decedent dies intestate,"[323] the general rule would determine the heirs according to the law in effect at the date of the testator's death. If the decedent were survived by a whole-blood brother and a half-blood sister, the whole-blood brother would have taken the entire estate.[324] Under the rationale of *White II* and *McDaniel*, if a question of title to that property arises in the year 2000, a court would first look to the following basic rule of construction: "Half bloods . . . are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession . . . ."[325] Invoking the magical term "rule of construction," the court would then apply the SCPC substantive rules[326] and award equal shares to the whole-blood brother and the half-blood sister, changing the ownership status of the property forty years after the decedent's death.[327]

The *White-McDaniel* rationale fails to recognize that virtually every will construction case obviously involves some rule of construction, which, given the court's reasoning, automatically invokes section 62-1-100(b)(5). The court should instead limit section 62-1-100(b)(5) to procedural matters that do not include substantive issues.[328]

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322. *See supra* note 316 and accompanying text.

323. Leaving testate property to devisees to be determined as if the decedent had died intestate is not an uncommon testamentary provision. *See* ROBERT P. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS 391 (1980).

324. S.C. CODE ANN. § 21-3-20 (Law. Co-op. 1976) (repealed by the SCPC).

325. S.C. CODE ANN. § 62-2-609 (Law. Co-op. 1987) (titled "Construction of generic terms to accord with relationships as defined for intestate succession").

326. *Id.* §§ 62-2-103 to -106 (Law. Co-op. 1987 & Supp. 1992).

327. The SCPC would not prevent a determination of title more than 40 years after the decedent's death. *See id.* § 62-3-108 (Law. Co-op. Supp. 1992).

328. One basic rule of statutory construction requires a court to read the provisions of a statute as consistent, if possible. *E.g.*, Chris J. Yahnis Coastal, Inc. v. Stroh

IV. COURT IGNORES STATUTE GOVERNING CONTRACTS FOR SUCCESSION

In *Chapman v. Citizens & Southern National Bank*[329] the decedent held, at the time of her death, a testamentary general power of appointment over a testamentary trust created by her husband. Both the decedent and her late husband had children by a prior marriage. The husband's testamentary trust provided that, in default of the exercise of the power of appointment, the trust assets were to pass to the husband's children. However, the decedent's will exercised the power and appointed the property to her children.[330]

Brewery Co., 295 S.C. 243, 368 S.E.2d 64 (1988). By limiting the effect of § 62-1-100(b)(5) to purely procedural issues, the court would avoid establishing an inconsistency between that section and § 62-1-100(b)(4). Moreover, by construing § 62-1-100(b)(5) as it did, the court effectively rendered § 62-1-100(b)(4) meaningless.

Even if these two sections are irreconcilable, the court should have used another basic rule of statutory construction to reach a different conclusion: if two statutory provisions are inconsistent, the more recent and more specific provisions should control. *E.g.*, Ramsey v. County of McCormick, 306 S.C. 393, 412 S.E.2d 408 (1991); Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2d 153 (1988). Section 62-1-100(b)(4), as clarified by amendment, *see supra* notes 310-311 and accompanying text, is both more recent and more specific and was available to the court by the time of the *McDaniel* decision.

The supreme court has been correct about the operation of § 62-1-100 when only a procedural issue is in question. In Van Sant v. Smith, 301 S.C. 556, 393 S.E.2d 174 (1990), the decedent died before July 1, 1987, the effective date of the SCPC. Prior to the SCPC's effective date, the executrix commenced an appeal of the probate court's decision in a dispute over the testator's mental capacity. However, after the SCPC's effective date, the contestants moved to hear the appeal on the record according to SCPC procedure. As noted in *Van Sant*, § 62-1-308(d) of the SCPC provides that appeals from the probate court to the circuit court are on the record and not de novo. *Id.* at 558, 393 S.E.2d at 175. The court also cited Rules 74 and 75 of the South Carolina Rules of Civil Procedure. *Id.* at 558 n.1, 393 S.E.2d at 175 n.1.

The *Van Sant* court referred to § 62-1-100(b)(2) concerning procedural issues for matters commenced before the effective date of the SCPC. *Id.* at 559, 393 S.E.2d at 175. That section provides for the application of the SCPC procedure unless the "interest of justice" requires application of the pre-SCPC procedure. S.C. CODE ANN. § 62-1-100(b)(2) (Law. Co-op. Supp. 1992). Under the pre-SCPC procedure, all appeals to the circuit court were on the record except for will contests, which were entitled to a de novo hearing and a jury trial. The pre-SCPC procedure did not allow jury trials in the probate court. *Van Sant*, 301 S.C. at 558, 393 S.E.2d at 175. The court held that the "interest of justice" required a jury trial. *Id.* at 559, 393 S.E.2d at 175. The former procedure allowed a jury trial on appeal, *id.* at 558, 393 S.E.2d at 175, but the current procedure permits a jury trial in the probate court, *id.* at 558-59, 393 S.E.2d at 175. If the *Van Sant* court had applied the SCPC procedure, the executrix would have been deprived of a jury trial in either court.

329. 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990).

330. *Id.* at 475, 395 S.E.2d at 450.

The court noted that the husband's testamentary trust granted the decedent a general power of appointment to enable the couple to comply, to their advantage, with the estate tax laws in effect when the husband signed his will.[331] According to the court, numerous letters in the record established that the decedent had promised her husband that she would not exercise the power.[332] The court held that a confidential relationship existed between the decedent and her husband because he trusted her to act "relating to the corpus of his estate after his . . . death" and that she had "the power to abuse the confidence" for her own benefit.[333] The *Chapman* court determined that the decedent had promised her husband that she would not exercise the power of appointment, so that the trust would pass to his children. Because the confidential relationship existed and the decedent broke her promise, the court imposed a constructive trust in favor of the children of the decedent's husband.[334]

Chapman overlooked the obviously applicable provisions of SCPC section 62-2-701, which provides rules for contracts concerning succession.[335] Section 62-2-701 codifies the common-law right to enter into contracts to make a will, not to make a will, to revoke a will, and not to revoke a will.[336] The SCPC imposes the additional requirement that contracts concerning succession, entered into after the effective date of the SCPC, be proved by some type of acceptable writing.[337] Before the enactment of the SCPC, it was possible to prove oral contracts concerning succession.[338]

The traditional method of enforcing contracts concerning succession

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331. *See id.* at 474 n.2, 395 S.E.2d at 450 n.2. The court rejected the finding in the appealed order that not permitting the decedent to exercise the power of appointment was "tax fraud" because the decedent did not change her mind about following her husband's wishes until after he died. *Id.* at 480-81, 395 S.E.2d at 453.

332. *Id.* at 474, 395 S.E.2d at 450.

333. *Id.* at 477, 395 S.E.2d at 451.

334. *Id.* at 478, 395 S.E.2d at 452.

335. S.C. CODE ANN. § 62-2-701 (Law. Co-op. 1987 & Supp. 1992).

336. *See* Pruitt v. Moss, 271 S.C. 305, 247 S.E.2d 324 (1978); Corontzes v. Trapalis, 259 S.C. 244, 191 S.E.2d 523 (1972); Havird v. Schissell, 251 S.C. 416, 162 S.E.2d 877 (1968); Caulder v. Knox, 251 S.C. 337, 162 S.E.2d 262 (1968); Footman v. Sweat, 247 S.C. 172, 146 S.E.2d 624 (1966) (per curiam); Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Brown v. Graham, 242 S.C. 491, 131 S.E.2d 421 (1963); Looper v. Whitaker, 231 S.C. 219, 98 S.E.2d 266 (1957); Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956); Ellisor v. Watts, 227 S.C. 411, 88 S.E.2d 351 (1955); McConnell v. Crocker, 217 S.C. 334, 60 S.E.2d 673 (1950).

337. S.C. CODE ANN. § 62-2-701.

338. *See Corontzes*, 259 S.C. 244, 191 S.E.2d 523; *Havird*, 251 S.C. 416, 162 S.E.2d 877; *Caulder*, 251 S.C. 337, 162 S.E.2d 262; *Footman*, 247 S.C. 172, 146 S.E.2d 624; *Hayes*, 242 S.C. 497, 131 S.E.2d 506; *Brown*, 242 S.C. 491, 131 S.E.2d 421.

reconciled the differing goals of the laws of wills and contracts. According to trust and estate law, a competent testator maintains the right to make, amend, or revoke a will until death.[339] Contract law is designed to enforce contracts. In the case of contracts concerning succession, the compromise between the two policies is to probate whatever will, if any, was last executed by the decedent before death, but to effectively enforce the contract through the imposition of a constructive trust.[340]

The usual rules of contract formation apply, and mutual consideration is necessary.[341] A promise for a promise would constitute sufficient consideration, but the lack of consideration would preclude finding that a contract exists.[342] Thus, cases in which testators create enforceable contracts by making mutual promises concerning succession are distinguishable from cases in which no consideration passes.[343] Based on this distinction, courts have declined to enforce mere moral obligations, which, unlike actual bilateral promises, otherwise fail to suffice as consideration for a contract.[344]

The *Chapman* court could have enforced the contract under section 62-2-701[345] by simply determining that the Chapmans had entered into a binding contract not to revoke. Instead, by basing its decision solely on the existence of a confidential relationship, the court risked creating a new reason for enforcing a promise not to revoke—the moral obligation. Generally, a moral obligation alone is not sufficient under the case law to enforce a promise not to revoke.[346] Thus, by ignoring the statute directly on point, which presumably would have rendered the same result, the court may have unnecessarily created the genesis for future testamentary enforcement of mere moral obligations in cases lacking the evidence sufficient to support the existence of a contract.

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339. *See* Brown v. Drake, 275 S.C. 299, 270 S.E.2d 130 (1980); Madden v. Madden, 237 S.C. 629, 118 S.E.2d 443 (1961); Lowe v. Fickling, 207 S.C. 442, 36 S.E.2d 293 (1945); Alexander v. Walden, 287 S.C. 126, 337 S.E.2d 241 (Ct. App. 1985).

340. *See Looper*, 231 S.C. 219, 98 S.E.2d 266.

341. *See, e.g.*, *Caulder*, 251 S.C. 337, 162 S.E.2d 262.

342. *See* Pruitt v. Moss, 271 S.C. 305, 247 S.E.2d 324 (1978); *Caulder*, 251 S.C. 337, 162 S.E.2d 262; Oursler v. Armstrong, 179 N.E.2d 489 (N.Y. 1961).

343. *See Pruitt*, 271 S.C. 305, 247 S.E.2d 324; *Caulder*, 251 S.C. 337, 162 S.E.2d 262; *Oursler*, 179 N.E.2d 489.

344. *See Oursler*, 179 N.E.2d 489.

345. The court expressly acknowledged the promises made: "We hold as a matter of fact that [Mrs. Chapman's] words are tantamount to a promise." Chapman v. Citizens & S. Nat'l Bank, 302 S.C. 469, 474 n.3, 395 S.E.2d 446, 450 n.3 (Ct. App. 1990). Presumably, a promise by Mr. Chapman could be inferred because he died with the arranged estate plan in effect.

346. *See Oursler*, 179 N.E.2d at 490.

V. CONCLUSION

In at least three areas, the South Carolina appellate courts have threatened established legislative intent and legal doctrine. Because of its ambiguity and imprecision, the *Seifert* opinion may have, at worst, contravened a clear expression of the general assembly's recognized purpose, created the potential for further erosion of legislative intent, and destroyed the time-honored recognition of the validity of revocable trusts. Even the most innocuous interpretation of *Seifert* introduces uncertainty into the practice of estate planning and opens the door for profligate litigation involving the elective share. The court arguably could have relied on a different, less disruptive theory to obtain the same result.[347] *Patrick* raises the specter that waivers are ineffective whenever circumstances later change. Because most waivers anticipate dynamic circumstances, the decision creates the possibility that waivers will be unable to accomplish the purposes for which they are intended.[348] As in *Seifert*, the *Patrick* court could have relied on a less sweeping theory to accomplish the same result.

The *White* and *McDaniel* decisions mock traditional concepts of vesting, title, and ownership by treating genuine issues of substantive rights merely as issues of construction. Continued adherence to the *White-McDaniel* rationale could undermine certainty about the status of title in South Carolina.

Finally, by ignoring the clearly applicable provisions of SCPC section 62-2-701, the court in *Chapman* may have created a new ground for enforcing promises concerning succession based on a moral obligation that falls short of a contract. The result is contrary to the purpose of section 62-2-701 to restrict enforcement of such promises when the evidence is not sufficiently reliable.[349]

The implications of these decisions portend serious consequences for a sincere construction of legislative intent under the relatively nascent SCPC. Perhaps, by recognizing these problems, the South Carolina appellate courts can decide future SCPC cases without disrupting the purpose of the legislature and the settled doctrines of common law. By restricting the inferences of these cases, concentrating on using more precise reasoning and language, and focusing on the goal of upholding the statutory law rather than on the desire to accomplish a narrow result, perhaps the courts may be able to ameliorate any past damage and avoid any future harm to the estate and probate practice in South Carolina.

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347. *See supra* part II.C.4.a.-g.

348. *See supra* notes 280-282 and accompanying text.

349. *See supra* notes 335-337 and accompanying text.