South Carolina Law Review

Volume 57 | Issue 1 Article 5

Fall 2005

The Impact of Significant Substantive Provisions of the South Carolina Trust Code

S. Alan Medlin
University of South Carolina School of Law

THE IMPACT OF SIGNIFICANT SUBSTANTIVE PROVISIONS OF THE SOUTH CAROLINA TRUST CODE*

S. ALAN MEDLIN**

---

*The South Carolina Legislature enacted the South Carolina Trust Code (SCTC), a version of the Uniform Trust Code (UTC), during the 2005 Regular Session. *See* Uniform Trust Code, No. 66, 2005 S.C. ACTS 280. This Act becomes effective on January 1, 2006. This Article was published prior to the effective date of the Act. However, for purposes of clarity and brevity, this Article cites provisions of the SCTC as they will appear in the South Carolina Code. (S.C. CODE ANN. § 62-7- ___). Textually, provisions of the SCTC are cited as SCTC "section 62-7-__."

The South Carolina Probate Code (SCPC) is codified at Title 62. This Article cites provisions of the SCPC in the text as "SCPC section 62-__-__." The adoption of the SCTC replaces earlier South Carolina law on trusts found in the SCPC. These replaced sections are cited as: "S.C. CODE ANN. §62-7-__ (repealed 2006)."

**David W. Robinson Professor of Law, University of South Carolina. B.A., University of South Carolina; J.D., University of South Carolina School of Law.

I. INTRODUCTION

For centuries, the substantive law of wills and trusts evolved slowly and resisted change. However, over approximately the last quarter century, a trend to codify substantial parts of the law of trusts and estates has developed, prompting a plethora of proposed uniform laws. During that time, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated such estate planning related uniform statutory codes as the Uniform Probate Code (UPC),[1] the

1. 8 U.L.A. 1 (1998). Although the NCCUSL originally promulgated the UPC in 1969, the NCCUSL has proposed a number of amendments, most extensively in 1990.

Uniform Statutory Rule Against Perpetuities,[2] the Uniform Principal and Income Act of 1997,[3] the Uniform Prudent Investor Act,[4] and the Uniform Transfers to Minors Act.[5]

South Carolina has followed the national trend, adopting versions of uniform codes to shape the substantive and procedural laws governing donative transfers. Since 1986, the South Carolina General Assembly enacted state versions of the UPC,[6] the Uniform Statutory Rule Against Perpetuities,[7] the Uniform Principal and Income Act of 1997,[8] the Uniform Prudent Investor Act,[9] and the Uniform Transfers to Minors Act.[10]

Until now, the most significant adoption was the General Assembly's enactment of South Carolina's version of the UPC—the South Carolina Probate Code (SCPC).[11] Before the SCPC, South Carolina's law of wills and trusts originated from common law. Thus, the enactment of the SCPC changed the study and practice of South Carolina wills and trusts law from a common law endeavor to one governed substantially by statute. The SCPC currently contains many of the substantive rules of wills and trusts law. To the extent that the SCPC does not supplant or replace the common law, "the principles of law and equity supplement its provisions."[12] Consequently, the study of South Carolina's substantive wills and trusts law has evolved into the examination of statutes augmented by principles of common law.

---

2. 8B U.L.A. 223 (2001). South Carolina was the first state to enact a version of this uniform act. *See infra* note 109.

3. 7B U.L.A. 131 (2000).

4. 7B U.L.A. 280 (2000).

5. 8C U.L.A. 1 (2001).

6. South Carolina Probate Code, No. 539, 1986 S.C. ACTS 3446 (codified at S.C. CODE ANN. §§ 62-1-100 to -7-602 (1987)).

7. Uniform Statutory Rule Against Perpetuities, No. 12, 1987 S.C. ACTS 20 (codified at S.C. CODE ANN. §§ 27-6-10 to -80 (1991)).

8. South Carolina Uniform Principal and Income Act, No. 80, § 3, 2001 S.C. ACTS 1923, (codified at S.C. CODE ANN. §§ 62-7-401 to -7-432 (Supp. 2001)).

9. South Carolina Uniform Prudent Investor Act, No. 80, § 2, 2001 S.C. ACTS 1920 (codified at S.C. CODE ANN. § 62-7-302 (Supp. 2001)).

10. South Carolina Uniform Gifts to Minors Act, No. 71, § 5, 1981 S.C. ACTS 127 (codified at S.C. CODE ANN. §§ 20-7-140 to -240 (1976)). Although South Carolina has technically retained its version of the original predecessor act, the South Carolina General Assembly adopted amendments in 2002 that incorporated the predominant feature of the revised Uniform Transfers to Minors Act (8C U.L.A. 1 (2001)) by increasing the age that a custodian is required to deliver property from eighteen to twenty-one. *See* South Carolina Estates and Probate Reform Act, No. 362, 2002 S.C. ACTS 3940 (codified at S.C. CODE ANN. §§ 20-7-150(1) & -180(4) (Supp. 2002)).

11. No. 539, 1986 S.C. ACTS 3446. For a discussion of the significant changes the SCPC wrought, 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).

12. S.C. CODE ANN. § 62-1-103 (1987).

The South Carolina General Assembly recently enacted a version of another uniform act, the Uniform Trust Code (UTC).[13] The UTC may rival the SCPC in the significance of its impact on the law of donative transfers. The UTC marks the first attempt to comprehensively codify the substantive and procedural law of trusts.[14] The South Carolina Trust Code (SCTC) modifies the UTC by creating its own rules in a number of instances.[15] Some parts of the SCTC compile only portions of existing statutory law and common law into one location, without changing either, and are thus relatively unremarkable. However, some parts do make substantial changes to pre-SCTC South Carolina law. Overall, the SCTC codifies (or recodifies) some existing South Carolina statutory law and common law, clarifies several issues previously not legislatively or judicially addressed in South Carolina, and changes some existing South Carolina law. This Article focuses on the SCTC changes to the pre-SCTC law.

II. REVOCABLE TRUSTS

A. The Revocable Trust as an Estate Planning Tool

Perhaps the SCTC's most significant changes to South Carolina trust law relate to revocable inter vivos trusts. Modern estate planners often use revocable inter vivos trusts to complement a will, the traditional dispositive document. Revocable

---

13. *See* Uniform Trust Code, No. 66, 2005 S.C. ACTS 280 (Supp. 2005). The NCCUSL promulgated the UTC in 1990, and the UTC received American Bar Association approval in that same year. *See* UNIF. TRUST CODE, 7C U.L.A. 189 (Supp. 2005).

The Comments to the UTC contain comprehensive discussions of each section. Professor David M. English, Reporter for the UTC, published several articles discussing the UTC's provisions and their impact. *See* David M. English, *The New Mexico Uniform Trust Code*, 34 N.M. L. REV. 1 (2004); David M. English, *The Kansas Uniform Trust Code*, 51 U. KAN. L. REV. 311 (2003); David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002); David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 30 CAP. U. L. REV. 1 (2002).

The drafters of the UTC substantially based it on the *Restatement (Third) of Trusts* (1993). Therefore, the *Restatement* serves as another excellent source for an examination of the UTC and its underlying foundation. However, the *Restatement* is not always correlative to the UTC.

14. The UTC's comprehensive approach does not intend to codify all trust law but instead supplements the common law, except when specifically contradicted by the UTC. This approach is typical uniform law treatment and resembles the treatment of the common law under the SCPC. *See* S.C. CODE ANN. § 62-1-103 (1987).

Because the SCPC already contained a number of trust-related provisions in Article 7 of Title 62, the SCTC will be codified at Article 7 of Title 62. Thus, these provisions replace the pre-SCTC provisions found in SCPC §§ 62-7-101 to -709. Consequently, the general provisions of the SCPC, such as SCPC § 62-1-103 describing the SCPC's relationship to the common law (see *supra* note 12 and accompanying text), will also apply to the SCTC.

15. The NCCUSL does not allow modification to its UTC Comments, so the SCTC contains the UTC Comments unamended and in their entirety—even when the SCTC stautory provisions differ from the UTC. However, South Carolina Comments follow the UTC Comments and note when the SCTC differs from the UTC.

inter vivos trusts allow settlors to effectuate a dispositive plan that, although legally valid immediately at creation, only has practical dispositive impact at the settlor's death. Consequently, these trusts offer two significant benefits to settlors: (1) retention of lifetime control over the property through the ultimate power—the right to revoke;[16] and (2) an alternative to the will for effectuating the disposition of property upon the settlor's death, which serves to avoid the probate process. Settlors can fund the trust while alive, retaining both the right to revoke the property and the status of sole beneficiary until death.[17] Thus, settlors maintain the most important aspects of property ownership: the right to control the property's management with the right to revoke and the right to the benefits of the property as the sole beneficiary. Moreover, settlors can also serve as trustees, retaining even more practical control over the property as the titular manager and caretaker. When a settlor dies, the revocable inter vivos trust operates to manage the trust property in accordance with the settlor's directions, similar to how a will directs the disposition of probate assets.[18]

Theoretically, some dispute exists as to whether the creation of a revocable inter vivos trust qualifies as a valid nontestamentary transfer. Typically, a donor must "presently" transfer some interest to the donee for a nontestamentary transfer to be valid.[19] When the donor of a donative transfer retains the right to revoke that transfer, the question arises whether the retained right to revoke prevents the present transmission of an interest in the property to the donee.[20]

Although the legislature and courts of South Carolina, as elsewhere, have historically recognized the revocable inter vivos trust as a valid nontestamentary transfer despite the settlor's retention of the right to revoke, the South Carolina Supreme Court in 1991 created some doubt about the viability of this view. In *Seifert v. Southern National Bank*,[21] the South Carolina Supreme Court held that a decedent's attempt to avoid the elective share by funding a revocable inter vivos

16. Although the *lingua franca* of estate planning tends to focus on the issue of revocability, the right to revoke is actually tantamount to the right to amend, and vice-versa. If a settlor retains the right to amend without reserving the right to revoke, the settlor can exercise his or her right to amend and add a right to revoke. The converse is also possible.

17. A settlor may or may not fund the revocable inter vivos trust during his or her lifetime. Either way, a settlor may choose to pour over by will some or all his or her probate assets into the revocable inter vivos trust at death. *See* S.C. CODE ANN. § 62-2-510 (1987) (recodifying South Carolina's version of the Uniform Testamentary Additions to Trusts Act (1960), located at 8B U.L.A. 367 (2001)).

18. The expense of probate (the probate court charges a fee based on the value of probate assets) and the publicity of probate (unlike a will, a revocable trust is not part of the public record) are also avoided if property is held in a revocable inter vivos trust at the time of the settlor's death. For a list of probate court fees, see S.C. CODE ANN. § 8-21-770 (Supp. 2004).

19. The donee of a trust is the beneficiary.

20. *See generally* Peoples Nat'l Bank of Greenville v. Peden, 229 S.C. 167, 92 S.E.2d 163 (1956) (recognizing a revocable inter vivos trust as valid). *Cf.* Seifert v. S. Nat'l Bank, 305 S.C. 353, 409 S.E.2d 337 (1991) (declaring a revocable inter vivos trust invalid when it is used to circumvent the spousal elective share).

21. 305 S.C. 353, 409 S.E.2d 337 (1991).

trust was illusory.[22] Consequently, the trust was void ab initio, and the decedent continued to own outright the property he attempted to place in the trust. As a result, the property remained part of his probate estate and was subject to his surviving spouse's elective share. Many South Carolina estate planners decried the result in *Seifert*, not only from the standpoint of its dubious interpretation of the elective share statutes, but, and perhaps more problematically, for its potential to raise doubts about the viability of any revocable inter vivos trust in South Carolina. Under the *Seifert* court's rationale, estate planners could not rely on the validity of any revocable inter vivos trust at creation because the trust property might later become the focus of an elective share dispute.[23] In an attempt to restore certainty to the general viability of the revocable inter vivos trust, the South Carolina General Assembly enacted SCPC section 62-7-112,[24] which, at a minimum, confirmed that a revocable trust is a valid nontestamentary transfer.[25]

B. The Presumption of Revocability

Traditionally, South Carolina law presumed a trust to be irrevocable unless the trust specifically indicated otherwise.[26] The SCTC reverses this basic presumption. SCTC section 62-7-602 presumes that a settlor reserves the right to revoke or amend a trust unless the trust expressly provides that it is irrevocable.[27]

Consequently, if a settlor intends for a trust to be irrevocable and unamendable, SCTC section 62-7-602 creates a trap for the unwary, especially those familiar with the pre-SCTC presumption. This trap may result in adverse or unintended tax consequences. In certain situations, estate and gift tax considerations require a settlor to complete an inter vivos gift.[28] Generally, settlors must transfer property to

---

22. *Id.* at 357, 409 S.E.2d at 339.

23. *See* S. Alan Medlin, *Result-Oriented Interpretations of the South Carolina Probate Code Create Estate of Confusion*, 44 S.C. L. REV. 287, 325 (1993).

24. Effective June 23, 1992.

25. *See* S.C. CODE ANN. § 62-7-112 (Supp. 2005) (repealed 2006). Former SCPC section 62-7-112 was recodified by the enactment of the SCTC at section 62-7-401(c). This statute also may have effectively, yet subtly, overruled *Seifert* as to the elective share, or at least may have removed the foundation that the court used to reach its conclusion. *See* Medlin, *supra* note 23, at 325–27.

26. *See* Dodd v. Berlinsky, 344 S.C. 172, 178, 543 S.E.2d 237, 240 (S.C. App. 2001) (citing Chiles v. Chiles, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (S.C. 1978)) (recognizing that an equity court can terminate an irrevocable trust procured by fraud, duress, or undue influence).

27. S.C. CODE ANN. § 62-7-602(a). To override the SCTC's presumption that a trust is revocable and amendable, section 62-7-602 requires only that settlors provide in the trust that it is irrevocable; this section does not require the settlor to provide in the trust that it is not amendable. However, an issue arises as to whether a statement of irrevocability in the trust overrides the presumption of both revocability and amendability. A literal interpretation of the statute would hold a trust both irrevocable and unamendable even if the settlor merely expresses that the trust is irrevocable.

28. For example, the completed gift of a fractionalized share, such as an interest in a limited partnership, can result in a discounted value of the underlying property for tax purposes and result in savings for both estate and gift tax purposes. *See infra* note 414.

an irrevocable trust for a gift in trust to be deemed complete for tax law purposes.[29] Thus, settlors intending a completed gift in trust may not realize desired tax treatment if they fail to expressly provide that the trust is irrevocable. To ameliorate concerns about the impact of this section, section 62-7-602 only prospectively applies to trusts created on or after the SCTC's effective date of January 1, 2006.[30]

C. Requisite Mental Capacity

The requisite mental capacity to make a valid revocable trust presents a novel issue in South Carolina, but SCTC section 62-7-601 offers a statutory solution by specifying the requisite mental capacity to make a valid revocable trust.[31] The section provides that to execute, amend, revoke, or add property to a trust, settlors must possess the mental capacity necessary to make a valid will in South Carolina. To make a valid will in South Carolina, testators must demonstrate the ability or capacity to know their estate, know the objects of their bounty, and understand the nature of their act (making a will).[32]

The SCPC requires that a testator be of sound mind to execute a valid will, but the SCPC does not attempt to specify the factors involved in making that determination.[33] Thus, existing South Carolina law that addresses the determination of testamentary capacity continues to be effective.[34] South Carolina enjoys a relatively rich body of case law dealing with matters of testamentary capacity,

---

29. *See* William P. Streng, Estate Planning, at A-77 to -78 & nn.675–88 (BNA Tax Management Portfolio 800 (2001)).

30. Uniform Trust Code, No. 66, § 9, 2005 S.C. ACTS 518.

31. Because an irrevocable trust is deemed a completed gift, a higher degree of capacity is required—the settlor must understand the nature of the trust and its probable consequences. Macauley v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002).

32. *See, e.g.*, Lee's Heirs v. Lee's Ex'r, 15 S.C.L. (4 McCord) 183, 194–95 (1827) (upholding a will as valid where there was evidence that an otherwise insane testator was of sound mind at the time of drafting); Hellams v. Ross, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977) (holding that evidence of a testator's habitual drunkenness failed to prove the testator lacked the requisite mental capacity at the time of drafting).

33. S.C. CODE ANN. § 62-2-501 (1987). Pre-SCPC South Carolina law also required that a testator be of sound mind. S.C. CODE ANN. § 21-7-10 (1976) (repealed 1987).

34. *See* S.C. CODE ANN. § 62-1-103 (1987). This section provides that, unless displaced by the SCPC, the principles of law and equity shall supplement the SCPC. *See supra* note 12 and accompanying text.

including mental capacity,[35] undue influence,[36] monomania or insane delusion (which is possibly not an independent ground for overturning a will in South Carolina but is at least a factor considered in the overall determination of testamentary capacity),[37] fraud,[38] and mistake.[39]

The test employed to determine requisite mental capacity to create a valid will also applies to determine requisite mental capacity to create a valid revocable trust. By choosing to apply the same test to both wills and trusts, the legislature underscored the SCTC's continuing theme that revocable trusts are as important as, and perhaps an equal partner to, the will. Instead of equating wills and trusts, the SCTC could have focused on the legal distinction between a revocable trust and a will. A revocable trust, as a valid nonprobate transfer, is effective during the settlor's lifetime because some interest presently passed to the beneficiary. However, a will is considered to effect a probate, or purely deathtime transfer, because no interest passes to a beneficiary until the decedent's death.[40]

D. Revocation or Amendment

SCTC section 62-7-602 specifies the methods a settlor can employ to revoke or amend a trust.[41] If the terms of the trust specify an exclusive method for revoking or amending, settlors must substantially comply with that method.[42] Thus, settlors must follow their own rules to revoke or amend the trust. If the terms of the trust do not express an exclusive method for revoking or amending, settlors may revoke or amend by one of several methods. First, the settlor may revoke or amend by executing a later will or codicil, which must state that the trust is revoked or

---

35. McCollum v. Banks, 213 S.C. 476, 50 S.E.2d 199 (1948); Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948); Sumter Trust Co. v. Holman, 134 S.C. 412, 132 S.E. 811 (1926); Matheson v. Matheson, 125 S.C. 165, 118 S.E. 312 (1923); Kirkwood v. Gordon, 41 S.C.L. (7 Rich.) 474 (1854); Tomkins v. Tomkins, 17 S.C.L. (1 Bailey) 92 (1828); *Lee*, 15 S.C.L. (4 McCord) 183. *See generally* Robert McC. Figg, Jr., *Of Carolina Quiddities, Quillets and Cases*, 18 S.C. L. REV. 719, 727–28 (1966) (discussing *Lee* and its impact on South Carolina law); David L. Means, *Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers*, 12 S.C. L. Q. 491, 531 (1960) (explaining that making a will requires less mental capacity than executing a deed or contract).

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

37. Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969); *In re* Washington's Estate, 212 S.C. 379, 46 S.E.2d 287 (1948); *Sumter Trust Co.*, 134 S.C. 412, 132 S.E. 811.

38. Myers v. O'Hanlon, 33 S.C. Eq. (12 Rich. Eq.) 196 (1861); *Floyd*, 34 S.C.L. (3 Strob.) 44. *See* Means, *supra* note 35, at 532.

39. *Ex Parte* King, 132 S.C. 63, 128 S.E. 850 (1925); Whitlock v. Wardlaw, 41 S.C.L. (7 Rich.) 453 (1854). *See* Means, *supra* note 35, at 531.

40. *See supra* notes 16–20 and accompanying text.

41. *See* S.C. CODE ANN. § 62-7-602(c).

42. *Id.* § 62-7-602(c)(i).

amended and must clearly and convincingly evidence the settlor's intent.[43] Next, the settlor may revoke or amend by delivering to the trustee a writing, other than a will or codicil, that clearly and convincingly evidences the settlor's intent.[44] Finally, the settlor may revoke or amend an oral trust by making an oral statement of that intent to the trustee.

SCTC section 62-7-602 is somewhat of a departure from pre-SCTC law. Prior to adoption of the SCTC, "if a particular mode of revocation [was] specified in a deed of trust, it [was] essential that the mode specified should be followed in order to make the revocation effective."[45] For example, if the settlor retained a right to revoke by specifying that written notice to the trustee was required for revocation, South Carolina law required the settlor to follow that procedure to effectuate the revocation. However, if the settlor retained the right to revoke without specifying a particular method for revocation, any act indicating the settlor's intent would suffice.[46]

SCTC section 62-7-602 also answers a previously unanswered question of South Carolina law: whether an attorney-in-fact acting pursuant to the authority of a power of attorney may revoke, amend, or distribute property from a trust created by the principal of the power of attorney.[47] A principal typically creates a power of attorney to allow an agent, the attorney-in-fact, to perform an act or acts on the principal's behalf.[48] The power of attorney is limited or special if the principal restricts the acts the attorney-in-fact may perform. Limited and special powers of attorney are commonly used as a matter of convenience. For example, a principal may empower an attorney-in-fact to complete the closing of a house purchase for him if he will be out of the country and unable to complete the closing himself. A principal may also grant broad authority to the attorney-in-fact, effectively allowing the attorney-in-fact to act as the principal's amanuensis, which is known as a general power. Estate planners often use the general power as an estate planning device in anticipation of the principal's possible incapacitation.

A power of attorney as an agency device can empower the attorney-in-fact only with the ability to perform acts that the principal is competent to perform himself. However, South Carolina (as well as every other state) allows by statute the creation of a durable power of attorney, which remains valid despite the principal's subsequent incapacity.[49] In some cases when a durable power of attorney empowers the attorney-in-fact to act for an incompetent principal, the attorney-in-fact may attempt to revoke or amend a trust created by the settlor. Because the principal may

---

43. *Id.* § 62-7-602(c)(2)(A).

44. *Id.* § 62-7-602. This section does not define what constitutes delivery to the trustee.

45. Peoples Nat'l Bank of Greenville v. Peden, 229 S.C. 167, 171, 92 S.E.2d 163, 165 (1956) (citations omitted).

46. *Id.* at 171, 92 S.E.2d at 165 (quoting 54 AM. JR. TRUSTS § 77 (1945)).

47. S.C. CODE ANN. § 62-7-602(e). This section, however, does not address situations when agents attempt to create a trust for the principal.

48. *See* A.L. Moses & Adele J. Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C. L. REV. 511, 514 (1979).

49. S.C. CODE ANN. § 62-5-501 (1987).

have created the trust as part of an overall estate plan,[50] the trust's revocation or amendment would in effect change the principal's estate plan. Whether the attorney-in-fact could do this was unanswered in South Carolina prior to the SCTC. Before the SCTC, South Carolina likely followed the generally accepted common law view that an agent cannot change a principal's will.[51] Thus, some would argue that an attorney-in-fact could not change the principal's trust because the effect would be the same as changing the principal's will, which was typically a complement to the trust as part of the principal's overall estate plan. However, others would argue that an attorney-in-fact could change the principal's trust because the trust is not a will, but is instead a nontestamentary planning device.

Under the SCTC, an attorney-in-fact has the power to revoke or amend the principal's trust if the trust or the power of attorney expressly authorizes revocation or amendment by the attorney-in-fact and if "the exercise of the power does not alter the designation of beneficiaries to receive the property on the settlor's death under the settlor's existing estate plan."[52] Thus, South Carolina estate planners should discuss this issue with a client when drafting a trust or power of attorney to ensure that the client considers the options and expresses the appropriate intention in the correct document.

E. Joint Revocable Trusts

South Carolina estate planners do not commonly use joint revocable trusts—trusts created by two or more settlors, usually spouses—because they can be fraught with potential problems.[53] However, SCTC section 62-7-602 addresses several issues relating to joint revocable trusts. If the trust consists of community property,[54] either spouse acting alone may revoke the trust, but both spouses must act together to amend the trust.[55] South Carolina is not a community property state, but if a married couple owned property while residing in a community property state and then subsequently move to South Carolina, their property retains the status of community property.[56] Thus, a trust created by married residents of South Carolina may contain community property, either because the couple created the trust while residing in a community property state or because some or all of the property used

---

50. *See supra* notes 16–18 and accompanying text.

51. *See* Moses & Pope, *supra* note 48, at 526; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. k (2003).

52. S.C. CODE ANN. § 62-7-602(e).

53. *See* Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 REAL PROP. PROB. & TR. J. 345, 352–62 (1997).

54. *See generally* Russell J. Weintraub, *Obstacles to Sensible Choice of Law for Determining Marital Property Rights on Divorce or in Probate: Hanau and the Situs Rule*, 25 HOUS. L. REV. 1113 (1988) (detailing conflict of laws problems between community property and non-community property states).

55. S.C. CODE ANN. § 62-7-602(b)(1) cmt.

56. *Id.* § 62-7-602(b)(1).

to fund the trust retained its community property status from their former residency in a community state property.

However, if "the trust consists of property other than community property," either settlor acting alone "may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution."[57] In a trust consisting of both community property and other property, the applicable rule would depend on which property the attempted revocation or amendment affects.

The distinction between community property and other property recognizes that joint settlors who are spouses may have different rights with respect to those categories of property. With community property as well as non-community property, a revocation of the trust simply returns the property to its ownership status before the settlors created the trust. Thus, the statute allows either spouse to revoke the trust because the only effect the revocation will have is to remove the property from the trust. However, an amendment to a trust funded with community property could affect the treatment of the property in which both spouses have an interest. The statute therefore requires both spouses to consent to an amendment of trusts funded with community property. But if a trust is funded with other property, a spouse acting alone can amend the trust because the statute restricts the effect of the amendment to the property contributed by the settlor making the amendment.

Section 62-7-602 also provides that the trustee must notify all settlors who did not participate in the revocation or amendment of the revocation or amendment.[58] This statutory provision is new to South Carolina law and is rooted in fairness. Because the statute allows fewer than all settlors to revoke or amend the trust in certain situations, the nonparticipating settlors ought to be aware of the revocation or amendment as it affects the overall trust.

The SCTC protects a trustee who acts without knowledge that a settlor has revoked or amended a trust.[59] This provision is also new to South Carolina law, and like section 62-7-602(b)(3), is rooted in fairness. Because section 62-7-602 authorizes some methods of revocation or amendment without notice to the trustee,[60] the unknowing but otherwise prudent trustee should not be liable for relying on the continuing viability of the trust.[61]

Upon revocation of a trust, the trustee must deliver the trust property in accordance with the settlor's directions.[62] Pre-SCTC law required a trustee to distribute trust property to the trust beneficiaries upon termination of the trust,[63] but did not specifically address the issue of a trustee's duties upon revocation, although

57. *Id.* § 62-7-602(b)(2).
58. *Id.* § 62-7-602(b)(3).
59. *Id.* § 62-7-602(g).
60. *See supra* note 43 and accompanying text.
61. *See infra* notes 75–78 and accompanying text.
62. S.C. CODE ANN. § 62-7-602(d).
63. Beaty Trust Co. v. S.C. Tax Comm'n, 278 S.C. 113, 115, 292 S.E.2d 788, 790 (1982) (citing Page v. Page, 243 S.C. 312, 315–16, 133 S.E. 2d 829, 831 (1963)).

the reasonable requirement would be to return the trust property, free from trust, to the settlor.

F. Other Means of Revocation or Amendment

Although Part 6 of the SCTC, "Revocable Trusts," is devoted to the revocation and amendment of trusts, other methods of revoking or amending trusts may be employed, and these methods may even be employed with respect to trusts considered to be irrevocable and unamendable.[64]

G. Settlors' Powers and Beneficiaries' Rights

Also new to South Carolina law is the SCTC's specification that any rights of a beneficiary in a revocable trust are subject to the settlor's control, and the SCTC's specification that the trustee exclusively owes duties to settlors and not to any beneficiary.[65] In continuing its attempt to increase the importance of trusts as testamentary documents, just as the SCTC applies the same test for determining requisite mental capacity to both wills and revocable trusts, the SCTC treats revocable trusts more as equivalents of a will.[66] As previously discussed, a will has deathtime significance only, while a non-probate transfer has lifetime significance because an interest in the trust presently passes to the beneficiary. But, even though the SCTC treats a revocable trust more like a will, the SCTC has avoided spoiling the qualification of the trust as a valid non-probate transfer.[67] Regardless of the legal niceties involved in finding that some interest presently passes to a beneficiary to qualify the revocable trust as a non-probate transfer, the SCTC's recognition of the settlor's control over a revocable trust recognizes a practical reality: the settlor of a revocable trust retains, through the right to revoke, the greatest power one can retain over the trust property, such that any other retained power is merely incidental and subordinate to that right to revoke.[68] This statutory recognition of a settlor's right of control may differ from the view of the South Carolina Supreme Court in *Seifert*,[69] but seems consistent with the prevailing—and correct—recognition of the real effect of a retained right to revoke.[70]

H. Limitations Period to Contest a Revocable Trust

Another issue unanswered by the common law in many states, including South Carolina, involves the time within which a contestant may contest the validity of a

---

64. *See infra* notes 113–87 and accompanying text.
65. S.C. CODE ANN. § 62-7-603.
66. *See supra* notes 31–40 and accompanying text.
67. *See* Medlin, *supra* note 23, at 287 & n.60.
68. *See* Medlin, *supra* note 23, at 297–98 & n.61, 300 & n.76.
69. *See supra* notes 21–22 and accompanying text.
70. *See supra* notes 16–20, 25 and accompanying text.

revocable trust. This issue again references the hybrid characteristics of a revocable trust—from a legal perspective, having lifetime significance to qualify as a non-probate transfer but, from a practical perspective, having only deathtime significance because of a settlor's right to revoke.[71] On this issue, the SCTC incorporates provisions founded on both theories. Section 62-7-604 prevents an individual from contesting the validity of a revocable trust unless the contest is commenced by the earlier of one year from the settlor's death or sixty days after the trustee sends notice of the trust, including a copy of the trust, pertinent information about the trust, and a warning about the time limit to contest the trust.[72] The SCTC does not require the trustee to provide notice or information about a revocable trust,[73] but a trustee who wants to commence the limitations period while a settlor is alive[74] might consider the strategic advantages of providing notice.

I. Protecting the Distributing Trustee Upon the Settlor's Death

A potential trap for the trustee of a revocable trust can arise when a settlor dies, and, according to the terms of the trust, the trustee is to distribute trust property to certain beneficiaries. The probate process does not control revocable trusts because they are non-probate transfers—estate planners often use revocable trusts for this reason.[75] Unlike probate assets subject to administration, the trustee of a revocable trust could theoretically distribute assets immediately to the beneficiaries upon the settlor's death. But a trustee who distributes immediately upon the settlor's death, despite the noble attempt to comply with the wishes of the deceased settlor, may be exposed to personal liability.

Some time period is set within which contestants desiring to question the validity of the deceased settlor's will must act.[76] The appropriate time period may vary from state to state and, even within a particular state, determination of the applicable time period may involve a complicated and arcane analysis. Whatever that time period is, a trustee who prematurely distributes trust property is arguably at risk. For example, consider a document that appears to be the deceased settlor's last will and appears to be part of a consistent and comprehensive estate plan that includes a revocable trust. Assume the pertinent law of the applicable jurisdiction allows the revocation of a revocable trust by will. The trustee then distributes the trust assets immediately following the settlor's death. If a court finds that a later-

71. *See supra* notes 16–20 and accompanying text.

72. S.C. CODE ANN. § 62-7-604(a). For a comparable requirement to notify creditors of a decedent's estate about the impending time limit to contest, see S.C. CODE ANN. §§ 62-3-804, -806 (1987).

73. *See infra* notes 220–53 and accompanying text.

74. In many cases, it will be unlikely that a prospective contestant will bring a contest for fear of upsetting settlors, who may use their retained right to revoke the contestant's beneficial interest.

75. *See supra* notes 16–20 and accompanying text.

76. *See, e.g.*, S.C. CODE ANN. §§ 62-3-108, -412 (Supp. 2004) (explaining the procedures and effects of testacy proceedings); *id.* § 62-3-413 (1987) (establishing the applicable time period for modifying or vacating an order).

discovered will revokes the initial will, and the terms of the later will revoke the revocable trust, then the trustee would have improperly distributed the trust assets. By revoking the trust, the trust assets would have become part of the probate estate, not passing to the initial trust's beneficiaries but instead passing in accordance with the deceased settlor's ultimate last will. The trustee may, if the law of the jurisdiction allows, seek the return of the distributed property, but this attempt may be futile if the trust beneficiaries are unwilling or unable to cooperate. As this example illustrates, a trustee may be reluctant to distribute trust assets before the limitations period to contest the deceased settlor's will has run. This reluctance, however, places the personal concerns of the trustee at odds with the settlor's intent for immediate distribution.

Again, the SCTC remedies this situation. SCTC section 62-7-604(b) protects a trustee who distributes trust property upon the settlor's death unless the trustee had notice of a possible contest over the trust's validity.[77] Further, the statute requires beneficiaries to return any improperly distributed property.[78]

J. Claims of a Settlor's Creditor

Before the SCTC, South Carolina had not decided what rights a settlor's creditors could assert against the assets of the settlor's revocable trust upon the settlor's death. Under a common law rationale, the settlor's creditors could reach the assets of a revocable inter vivos trust during the settlor's lifetime. Usually, a settlor is also a beneficiary of a revocable inter vivos trust; thus a creditor could reach the trust assets through the settlor's interest as beneficiary.[79] In any event, a creditor who properly asserts its claim should be able to stand in the shoes of the debtor with respect to the debtor's property. Thus, a settlor's creditor could exercise the settlor's right to revoke, removing the trust property from the trust, subjecting it to the creditor's rights. Whether, under a common law rationale, a settlor's creditors would reach the property in a revocable inter vivos trust after the settlor's death is more problematic. In that case, the creditor has lost the opportunity to assert the settlor's right to revoke because the settlor no longer has a right to revoke. The SCPC addressed this question but provided no affirmative answer.[80]

SCTC section 62-7-505 provides that a settlor's creditors may reach the assets of a revocable trust during the settlor's lifetime, regardless of whether the trust contains a spendthrift provision.[81] Moreover, section 62-7-505 provides that, after the settlor's death, the settlor's creditors may reach the assets of a revocable trust if the probate assets are otherwise insufficient.[82]

---

77. S.C. CODE ANN. § 62-7-604(b).
78. *Id.* § 62-7-604(c).
79. *See* State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771 (Mass. App. Ct. 1979).
80. *See* S.C. CODE ANN. § 62-6-201(b) (1987).
81. S.C. CODE ANN. § 62-7-505(a)(1).
82. *Id.* § 62-7-505(a)(3).

III. THE CREATION OF TRUSTS

Part 4 of the SCTC also significantly changes pre-SCTC South Carolina trust law. Part 4 covers the rules regarding the creation of trusts. Its provisions govern not only the effective creation of trusts, whether revocable or irrevocable, but also governs their modification, reformation, and amendment.[83]

A. General Rules

Section 62-7-401 sets forth different methods for creating trusts and applies to both declarations of trust (when the settlor retains legal title to the trust property and serves as trustee)[84] and transfers in trust (when the settlor transfers legal title to another person as trustee). This section changes South Carolina law by requiring a writing for all declarations of trust. Pre-SCTC law allowed the creation and proof of trusts consisting of personal property by oral declaration, as long as those declarations were "clear and explicit."[85] SCTC section 62-7-401 now requires some written evidence for a declaration of trust, even if the trust consists only of personal property.[86] On the other hand, pre-SCTC law did not allow an oral trust of real property. This rule was not due to trust law requirements but rather to comply with the requirements of the Statute of Frauds.[87] Though section 62-7-401 requires a writing for the creation of a declaration of trust, SCTC section 62-7-407 otherwise allows the creation of an oral trust if proved by clear and convincing evidence.[88] But that section, restricted by section 62-7-401, effectively applies only to transfers in trust. The Statute of Frauds thus continues to apply to require a writing for trusts of real property.[89]

B. Charitable Trusts

Part 4 of the SCTC generally follows the common law requirements needed to create a valid charitable trust, and SCTC section 62-7-405 specifies acceptable charitable purposes.[90] The list of charitable purposes in section 62-7-405 comes

---

83. Of course, the modification, amendment, and reformation provisions apply to trusts that are otherwise irrevocable and unamendable. If a trust is revocable or amendable, settlors can modify, amend, or reform the trust by using the powers reserved by settlors rather than having to resort to the provisions of Part 4. *See supra* notes 41–46 and accompanying text.

84. Also known as a self-trusteed trust.

85. *See* Harris v. Bratton, 34 S.C. 259, 262, 13 S.E. 447, 448 (1891); *see also* McElveen v. Adams, 108 S.C. 437, 439, 94 S.E.2d 733, 734 (1917) (holding that the oral declaration of a testator was sufficient to create a trust of personal property).

86. S.C. CODE ANN. § 62-7-401(a)(2).

87. *See* Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 593 (Ct. App. 2000) (citing Whetstone v. Whetstone, 309 S.C. 227, 231–32, 420 S.E.2d 877, 879 (Ct. App. 1992)).

88. S.C. CODE ANN. § 62-7-407.

89. *Id.* § 62-7-407 S.C. cmt.

90. *Id.* § 62-7-405(a).

from the *Restatement of Trusts* and includes: "(a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; or (e) other purposes to the accomplishment of which is beneficial to the community."[91] However, section 62-7-405 does liberalize the traditional common law requirements to create a charitable trust by allowing the creation of a valid charitable trust even if a settlor fails to indicate in the trust terms a particular charitable purpose or beneficiary.[92] Under general common law treatment, a trust without a particular charitable purpose or beneficiary would likely fail. Section 62-7-405 instead allows the court to "perfect" the charitable trust by choosing a particular charitable purpose or beneficiary, but "[the] selection must be consistent with the settlor's intention to the extent it can be ascertained."[93] This change expands upon the traditionally-recognized methods for creating a valid charitable trust for property law purposes.

The SCTC, by expanding upon the traditional treatment of charitable trusts may, in some cases, protect the tax advantages available to charitable trusts. A settlor often creates a charitable trust with tax benefits in mind. Obviously, the Internal Revenue Code imposes its own particular requirements that a charitable trust must meet to pass muster for tax purposes.[94] A trust that satisfies the property law charitable trust requirements is not charitable for tax purposes unless it also satisfies the tax law requirements. Similarly, an invalid trust under state property law is not going to be valid for tax law purposes.

Section 62-7-405 also broadens, and probably clarifies, the powers of the Attorney General with respect to charitable trusts. Although pre-SCTC law gave certain powers over charitable trusts to the Attorney General, the applicable statutory provisions were arcane and not necessarily comprehensive. Former SCPC section 62-7-501 required individual trustees of certain charitable trusts to file a copy of the trust with the Attorney General, and former SCPC section 62-7-502 required that trustees of certain charitable trusts file annual reports with the Attorney General.[95] But former SCPC section 62-7-505 exempted many institutions, including churches and schools, from these requirements.[96] Current section 62-7-405 imposes the requirement that a trustee file a certified copy of all charitable trust instruments with the Attorney General, unless separately exempted by another rule or statute or by a regulation issued by the Attorney General.[97] However, Part 4 does not require the trustee for any trust to file annual reports with the Attorney General.[98]

---

91. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 368 (1959). *See also* Porcher v. Cappelmann, 187 S.C. 491, 495–96, 198 S.E. 8, 10 (1938) (enumerating acceptable charitable purposes to create a valid charitable trust).

92. S.C. CODE ANN. § 62-7-405(b). Compare former SCPC section 62-7-105.

93. S.C. CODE ANN. § 62-7-405(b).

94. *See* I.R.C. § 501(c) (West Supp. 2005).

95. S.C. CODE ANN. § 62-7-501 to -502 (1987) (repealed 2006).

96. *Id.* § 62-7-505.

97. S.C. CODE ANN. § 62-7-405(d).

98. *See id.*

C. *Other Noncharitable Trusts*

Under pre-SCTC law, a settlor could create two types of express trusts:[99] charitable trusts or noncharitable trusts.[100] To be valid, a noncharitable or private trust had to name a definite beneficiary. In contrast, a charitable trust, which had to benefit society or a reasonably large segment thereof, could not benefit a definite beneficiary because benefiting a definite beneficiary would prevent a determination that the trust benefited society or a reasonably large segment thereof, thereby precluding the qualification of the trust as charitable.

Pre-SCTC law did not recognize an honorary trust, which is a trust with no definite beneficiary, no charitable beneficiary, and no charitable purpose, and is thus effectively a power of appointment. A putative trustee is usually allowed to administer the trust for the intended beneficiary or purpose. The classic example involves a settlor who attempts to create a trust for the benefit of a pet.[101] Under common law, a pet did not qualify as a definite beneficiary, and a trust to care for a pet did not qualify as having a charitable beneficiary purpose—thus, the settlor could not create a valid private trust or a valid charitable trust. However, some courts held that in these situations a settlor created a valid honorary trust and allowed the named trustee to care for the settlor's pet with the trust funds.[102]

SCTC section 62-7-408 marks a change in South Carolina law as it validates and authorizes honorary trusts in certain cases. This section allows a settlor to create a trust for the care of animals, either those in existence or gestation[103] during a settlor's lifetime, regardless of whether the animals are alive at the time the trust was created.[104] "The trust terminates upon the death of the last surviving animal to die."[105] If the property in trust exceeds the amount necessary to provide for the animals, the trustee must return the excess trust assets to the settlor or the settlor's successors.[106]

Section 62-7-409 allows a settlor to create a trust without a definite beneficiary and without a charitable purpose if the trust has "a noncharitable but otherwise valid purpose to be selected by the trustee."[107] Consequently, this section authorizes a type of trust not valid under the common law: a trust with a benevolent purpose but

---

99. The term express trust reflects a settlor's expression of intent to create a trust.

100. Noncharitable trusts are also known as private trusts.

101. *See, e.g.*, *In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950) (upholding the validity of a trust created for the benefit of the settlor's dog).

102. *Id.* at 784.

103. Allowing a settlor to create a trust for the care of an animal in gestation creates the concept of the posthumous pet. Whether "in gestation" includes frozen embryos is problematic.

104. S.C. CODE ANN. § 62-7-408(b).

105. *Id.*

106. *Id.* § 62-7-408(c).

107. *Id.* § 62-7-409(1). Former SCPC section 62-7-105 allowed the trust instrument to empower a trustee of a valid charitable trust to designate the objects and beneficiaries of the charitable trust.

not for a recognized charitable purpose.[108] For example, section 62-7-409 permits a settlor to create a trust for the payment of money to those selected by the trustee, regardless of their financial circumstances. Under the common law, that trust would not qualify as a charitable trust because the payment of money to those who are not impecunious would not satisfy the charitable purpose of relieving poverty, or any other recognized charitable purpose. Section 62-7-409 does restrict the term of this type of benevolent trust to the maximum period allowed under the Rule Against Perpetuities,[109] which ordinarily does not apply to qualified charitable trusts.[110] However, the Rule Against Perpetuities does not apply to benevolent trusts associated with the upkeep of cemeteries.[111] As with a trust for the care of animals, if the property in a benevolent trust exceeds the amount necessary to execute the settlor's purpose, the trustee must return the excess trust assets to the settlor or the settlor's successors.[112]

D. Modification, Early Termination, and Reformation of Trusts

Part 4 of the SCTC deals with the modification and reformation of trusts that a settlor cannot otherwise modify or amend, either because the settlor failed to retain the right to revoke or amend the trust[113] or because the settlor is unable to exercise the right to revoke or amend the trust, typically due to death or incapacity. Trusts terminate naturally upon reaching the stated termination date or upon the occurrence of a stated condition of termination.[114] The early termination of a trust is therefore considered herein as a modification of the trust.

Historically, courts were less reluctant to modify the administrative provisions of trusts than to amend the settlor's dispositive provisions. Administrative provisions, although perhaps important to the settlor, are not as important as the dispositive provisions; the settlor creates a trust with the primary purpose of benefitting the beneficiary in the intended manner. Viewed another way, the

---

108. *See supra* notes 91–93 and accompanying text; *see also* Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 789 (Va. Ct. App. 1951) (distinguishing between charitable, public trusts and benevolent, private trusts).

109. *See* S.C. CODE ANN. § 27-6-10 to -80 (1991). Under South Carolina's version of the Uniform Statutory Rule Against Perpetuities (USRAP), a trust could last as long as ninety years. SCTC section 62-7-408 (see *supra* notes 103–06 and accompanying text) does not restrict the term of animal care trusts to the maximum period allowed under the Rule Against Perpetuities. But because South Carolina has adopted a version of USRAP, even if section 62-7-408 did apply the Rule Against Perpetuities period to animal care trusts, it would possibly affect only such animals as sea turtles (and perhaps my neighbor's incessantly barking dog, which it seems will live far more than ninety years). Thus, either way, Rule afficianados will be deprived of the opportunity to coin a new term: catlives in being.

110. S.C. CODE ANN. § 62-7-409(1).

111. *Id.*

112. *Id.* § 62-7-409(3).

113. *See supra* notes 28–30 and accompanying text.

114. Macauley v. Wachovia Bank of S.C., N.A., 333 S.C. 201, 208, 508 S.E.2d 46, 50 (Ct. App. 1998) (quoting Clement v. Charlotte Hosp. Ass'n, 137 So. 2d 615, 617 (Fla. Dist. Ct. App. 1962)).

administrative provisions serve as the means of accomplishing the settlor's dispositive ends. Consequently, a court is more willing to amend the trust's administrative provisions if they have become impossible or impracticable.[115]

Although a court should be less willing to modify dispositive provisions of a trust for fear of changing or disregarding the settlor's intent, modification under pre-SCTC law was possible in the appropriate circumstances. Generally, the dispositive provisions of otherwise irrevocable and unamendable trusts could be modified by four methods.

First, a court could modify a trust by obtaining the consent of the settlor and all of the beneficiaries, who comprise all of the parties interested in the trust.[116] The law did not require the consent of the trustee because the trustee was not considered an interested party for this purpose.[117]

Second, when the settlor was dead, incompetent, or otherwise unavailable to consent,[118] a court could modify the trust by obtaining the consent of all the beneficiaries and by demonstrating that no material purpose of the trust remained unaccomplished.[119]

---

115. *See, e.g., Ex parte* Guaranty Bank & Trust Co., 255 S.C. 106, 177 S.E.2d 358 (1970) (holding that a trust's beneficiaries could sell the land specifically reserved for farming by the administrative provisions in the trust when the development of interstate highway rendered farming the land impractical and when the sale of the land furthered the settlor's purpose of providing for the beneficiaries).

116. *See* Klugh v. Seminole Sec. Co., 103 S.C. 120, 155, 87 S.E. 644, 646 (1916).

117. *Cf.* S.C. CODE ANN. § 62-1-403(2)(ii) (Supp. 2004) (providing that "orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties").

118. Theoretically, a court could modify a trust even if the settlor was available and despite the settlor's opposition to the modification. Although possible, the practical likelihood of this avenue for modification being successful is minimal, assuming that settlors would oppose modification only if it would deviate from the settlor's intended purpose. In that case, the settlor would make a compelling witness for the position that the material purpose of the trust remained unaccomplished. *But see* Chiles v. Chiles, 270 S.C. 379, 242 S.E.2d 426 (1978) (refusing to allow a settlor to modify an irrevocable inter vivos trust by extinguishing the beneficiary's interest to receive more favorable tax treatment).

119. *See* Claflin v. Claflin, 20 N.E. 454, 455 (Mass. 1889) ("This court has ordered trust property conveyed by the trustee to the beneficiary when . . . the purposes of the trust had been accomplished."). All beneficiaries must consent to the modification of the trust under pre-SCTC law under either the first or second method. If all the beneficiaries are competent, ascertained, available, and willing adults, getting consent is easy. However, many trusts benefit not only known and existing beneficiaries, but also minor, unborn, or unascertained beneficiaries. In the latter case, obtaining the consent of the minor, unborn, or unascertained beneficiaries creates a problem. Nevertheless, two methods operate to bind minor, unborn, or unascertained beneficiaries. Under one method, the court can appoint a guardian ad litem to act on behalf of the minor, unborn, or unascertained beneficiary. But, this tactic may lead to undesired results. The guardian ad litem may, and usually should, be wary that the minor, unborn, or unascertained beneficiary, once ascertained and an adult, may question why the guardian ad litem relinquished his or her property interest. Wherefore, the guardian ad litem may be unwilling to consent to the proposed modification, particularly if it involves the relinquishment of some interest in the trust. The other method used is the doctrine of virtual representation. Virtual representation allows a competent consenting beneficiary to bind minor, unborn, and unascertained beneficiaries with an identity of interest. *See infra* note 132 and accompanying text. The problem here involves finding, with assurance, that the consenting beneficiary actually has an interest identical to that of the minor, unborn,

Third, a court could modify the trust by a so-called family settlement. Courts generally want to remedy disputes among family members. Thus, if family members have a legitimate dispute (not a concocted dispute) about the terms or validity of a trust, a court could allow the modification of a trust as part of an omnibus settlement of the dispute. The SCPC provides a convenient procedure to effectuate a family settlement.[120]

Finally, a court could modify a trust by construction of the trust. In this case, no actual modification occurs. Rather, a court construes the existing terms of trust to allow the proposed modification without changing the settlor's intent. For example, an income beneficiary may request invasion of the principal because the trust income has become insufficient with respect to the beneficiary's needs. Particularly in the case of a surviving spouse, the court might construe the settlor's intent to allow invasion of the principal, without actually needing to modify the trust.[121]

In contrast to modification, reformation involves correcting the language of a trust that otherwise fails to properly memorialize the settlor's intent. The difference between modification and reformation can be significant, especially for tax reasons. Modification involves altering the settlor's original intent, which could trigger tax consequences in certain cases.[122] Because reformation merely corrects the language of the trust to reflect the settlor's original intent, no substantive change results and tax consequences should not emanate.

1. Modification by Consent

Part 4 of the SCTC adopts the common law methods for modification and early termination. Section 62-7-411 recognizes the ability of the settlor and all the beneficiaries to consent to modification or early termination of a trust, even if modification or early termination is contrary to the material purposes of the trust.[123] Section 62-7-411 also allows all beneficiaries to consent to modification or early termination of a trust, but only if the changes do not affect the material purpose of the trust.[124] However, section 62-7-411 apparently changes the pre-SCTC common law by requiring court approval for a modification by either method.[125] Pre-SCTC

---

or unascertained beneficiary. Although neither method is foolproof, either may work in a particular case.

120. S.C. CODE ANN. §§ 62-3-1101 to -1102 (1987 & Supp. 2004).

121. *See, e.g.*, Staley v. Ligon, 210 A.2d 384 (Md. 1965) (holding "a court of equity will authorize a deviation from the terms and directions of a trust instrument . . . if owing to circumstances not anticipated by the trustor compliance would defeat or substantially impair the accomplishment of the purposes of the trust").

122. For example, beneficiaries re-allocating their inherited interests pursuant to section 62-3-912 are likely involved in a gifting process for transfer tax purposes.

123. S.C. CODE ANN. § 62-7-411(a). *See supra* notes 116–19 and accompanying text.

124. S.C. CODE ANN. § 62-7-411(b) to -411(c).

125. *Id.* § 62-7-411(a).

precedent appeared to allow modification by consent without court approval.[126] The SCTC also changes pre-SCTC law by allowing the court to approve a modification proposal even when all the beneficiaries do not consent, as long as the court finds that modification would be appropriate if all beneficiaries had consented and that the non-consenting beneficiaries' interests are adequately protected.[127] Finally, section 62-7-411 specifies that a settlor's attorney-in-fact can consent for the settlor if authorized to do so by the power of attorney or the trust.[128] A settlor's conservator or guardian can consent for the beneficiary.[129]

The SCTC adopts several methods, with some differences from the pre-SCTC methods, for obtaining the consent of a beneficiary who is incompetent or unascertained.[130] Section 62-7-305 permits a court to appoint a guardian ad litem to represent the interests of a beneficiary, a method also employed before the SCTC.[131] Section 62-7-304 continues South Carolina's recognition of the doctrine of virtual representation, by which an unborn or unascertained beneficiary can be represented by a beneficiary with substantially identical interests.[132] Additionally, SCTC section 62-7-303 maintains the concept, employed under pre-SCTC law, that a fiduciary can represent the interests of beneficiaries.[133] New to South Carolina law, however, is the SCTC's specification that an agent may represent the agent's principal and that a parent may represent a minor or unborn child, if no conflict of interest exists.[134]

Part 4 of the SCTC maintains but also expands the ability of persons interested in a trust to settle a dispute through the so-called family settlement agreement by

---

126. *See* Klugh v. Seminole Sec. Co., 103 S.C. 120, 157–58, 87 S.E. 644, 647 (1916).

127. S.C. CODE ANN. § 62-7-411(d).

128. *Id.* § 62-7-411(a). *See also supra* notes 51–52 and accompanying text (discussing SCTC section 62-7-602(e), which grants an attorney-in-fact the power to revoke or amend a trust with express authorization).

129. S.C. CODE ANN. § 62-7-411(a).

130. *See supra* notes 118–19 and accompanying text. The SCTC adds the definition of "beneficiary representative" to the UTC. SCTC section 62-7-301(a) defines a beneficiary representative as "a person who may represent and bind another person concerning the affairs of trusts." S.C. CODE ANN. § 62-7-301(a). Section 62-7-301(b) provides that "notice to a beneficiary representative has the same effect as if notice were given directly to the represented person" by the beneficiary representative. *Id.* § 62-7-301(b). Section 62-7-301(c) provides that "consent of a beneficiary representative is binding" as if the person represented by the beneficiary representative gave the consent himself, unless the represented person timely objects. *Id.* § 62-7-301(c). Section 62-7-301(e) provides that "orders binding a beneficiary representative . . . [generally] bind the person(s) represented by that beneficiary representative." *Id.* § 62-7-301(e).

131. *Id.* § 62-7-305.

132. *Id.* § 62-7-304. *See also* S.C. CODE ANN. § 62-1-403(2)(iii) (Supp. 2004) ("A minor or unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.").

133. S.C. CODE ANN. § 62-7-303(a). *See supra* note 119; *see also* S.C. CODE ANN. § 62-1-403(2)(ii) (Supp. 2004) (stating that orders binding fiduciaries also bind the persons these fiduciaries represent when no conflict of interest exists).

134. S.C. CODE ANN. § 62-7-303(a)(3), (6).

modifying the trust with court approval.[135] Apparently, a court can approve a SCPC family settlement agreement even if the resulting amendment is inconsistent with the material purposes of the trust.[136] Thus, from one perspective, modification by a family settlement agreement is broader than a modification wrought by the method of obtaining the consent of all beneficiaries,[137] which cannot be inconsistent with the material purposes of the trust. However, the SCPC limits family settlement agreements to matters involving the "compromise of a controversy as to admission to probate of an instrument offered . . . as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate."[138] Although some trust matters could fall within these categories, not all trust matters would.

The SCTC expands the possible scope of family settlement agreements by bringing other trust issues within its reach. SCTC section 62-7-111 allows interested persons to reach a binding agreement, even without court approval, concerning the following trust matters:

> (1) the approval of a trustee's report or accounting; (2) direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power; (3) the resignation or appointment of a trustee and the determination of a trustee's compensation; (4) transfer of a trust's principal place of administration; and (5) liability of a trustee for an action relating to the trust.[139]

2. Termination to Avoid Inefficient Administration

SCTC section 62-7-414 empowers a trustee to terminate a trust, without court approval, if its value is less than $100,000 and if the trustee determines that the value of the trust does not justify the cost of its administration.[140] But before terminating the trust, the trustee must notify all the beneficiaries of his intentions to terminate the trust. This provision codifies the practice of many South Carolina estate planners of including a "small-trust termination provision" in the trust document.[141] The cost of administering a trust does not necessarily correlate to the value of the trust property—certain hard costs arise regardless of the trust's value. At some point, a trust's value may be so low that the hard costs prevent a cost-efficient administration of the trust and may, in some cases, even cause the trust to

135. See *id.* § 62-7-411 and *supra* note 120 and accompanying text.
136. *See* S.C. CODE ANN. § 62-7-411(a)(i).
137. *See supra* notes 116–19, 122–29 and accompanying text.
138. S.C. CODE ANN. § 62-3-1101 (Supp. 2004).
139. S.C. CODE ANN. § 62-7-111(b).
140. *Id.* § 62-7-414(a).
141. *See* 1 MICHAEL L.M. JORDAN & ROBERT P. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS 12-37 (3d ed. 2004).

suffer net losses. In those cases, terminating the trust and distributing the assets outright to the beneficiaries may change the settlor's intentions but will save money for the beneficiaries.[142]

Section 62-7-414, in addition to allowing a trustee to terminate a trust, gives courts the authority to terminate, as well as modify, a trust "if the value of the trust property is insufficient to justify the cost of administration."[143] Section 62-7-414 also allows courts to remove trustees and appoint replacements in this situation.[144]

3. *Modification Without Consent*

Part 4 of the SCTC significantly changes the pre-SCTC law regarding a court's authority to amend a trust because of a change in circumstance. Under pre-SCTC law, courts could modify the administrative provisions of a trust if those provisions became impossible or impracticable.[145] A classic example of the modification of a trust's administrative provisions appears in *Ex parte Guaranty Bank & Trust Co.*[146] In that case, the settlor directed his trustee to continue the use of his land for farming purposes. However, many years after the settlor created the trust, two interstates were built across the property, rendering it far more valuable as commercial property. Although the trust provisions did not include a power of sale, the court, noting the post-execution change of circumstances and the considerable increase in income that would be generated by the requested deviation from the trust terms, approved the sale of the property.[147]

By contrast, courts have not been inclined to change the dispositive provisions of trusts absent the consent of all interested persons[148] because changing the dispositive provisions means changing a settlor's gift, and in certain cases divesting vested rights.[149] But SCTC section 62-7-412 empowers a court to modify even the dispositive provisions of a trust because of a change of circumstance not anticipated by a settlor.[150] By substantially expanding the court's power to modify dispositive

---

142. SCTC section 62-7-414 does not apply to conservation easements. S.C. CODE ANN. § 62-7-414(d). For an explanation of conservation easements, see Edward E. Milam et al., *What's Good for the Earth May be Good for the Pocketbook*, TAXES, January 2002, at 14, 15.

143. S.C. CODE ANN. § 62-7-414(b).

144. *Id.*

145. *See supra* text at note 115.

146. 255 S.C. 106, 177 S.E.2d 358 (1970).

147. *Id.* at 112–14, 177 S.E.2d at 360–62. The court observed that even though the trust did not include a power of sale, the trust did not expressly prohibit a sale of the property, either. *Id.* at 111, 177 S.E.2d at 360. Implying a power of sale, however, would arguably contradict the settlor's purpose of continuing his family's use of the property as a farm or as rental property. It is worth noting that pre-SCTC law, namely SCPC section 62-7-704, would have authorized the trustee to sell trust property unless the settlor indicated a contrary intention by reserving the property for only farm use. S.C. CODE ANN. § 62-7-704(c)(7) (repealed 2006).

148. *See supra* note 115 and accompanying text.

149. *See supra* note 115 and accompanying text.

150. The modified dispositive provisions must conform "to the extent practicable . . . with the settlor's *probable* intention." S.C. CODE ANN. § 62-7-412 (emphasis added).

provisions, the SCTC effectively authorizes changing the settlor's gift. Not only does this expansion of authority have property law implications, but tax consequences may also result.[151]

4. Reformation for Mistake

The SCTC also permits a court to reform a trust to make its terms consistent with a settlor's intent. Section 62-7-415 allows reformation, even if the trust terms are not ambiguous, "to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."[152] Although the concept of reforming a trust based on a mistake of fact or law has been accepted generally,[153] no pre-SCTC South Carolina statute or case directly addressed the issue.

5. Modification for Tax Motives

Often the purpose of reforming a trust in modern estate planning practice is to achieve a favorable tax result.[154] The SCTC provides two provisions where modifying trusts to achieve beneficial tax consequences is allowed. SCTC section 62-7-416 allows the court to approve the modification of trusts to accomplish the settlor's tax objectives.[155] A court may approve a proposed modification for tax purposes if the result is not inconsistent with the settlor's probable intent, and the modification can have retroactive effect.[156] Section 62-7-417 permits the trustee, without court approval, to combine or divide trusts if the combination or division does not impair a beneficiary's rights or the accomplishment of the trust's purposes.[157] Although the latter section does not limit the trustee's ability to combine or divide trusts to only tax-related situations,[158] tax objectives may drive many trust combinations or divisions.

The classic tax scenario exemplifying the desire to divide or combine trusts involves the federal generation-skipping transfer (GST) tax, which generally imposes a tax on trusts that have multi-generational beneficiaries who would

---

151. For example, modifying a bypass or credit shelter trust to give a surviving spouse the right to demand a principal beyond a certain limit may cause that trust, otherwise not includible, to be includible in the surviving spouse's taxable estate. *See infra* text at notes 164–81.

152. S.C. CODE ANN. § 62-7-415.

153. *See* RESTATEMENT (THIRD) OF TRUSTS § 12 cmt. c (2003); F. Ladson Boyle, *When It's Broke—Fix It: Reforming Irrevocable Trusts to Change Tax Consequences*, 53 TAX LAW. 821, 822–26 (2000).

154. *See supra* note 29 and accompanying text.

155. S.C. CODE ANN. § 62-7-416. *See supra* note 122 and accompanying text.

156. *See supra* note 122 and accompanying text.

157. S.C. CODE ANN. § 62-7-417.

158. Presumably, a valid non-tax reason to combine or divide trusts would be to facilitate a more efficient trust administration.

otherwise escape estate taxation at one generation.[159] For instance, if a settlor creates a trust benefitting the settlor's child for life with the remainder to the settlor's grandchildren, the child's taxable estate at death would not include the value of the trust because the child held only a life estate interest created by a third party.[160] Without the GST tax, the settlor would be able to skip a generation of wealth transfer taxation simply by limiting the child's interest to a life estate. From the Treasury's perspective, the GST tax plugs that gap by imposing a separate tax on the generation-skipping transfer at a rate equivalent to the maximum estate tax bracket amount.[161] However, as of 2005, the Internal Revenue Code allows a settlor to exempt $1.5 million[162] from the GST tax. If a trust contains only exempt property or only nonexempt property, the GST calculations are relatively simple. If, however, a trust contains both exempt and nonexempt property, the GST calculations are arcane and complex.[163] Consequently, many estate planners prefer that a GST-affected trust contain only exempt or only nonexempt property. The combination or division of trusts can accomplish this goal once the settlor funds the trust or trusts and knows the GST implications.

Another reason to seek trust reformation arises when a surviving spouse is given too much power over the nonmarital or bypass trust created by his or her deceased spouse. Holding too much power over a nonmarital trust results in the inclusion of the trust assets in the surviving spouse's taxable estate. A nonmarital trust is typically funded by formula with the exclusion amount, which means the trust assets escaped taxation in the deceased spouse's estate and would also escape taxation in the surviving spouse's estate if the surviving spouse does not hold too much power over the trust to qualify under the federal estate tax rules. Reforming the nonmarital trust to remove the excess power may avoid taxation of the surviving spouse's estate.

A recent Massachusetts case illustrates this situation. In *Walker v. Walker,*[164] the testator established a revocable trust in 1988 and died in 1989.[165] The trust provided for distribution of the trust assets upon the testator's death into as many as three subtrusts: "a general marital trust, a special marital trust, and a nonmarital deduction trust."[166] The two terms of the marital trusts provided that the testator

159. *See generally* I.R.C. §§ 2601 to 2663 (2000) (imposing the GST tax and providing for its administration).

160. *Id.* § 2653(a).

161. *Id.* §§ 2602, 2641.

162. *Id.* §§ 2631, 2010.

163. *Id.* §§ 2642, 2653(b)(1). The determination of the GST tax attributable to taxable events in a trust depends on the inclusion ratio applicable to the trust property. An inclusion ratio of zero means that no GST tax will be attributable to that trust—i.e., that trust is totally exempt. An inclusion ratio of one means that all taxable events for that trust will result in a GST tax. To simplify the GST tax treatment of a trust, an inclusion ratio of zero or one is preferable. Any other ratio creates allocation problems. Thus, trustees may want to combine or divide trusts to ensure that an inclusion ratio of zero or one is applicable to a particular trust.

164. 744 N.E.2d 60 (Mass. 2001).

165. *Id.* at 62.

166. *Id.*

intended to take maximum advantage of the state and federal estate tax marital deductions and should be construed accordingly.[167] The two marital trusts provided that the testator's surviving wife receive the net income for life, authorized the trustees to distribute the principal to her in their discretion, and provided her with "the power to demand all or any portion of the principal of the general marital trust during her lifetime."[168] The testator also gave his wife a general testamentary power of appointment over the principal of the general marital trust and a special testamentary power of appointment over the principal of the special marital trust, limiting the objects of that special power to his issue and their spouses.[169]

The formula apportioning the assets among the three trusts allocated the maximum unified credit amount to the nonmarital trust. Because the testator's estate did not exceed the unified credit amount, the marital trusts were not funded and the nonmarital trust received all of the available assets.[170]

The specific provisions of the nonmarital trust did not give the testator's wife a testamentary power of appointment.[171] However, other trust language gave the testator's wife, "in her capacity as trustee, unbridled discretion to pay principal from the nonmarital deduction trust to herself as beneficiary."[172] This authority constituted a general power of appointment for estate tax purposes, causing the nonmarital trust assets to be included in the wife's estate, regardless of whether she exercised the power.[173] If not for the general power of appointment, the nonmarital trust would escape inclusion in the wife's estate, as well as the testator's estate.[174]

The trustees sought a reformation of the nonmarital trust to add an ascertainable standard—"health, education, support or maintenance"—to the wife's power as trustee to distribute the principal to herself as beneficiary.[175] The addition of the ascertainable standard would convert the wife's power to distribute assets from a general power to a special power for estate tax purposes, thus allowing exclusion of the nonmarital trust assets from her estate under Internal Revenue Code § 2041.[176]

The court relied on testimony from the drafting attorney who, once his memory was refreshed by a review of pertinent file documents, recalled that the testator intended for the nonmarital trust assets to pass free from estate tax in both his estate and his wife's estate.[177] Following the "well-settled" Massachusetts rule that a court may reform a trust to comply with the settlor's intent, including considering trust

---

167. *Id.*
168. *Id.* at 63.
169. *Id.*
170. Walker v. Walker, 744 N.E.2d 60, 63 (Mass. 2001).
171. *Id.*
172. *Id.*
173. *Id.* at 64.
174. *Id.*
175. *Id.* at 65 n.12.
176. Walker v. Walker, 744 N.E.2d 60, 65 (Mass. 2001).
177. *Id.* at 64.

documents that are inconsistent with the settlor's tax goals, the court allowed reformation.[178]

The *Walker* court indicated that the testator included the powers of appointment over the general and special marital trusts to comply with the requirements for a marital deduction that were in effect at the time the documents were executed.[179] Qualified terminable interest trusts (QTIP) began to qualify for the marital deduction in 1981. Prior to that time, a surviving spouse had to hold the unfettered right to all net trust income for life and also had to hold at least a general testamentary power of appointment over the principal. After the recognition of the QTIP trust, the surviving spouse was no longer required to hold a general power of appointment over the trust principal to qualify for the marital deduction. In *Walker*, however, the court may have misapprehended the purpose of the power of appointment over the special marital trust, which was a special power limited to the testator's issue and their spouses. As such, the special marital trust would not have qualified as a QTIP trust.[180] Nevertheless, the general power of appointment over the nonmarital trust would have included that trust in the wife's estate for estate tax purposes. Thus, the court correctly discerned the purpose of the trustees' reformation proposal.[181]

---

178. *Id.* at 65.

179. *Id.*

180. *Id.* at 63.

181. Even without court reformation, another argument exists to challenge an IRS claim that a surviving spouse maintains a general power of appointment over nonmarital trust assets. In *First Union National Bank of South Carolina v. Cisa*, 293 S.C. 456, 361 S.E.2d 615 (1987), the testator's will created a marital and a nonmarital, or residuary, trust. *Id.* at 458, 361 S.E.2d at 616–17. The language of the trust provided that the trustees, a group which arguably included the testator's surviving wife, held the discretionary power to distribute income and the principal to a group of beneficiaries which certainly included the testator's surviving wife. *Id.* at 461–62, 361 S.E.2d at 618–19. Therefore the issue arose whether the testator intended for his wife to "have the right to participate in decisions regarding the distribution of income and principal to herself." *Id.* at 462, 361 S.E.2d at 618. Upon the wife's death, the IRS sought to include the assets of the nonmarital trust in her taxable estate because she maintained a general power of appointment over the trust. *Id.* at 459, 361 S.E.2d at 617. The court concluded that she did not possess a general power of appointment because it would be an impermissible conflict of interest and a breach of fiduciary duty if she exercised her discretion as trustee to favor herself over other beneficiaries. *Id.* at 463, 361 S.E.2d at 619. The court cited *In re* Dana, 371 N.E.2d 755 (Mass. 1977), one among many favorable Massachusetts rulings. First Union Nat'l Bank of S.C. v. Cisa, 293 S.C. 456, 460–62, 361 S.E.2d 615, 618–19 (1987). In effect, according to the court, the testator's wife could not participate as trustee in any decision that would disburse trust assets to herself, and consequently, did not have a general power of appointment over the nonmarital trust assets. *Id.* at 463, 361 S.E.2d at 619.

To add legislative suspenders to the court's belt, the South Carolina General Assembly enacted a statute essentially codifying the *Cisa* rule and declared the statutory law to be consistent with the common law already in existence. See SCPC section 62-7-603, which is recodified in essence at SCTC section 62-7-814(c).

For trustees looking for a reformation and modification ally, Massachusetts courts have been at the forefront of reformation-friendly venues.[182] Presumably, SCTC sections 62-7-416 and 62-7-417 should open the door for taxpayer-friendly reformations and modifications in South Carolina.[183]

Prior to the General Assembly's enactment of the SCTC, South Carolina statutorily permitted the consolidation or division of trusts if that action was consistent with the settlor's intent, was in the best interests of the beneficiaries, and was aligned with the goal of efficient administration of the trust.[184] However, the statute required court approval if the trust did not authorize these actions.[185] SCTC section 62-7-417, however, does not require court approval in these situations.[186] Nevertheless, a trustee might still seek court approval, both to limit the trustee's potential liability and to gain ammunition in an anticipated battle with the IRS.[187]

In conclusion, SCTC section 62-7-417's broad reach allows a trustee to combine or divide trusts for more than just tax reasons, while section 62-7-416 allows a court to approve a modification request, presumably including, but not limited to, a combination or division solely for tax reasons.

IV. THE TRUSTEE

A. Clarification of the Trustee's Standard of Care

Part 8 of the SCTC duplicates many of the provisions of South Carolina's version of the Uniform Prudent Investor Act,[188] enacted in 2001, and formerly found at SCPC section 62-7-302.[189] However, the Uniform Prudent Investor Act, as well as the South Carolina's version of the Act, covers only the investment and management of property and does not cover broad trustee responsibilities for trust administration.[190] Before the enactment of South Carolina's version of the Uniform Prudent Investor Act in 2001, earlier versions of SCPC section 62-7-302 provided a trustee standard of care.[191] But even before the first statutory statement of a

---

182. *See, e.g.*, Fleet Nat'l Bank v. Mackey, 745 N.E.2d 943 (Mass. 2001) (holding that a court can reform a trust where no language forbids reformation and such a reformation would further the decedent's intent regarding tax effects); Walker v. Walker, 744 N.E.2d 60 (Mass. 2001) (holding that, even when express provisions in a trust dictate a certain tax result, a court can reform a decedent's trust as long as the party seeking reformation shows that the reformation would correspond with the decedent's intent).

183. *See supra* notes 155–63 and accompanying text.

184. S.C. CODE ANN. § 62-7-211 (Supp. 2004) (repealed 2006).

185. *Id.*

186. *See* S.C. CODE ANN. § 62-7-417.

187. For an explanation of binding the IRS through state court decisions, see Boyle, *supra* note 153, at 831–34.

188. 7B U.L.A. 280 (2000).

189. South Carolina Uniform Prudent Investor Act, No. 80, § 2, 2001 S.C. ACTS 1920. *See* S.C. CODE ANN. § 62-7-302 (Supp. 2004) (repealed 2006).

190. S.C. CODE ANN. § 62-7-302(A)–(C) (Supp. 2004) (repealed 2006).

191. *See id.* § 62-7-302(a) (1987) (repealed 2001).

trustee's standard of care, South Carolina common law imposed a standard by which trustee malfeasance was measured. A brief review of the evolution of the trustee standard of care in South Carolina helps to illustrate how Part 8 of the SCTC effected these changes.

In *Epworth Orphanage v. Long*,[192] the South Carolina Supreme Court considered a classic conflict of interest dilemma that occurred during the Depression. A trustee, who was also a stockholder of the bank involved in this case, retained trust funds deposited with the bank.[193] As the bank's failure loomed, the trustee was faced with a Hobson's choice. Withdrawing the trust funds from the bank may have hastened the bank's failure, but retaining the trust deposits with the bank increased the chances that the trust would lose some or all of its investment.[194] The bank eventually paid its depositors only a portion of their funds on deposit, and the trust consequently suffered a loss of the trust principal.[195] In examining the trustee's personal liability, the court described the applicable standard of care for trustees in the following manner: "'The general rule in reference to the accountability of trustees is that they shall use such diligence in the management of the trust fund as a prudent man would do in relation to his own affairs, and that they shall not be charged with loss except for neglect of duty.'"[196] Thus, the common law iteration of a trustee's standard of care focused on how a prudent man would handle his own affairs.

In addition to the common law standard of care described in *Epworth*, South Carolina had a statutory standard of care for fiduciaries.[197] In its initial version, SCPC section 62-7-302 provided that "a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs."[198] Thus, in its original form, the SCPC imposed a prudent man standard upon fiduciaries, similar to the *Epworth* common law iteration of a trustee's standard of care. The 1990 amendments to the SCPC somewhat altered the trustee's standard of care: "[A] fiduciary shall exercise the judgment and care under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the fiduciary account."[199] The applicable standard of care in 1990 could therefore be described as a "prudent fiduciary" standard. Because the law generally requires a person to take better care of someone else's property than his or her own property, the 1990 amendment to section 62-7-302 effectively raised the trustee standard of care bar from the prior standard.

---

192. 207 S.C. 384, 36 S.E.2d 37 (1945).

193. *Id.* at 397–98, 36 S.E.2d at 42–43.

194. *Id.* at 399–400, 36 S.E.2d at 43–44.

195. *Id.* at 395–97, 36 S.E.2d at 41–42.

196. *Id.* at 397, 36 S.E.2d at 42 (quoting *In re* Wilcox, 170 S.C. 167, 172, 169 S.E. 890, 891 (1933)).

197. S.C. CODE ANN. § 21-11-10 (1976) (repealed 1986).

198. *Id.* § 62-7-302(a) (1987) (repealed 2006).

199. *Id.* § 62-7-302(a) (Supp. 1990) (repealed 2006).

In 2001, the adoption of South Carolina's version of the Uniform Prudent Investor Act again changed the standard of care applicable to trustees.[200] The NCCUSL promoted the Uniform Prudent Investor Act as a companion act to the Uniform Principal and Income Act of 1997. The NCCUSL intended for these acts, acting together, to modernize the investment and management of trust assets as well as modernize the allocation of receipts and expenses between trust income beneficiaries and principal beneficiaries. This goal of the NCCUSL was in response to the trend of recognizing the validity of the modern portfolio theory, which allows a trustee in certain cases to eschew traditional methods of allocating receipts and expenses between income and principal beneficiaries by category and to instead consider more broadly the overall trust return, regardless of category, when allocating between income and principal beneficiaries.

Problematically, the only pre-SCTC statutory statement of a trustee's standard of care arguably applied only to investment and management;[201] other issues involving a trustee's standard of care were not covered by statute. Moreover, the SCPC statute did not define, nor did case law construe, the standard of care under the 2001 version of section 62-7-302: "[A] trustee shall invest and manage assets as a *prudent investor* would."[202]

Arguably, former SCPC section 62-7-302[203] left a statutory gap in coverage by not providing for a statutorily expressed standard of care for trustee matters other than investment and management. SCTC section 62-7-804 rectifies this omission by providing that "[a] trustee shall administer the trust as a prudent person would . . . [and] shall exercise reasonable care, skill, and caution."[204] By applying the standard of care to the administration of the trust, rather than only to investment and management, the SCTC globally imposes its standard of care to a trustee's action or failure to take action.[205]

---

200. *See id.* § 62-7-302 (Supp. 2001) (repealed 2006).

201. *Id.* § 62-7-704(b) (Supp. 2004) (repealed 2006). Former SCPC section 62-7-704(b), regarding the exercise of a trustee's powers, requires a trustee to act "with due regard to his obligation as a fiduciary and . . . subject to the standards provided in Section 62-7-302." *Id.* § 62-7-704(b). SCTC section 62-7-815(b) provides that "[t]he exercise of a power is subject to the fiduciary duties prescribed by this part." S.C. CODE ANN. § 62-7-815(b).

202. S.C. CODE ANN. § 62-7-302(c)(1) (Supp. 2001) (repealed 2006) (emphasis added).

203. The SCTC moves South Carolina's version of the Uniform Prudent Investor Act to Part 9 with a few appropriate deletions to make it consistent with those broader correlative provisions in Part 8. *See* S.C. CODE ANN. § 62-7-933. Part 9 covers investing and fiduciary accounting matters. The SCTC also moves the provisions of South Carolina's version of the Uniform Principal and Income Act, governing fiduciary accounting principles, to Part 9. *Id.* §§ 62-7-901 to -932.

204. *Id.* § 62-7-804.

205. When disputes arise over the long-term administration of a trust, deciding which standard of care, extant during certain periods, applies to evaluate the trustee's performance can be problematic. A particular action might pass or fail muster depending on which standard of care serves as the measure. Statutes of limitation might resolve some of the issues involved with a changing standard of care—although the applicable statutes of limitation seemed to have been defined differently depending on the existing statute. Compare former S.C. CODE ANN. § 62-7-307 (1987) (repealed 2006) with S.C. CODE ANN. § 62-7-1005 (establishing a statute of limitations for actions against trustees for breach of trust).

B. A Significant Change to Trustee Powers

Part 8 of the SCTC incorporates the essence of the pre-SCTC version of the Uniform Trustees Powers Act (UTPA) by listing specific trustee powers formerly found at section 62-7-703 of the SCPC. However, SCTC section 62-7-815 adds a broader trustee power not expressed in the pre-SCTC version of the UTPA.[206] Section 62-7-815 gives the trustee the general power of a property owner over the settlor's property, except as limited by the trust's terms.[207] Although the previous UTPA iteration of the specific powers of a trustee covered many situations, the grant to the trustee of the power of an owner expands the trustee's powers to an unprecedented level. In addition to providing the broadest possible power to a trustee in section 62-7-815, the SCTC—as does the UTC—continues the statutory tradition of including a laundry list of specific powers.[208] As before, settlors can limit the statutory grant of powers given to a trustee.[209]

The propriety of a trustee's action depends on two factors: whether the trustee is empowered to take the action and whether the trustee, if empowered, exercises the power in a manner consistent with the applicable standard of care.[210] Consequently, a trustee cannot act with impunity merely because the trustee has the power to act.[211] Generally, any action by a trustee is subject to review for compliance with the applicable standard of care. However, one situation in which a trustee may not be subject to the usual standard of care involves the exercise of, or decision not to exercise, the broad power to make discretionary distributions.[212]

---

206. S.C. CODE ANN. § 62-7-815(a)(2)(A).

207. *Id.*

208. *Id.* § 62-7-816.

209. *Id.* § 62-3-815(a)(2).

210. *See supra* notes 204–09 and accompanying text.

211. *See* S.C. CODE ANN. § 62-3-815(b) ("The exercise of a power is subject to the fiduciary duties prescribed by this part.").

212. *See id.* § 62-7-814. SCTC section 62-7-814 confirms the essence of the common law rule involving the exercise of the broad discretionary power to make distributions. *See also* Sarlin v. Sarlin, 312 S.C. 27, 30, 430 S.E.2d 530, 532 (Ct. App. 1993) (holding that a trustee must exercise discretionary powers in good faith and in accordance with the purpose of the trust); Page v. Page, 243 S.C. 312, 315, 133 S.E.2d 829, 831 (1963) (establishing that when a trustee is given discretionary power, he may or may not choose to exercise it, but if he chooses to exercise it he must not do so in an arbitrary fashion).

The implications of section 62-7-814 are considered more fully later in this Article. *See* discussion *infra* Part VII.A.

V. GENERAL PROVISIONS AND DEFINITIONS

A. Qualified Beneficiaries

Part 1 of the SCTC covers general provisions and definitions. The only significant new definition is "qualified beneficiary,"[213] a term that has repercussions elsewhere in the SCTC—especially as to certain rights, including notice.[214] A qualified beneficiary is a beneficiary who, on the date of determination, is either: (1) a current recipient or current permissible recipient of a trust distribution; (2) a recipient or permissible recipient of a trust distribution if the interest of the current recipients or current permissible recipients terminated on the date of determination without terminating the trust; or (3) would be a recipient or permissible recipient of a distribution if the trust terminated on the date of determination.[215]

The following example details the nature of this new definition. *S* creates a trust that requires the trustee to distribute annually half the net income to *A* and authorizes the trustee to distribute the remaining half of the net income among *A*, *B*, and *C* in the trustee's discretion. At the death of the last to die of *A*, *B*, and *C*, the trust requires the trustee to distribute half the net income to *D* and authorizes the trustee to distribute the remaining half of the net income among *D*, *E*, and *F* in the trustee's discretion. Upon the death of the last to die of *D*, *E*, and *F*, the trust is to terminate and the trustee is to distribute the trust assets equally among the issue of *D*, *E*, and *F* alive at the time of trust termination. *A*, *B*, *C*, *D*, *E*, and *F* are all qualified beneficiaries. The issue of *D*, *E*, and *F* who are alive at the date of determination are all qualified beneficiaries. The issue of *D*, *E*, and *F* who are not alive at the date of termination are not qualified beneficiaries, even if they eventually became remainder beneficiaries, because they are born after the date of determination and must survive until the date the trust is actually terminated.

Thus, when rights under the SCTC are limited to qualified beneficiaries,[216] the class of beneficiaries entitled to those rights may be smaller than the class of actual beneficiaries, which might include remote or contingent beneficiaries. But, in a case such as appointing a successor trustee, the SCTC definition of qualified beneficiary helps to avoid the problem of binding unknown or unascertained beneficiaries.[217]

---

213. S.C. CODE ANN. § 62-7-103. The term translates loosely to current beneficiary, as opposed to remote or contingent beneficiary.

214. A qualified beneficiary is entitled to notice if the trustee resigns, S.C. CODE ANN. § 62-7-705(a)(1), entitled to notice regarding information about the trust's administration, *id.* § 62-7-813(a), and information about the combination or division of trusts, *id.* § 62-7-417, and entitled to notice if the trustee moves the principal place of administration, *id.* § 62-7-108(e). Moreover, qualified beneficiaries can appoint a successor trustee. *Id.* § 62-7-704(c)(2).

215. *Id.* § 62-7-103(12)(A)–(C).

216. *See supra* notes 213–15.

217. *See supra* notes 213–15. Of course, other mechanisms exist for binding unknown or unascertained beneficiaries. *See supra* notes 130–34 and accompanying text.

B. Default and Mandatory Rules

SCTC section 62-7-105 lists default rules that govern a trust absent the settlor's expression of intent to the contrary.[218] SCTC section 62-7-105 also provides for certain mandatory rules, which apply even if the settlor expressed an intent to the contrary.[219]

The inclusion of certain mandatory provisions in the UTC generated significant controversy. While much of the debate about the UTC focused on the creditors' rights issues,[220] one significant dispute involved the UTC's treatment of notice to beneficiaries.[221] Many of the mandatory rules in section 105 are noncontroversial. For example, section 105 does not allow exception from the UTC's rules for the requirements to create a trust, for a trustee to act in good faith, for a trust to have a lawful purpose, for the power of a court to modify or terminate a trust, for the effect of a spendthrift provision, for the rights of a third party with respect to the trust, for statutes of limitation periods, and for subject matter jurisdiction.[222] Rules like these are firmly grounded in the common law or in a state's power to set limitation periods and jurisdictional rules. The SCTC's inclusion of these mandatory rules does not represent a significant change to South Carolina law.

However, the original iteration of UTC section 105 also required the trustee to give notice to certain beneficiaries regardless of the settlor's preferences. The drafters of the UTC expressed concern that a trust that does not require notice to beneficiaries becomes in effect a secret trust. The drafters reasoned that if beneficiaries were not even aware that they were beneficiaries of a trust, no mechanism existed to ensure that a trustee was acting appropriately.[223]

Others took contrary positions. Some estate planners endorsed mandatory disclosure but differed on the applicable circumstances—especially relating to the beneficiary's age. Other estate planners opined that settlors may have legitimate reasons for not informing beneficiaries that they have an interest in a trust, or even that a trust exists, until a certain time or event. These estate planners argued that if the settlor wants to keep a beneficiary in the dark he ought to be able to do so.

In the Comment to section 105, the UTC drafters posit that these provisions were already a compromise between competing viewpoints:

> Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries,

---

218. S.C. CODE ANN. § 62-7-105(a).

219. *Id.* § 62-7-105(b).

220. *See infra* text accompanying notes 294–370.

221. *See supra* note 214.

222. S.C. CODE ANN. §§ 62-7-105(b)(1)–(5), (8)–(9), (11).

223. *See id.* § 62-7-105 cmt. ("Waiver by a settlor of the trustee's duty to keep the beneficiaries informed . . . does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.").

> encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.
>
> The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy . . . . Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §§ 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC §§ 1005(c).[224]

The UTC drafters eventually compromised further and offered the mandatory notice provisions in brackets, which alerts a state considering adoption that it may want to delete or modify those provisions because uniformity is not necessarily expected as to those issues. UTC subsections 105(8) and (9) now read as follows:

> [(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;]
> [(9) the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;][225]

Additionally, the drafters amended the original version of UTC section 813(b)(2) and (3) so the corresponding notice requirements were only prospective in nature.[226] Thus, trusts created before the adoption of the UTC do not need to address the issue of how to give retroactive notice—even if an adopting state chooses to treat the notice provisions as mandatory.

Despite the apparent compromise of including subsections (8) and (9) in brackets, the UTC drafters continue to express their preference for the inclusion of these provisions in any enacted version of the UTC. In the Comment to the 2004

---

224. UNIF. TRUST CODE, § 105 cmt. (amended 2004), 7C U.L.A. 202–03 (Supp. 2005). *See also* Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, PROB. & PROP., Mar./April 2003, at 18, 20 (discussing the opposing viewpoints with respect to beneficiaries' rights to notice and discussing the compromises reached by the UTC).

225. UNIF. TRUST CODE § 105(b)(8)–(9) (amended 2004), 7C U.L.A. 200 (Supp. 2005).

226. UNIF. TRUST CODE § 813(e) (amended 2004), 7C U.L.A. 302 (Supp. 2005).

amendment to section 105, the drafters state that "the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity."[227]

The enacted version of the UTC in South Carolina does not include the UTC provision that makes notice mandatory. Therefore, if a South Carolina settlor intends for the trustee to not notify certain beneficiaries about certain trust issues, or even about the existence of the trust, the SCTC will not override the settlor's intentions and require notice. But just because the SCTC does not make notice mandatory does not resolve the question of whether the settlor can prevent notice to beneficiaries in South Carolina; no South Carolina case directly addresses this issue. However, this issue of whether the settlor has the right to prohibit notice to beneficiaries has been recently litigated in two nearby states. These cases, decided before the promulgation of the UTC, both involved a settlor's alleged oral instructions to a trustee to not disclose the existence of a trust to a beneficiary. The question of whether the settlor has this right was one of first impression for both jurisdictions addressing it.

The settlor in *Taylor v. NationsBank Corp.*[228] executed five versions of an inter vivos trust from 1985 to 1992.[229] He revoked the first three trusts before his death, leaving only the 1990 trust as amended by the 1992 amendment effective at his death.[230] In the 1990 version, the settlor gave $500,000 to each of his grandchildren surviving him and $100,000 to each of his great-grandchildren.[231] The residue of the trust funded the settlor's charitable foundation.[232] The 1992 amendment reduced the grandchildren's share to $100,000 each.[233] The settlor instructed his trustees to maintain the confidentiality of the trust terms; this oral instruction was apparently not included in the trust agreement itself.[234] "[B]eliev[ing] themselves to be 'morally and legally obligated not to disclose the contents of his Trust Agreement,'"[235] the trustees refused the beneficiaries' demand to produce the trust documents.[236]

The main dispute centered around the trustees' argument that the settlor's instructions bound them to not disclose the terms of the trust and the beneficiaries' contention that they had an absolute right to receive complete information about the trust and to examine the trust documents.[237] The court, citing the *Restatement (Second) of Trusts* section 173, stated that beneficiaries may examine the trust

227. UNIF. TRUST CODE § 105 cmt. (amended 2004), 7C U.L.A. 202 (Supp. 2005).
228. 481 S.E.2d 358 (N.C. Ct. App. 1997).
229. *Id.* at 359.
230. *Id.* at 359–60.
231. *Id.* at 359.
232. *Id.*
233. *Id.*
234. Taylor v. NationsBank Corp., 481 S.E.2d 358, 359 (N.C. Ct. App. 1987).
235. *Id.*
236. *Id.* at 361.
237. *Id.*

document unless the document itself restricts a trustee's duty to disclose the contents of the trust document.[238] Because the settlor's trust documents did not contain a specific express provision limiting the beneficiaries' right to inspect the documents, the court ordered the trustees to make the 1990 and 1992 documents available for inspection.[239] However, the court refused to allow the beneficiaries to examine the revoked versions of the trust because those documents were inoperative and the beneficiaries accordingly had no interest under them.[240]

In *Fletcher v. Fletcher*,[241] the settlor executed an inter vivos trust, which provided for a division of the trust property into three separate trusts upon her death—one for her son and one for each of her son's two children.[242] After the settlor's death, the co-trustees of the separate trusts denied the son's demand to inspect the entire set of trust documents and schedule of assets, instead giving him only the pages of the trust documents pertinent to his separate trust.[243] The trustees claimed that the settlor had orally instructed them not to disclose the trust terms to the beneficiaries.[244] The trustees contended that, upon the settlor's death, the original trust separated into three separate trusts and that the son was only entitled to information relating to his trust.[245] The trustees also contended that the disclosure of the entire set of trust documents to the son would violate their duty of confidentiality to the beneficiaries of the other two separate trusts.[246] They also claimed that an order compelling disclosure would violate the settlor's right to privacy that was effectuated through the use of the inter vivos trust.[247] The trustees filed a copy of all the trust documents with the court under seal.[248]

The court opined that the trustees overemphasized their duties at the expense of the son's rights as a beneficiary.[249] The *Fletcher* court, like the *Taylor* court, referred to *Restatement (Second) of Trusts* section 173 for the proposition that a beneficiary is entitled to complete and accurate information, including the right to inspect the trust documents, unless the terms of the trust expressly limit this right.[250] The court noted that the trust documents contained no restriction on the son's right to examine the documents.[251] Moreover, the court dismissed the trustee's argument that the three separate trusts created distinct rights of confidentiality among the three beneficiaries; the court found instead that the settlor created the trust as a

238. *Id.* at 362.
239. *Id.*
240. Taylor v. NationsBank Corp., 481 S.E.2d 358, 362 (N.C. Ct. App. 1987).
241. 480 S.E.2d 488 (Va. 1997).
242. *Id.* at 489.
243. *Id.* at 490–91.
244. *Id.* at 492.
245. *Id.* at 491.
246. *Id.*
247. Fletcher v. Fletcher, 480 S.E.2d 488, 491 (Va. 1997).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 491–92.

single integrated unit.[252] The court also reasoned that the son should be able to examine the trust documents because he otherwise would be unable to intelligently scrutinize the trustees' performance.[253]

Both cases appear to hinge on the settlor's failure to include express limitations in the trust document restricting the rights of the beneficiaries to examine the documents and restricting the duties of the trustees to disclose the terms of the trust. Both cases seem to indicate a different conclusion would have resulted if the settlor had expressly provided for nondisclosure in the trust document.

Although SCTC section 62-7-105 does not make notice to beneficiaries mandatory, drafters should be wary of protecting a settlor's intent regarding notice. In light of *Taylor* and *Fletcher*, if a settlor wants privacy protection, even from the trust beneficiaries, the estate planner should consider including express provisions for nondisclosure in the trust document itself. Of course, whether a South Carolina court will follow the reasoning in *Taylor* and *Fletcher* remains an open question.

C. Choice of Governing Law

The SCTC, for the first time in South Carolina, includes a statutory provision allowing settlors to direct what law governs the meaning and effect of their trust.[254] Section 62-7-107 provides that "in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue is determinative."[255] Although section 62-7-107 is the first South Carolina statutory choice of governing law provision, the statute recognizes the essence of previously established case law, perhaps embodied most famously in *Russell v. Wachovia Bank, N.A.*[256]

The testator in *Russell* was a judge for the United States Court of Appeals for the Fourth Circuit, serving until his death at age 92.[257] He had also served as a United States Senator, the Governor of South Carolina, and the President of the University of South Carolina.[258] His estate was worth approximately $33 million.[259] His surviving family included four children and three grandchildren through his daughter.[260] His three grandchildren lived most of their lives with him.[261] Over the later years of his life, the "[t]estator's physical condition deteriorated . . . and he was

252. *Id.* at 492.
253. Fletcher v. Fletcher, 480 S.E.2d 488, 492 (Va. 1997).
254. S.C. CODE ANN. § 62-7-107(1).
255. *Id.* § 62-7-107(2).
256. 353 S.C. 208, 578 S.E.2d 329 (2003).
257. *Id.* at 214, 578 S.E.2d at 332.
258. *Id.*
259. *Id.*
260. *Id.* at 213–14, 578 S.E.2d at 332.
261. *Id.* at 214, 578 S.E.2d at 332.

occasionally hospitalized."[262] In 1996, the testator executed his last will and executed several trusts; a codicil was executed in 1998, two days before his death.[263]

The testator's estate plan provided for his wife for her life, with the remainder passing either outright or in trust in various proportions to his children and grandchildren.[264] The testator devised $750,000 to one son, one-third of his remaining estate to each of his other two sons, and divided the remaining third into one-fourth life estates for his daughter and the three grandchildren. Those allocations were coupled with the trustee's discretionary power to invade the principal.[265] The son receiving the pecuniary devise and the daughter both contested the will and the trusts under a theory of undue influence.[266]

The contestants presented evidence that the testator was occasionally confused—once thinking he was in Richmond instead of South Carolina.[267] They also presented evidence that the grandchildren showed disrespect to the testator and fought in his presence.[268] The grandchildren spent as much as $12,000 per month of the testator's money and had access to his office. Some evidence also indicated that his daughter's ex-husband maintained constant contact with the testator's estate planning attorney.[269] Two doctors testified that the testator may have been susceptible to attempts of undue influence.[270]

The proponent, Wachovia Bank, as executor and trustee, presented "undisputed evidence" that the testator was competent until the day of his death and presented evidence that showed that the testator's secretary, at his direction, managed his financial affairs.[271] For most of their meetings, the testator was alone with the estate planning attorney, and neither his grandchildren or their father, the daughter's ex-husband, were present at the execution of the documents.[272]

The lower court granted summary judgment to the proponent.[273] The appellate court observed that the applicable standard of proof for undue influence is "unmistakable and convincing evidence."[274] The court noted that "[g]enerally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship."[275] Moreover, the court, relying on precedent, stated that even if a testator is subjected to undue influence, an "unhampered opportunity" to change his

262. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 214, 578 S.E.2d 329, 332 (2003).
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 213, 578 S.E.2d at 331.
267. *Id.* at 215, 578 S.E.2d at 332.
268. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 215, 578 S.E.2d 329, 332 (2003).
269. *Id.* at 215, 578 S.E.2d at 331.
270. *Id.*
271. *Id.* at 214, 578 S.E.2d at 331.
272. *Id.*
273. *Id.* at 213, 578 S.E.2d at 331.
274. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).
275. *Id.* at 217, 578 S.E.2d at 333.

or her will, free from the influence, effectively destroys the effect of the influence.[276]

The appellate court found that, although the evidence might indicate that the grandchildren were "churlish, spoiled children, who took advantage of Testator's generosity," that behavior did not reach the level necessary to prove undue influence.[277] Additionally, the court determined that the undisputed evidence showed the testator was mentally competent, independent, and able to see his friends, associates, and relatives until just a few days before his death.[278] The court found no evidence that the grandchildren or their father unduly influenced the testator in the execution of his will or codicil.[279] The court bolstered its conclusion by observing that the testator had numerous unhampered opportunities to change his will after the 1996 execution, which negated any aspersion of undue influence.[280]

The appellate court applied North Carolina law to the claim of undue influence with respect to the trusts because the testator expressly provided for North Carolina law's application.[281] The court ruled that, as to personal property, a settlor may designate the governing law if (1) the designated state has a substantial relation to the trust, looking to such factors as whether a settlor designated that state, the trustee's place of business at the trust's creation, the settlor's domicile, the beneficiaries' domicile, or the location of the trust property; and (2) resorting to that state's law would not violate the public policy of the settlor's state of domicile at death.[282]

In applying North Carolina law, the court reviewed a number of factors properly considered when determining whether a settlor was unduly influenced to create a trust.[283] Reviewing those factors, the court concluded: (1) evidence demonstrated that the testator occasionally suffered from mental and physical weakness; (2) although the testator was living with the grandchildren, he was not subject to their supervision or control; (3) others had the opportunity to interact with the testator; (4) although the estate plan included the grandchildren for the first time after they became more involved in his affairs, evidence indicated that the testator was compensating for the daughter's failure to include them in her estate plan; (5) the beneficiaries were related to the testator; (6) the testator did not disinherit the natural objects of his bounty; and (7) the grandchildren did not procure the execution of the estate plan.[284] Consequently, the appellate court upheld summary judgment in favor of the proponent.[285]

---

276. *Id.* at 220, 578 S.E.2d at 335.
277. *Id.* at 218, 578 S.E.2d at 334.
278. *Id.* at 219, 578 S.E.2d at 335.
279. *Id.* at 218, 578 S.E.2d at 334.
280. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003).
281. *Id.*
282. *Id.* at 221, 578 S.E.2d at 335–36.
283. *Id.* at 222, 578 S.E.2d at 336.
284. *Id.* at 222–23, 578 S.E.2d at 336–37.
285. *Id.* at 225, 578 S.E.2d at 338.

SCTC section 62-7-107 makes it easier and more certain for a South Carolina settlor wishing to choose the law of another state to govern the operation and construction of a trust. Recently, some states have enacted statutes allowing a settlor to create a trust, receive the benefits from it, and yet protect the assets of the trust from creditors. These statutes express a policy contrary to the general common law policy prohibiting a settlor from protecting assets from creditors while continuing to enjoy the benefits of the property.[286] Presumably, Alaska and Delaware enacted these statutes in an attempt to stimulate trust business.[287] Another recent phenomenon is the introduction by some states, such as Alaska and Delaware, of statutes abolishing the Rule Against Perpetuities.[288] Consequently, presumably pursuant to section 62-7-107, a settlor wishing to create a valid self-settled asset protection trust or a trust not subject to the Rule Against Perpetuities[289] may express the intent that the law of an accommodating state govern the trust.[290]

D. Applying Will Construction Rules to Trusts

Notwithstanding the other important changes in Part 1 of the SCTC, perhaps the most significant addition to pre-SCTC law is section 62-7-112, which applies the rules of will construction[291] to trust construction when "appropriate."[292] Although at least one South Carolina case applied will construction rules to trust construction in certain situations,[293] the SCTC statutorily more concretely allows for this treatment.

---

286. RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b (2003). *See infra* notes 367–68 and accompanying text.

287. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 515–16 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L. 423, 424 (1998).

288. *See* Charles D. Fox, IV, & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 310 nn.59–60 (2002).

289. Of course, just because a state does not limit the vesting of trusts to a period compliant with the Rule Against Perpetuities does not mean that a trust that would otherwise violate the Rule will accomplish the settlor's tax objectives, if any. *See* Boyle, *supra* note 153, at 821.

290. Whether such a situs designation would effectively avoid the applicable South Carolina law concerning creditor's rights in self-settled trusts or the Rule Against Perpetuities is problematic. Section 62-7-105 imposes certain mandatory rules that a settlor's expression of a contrary intention cannot override. *See supra* notes 218–22 and accompanying text. For instance, section 62-7-105(b)(5) prevents the settlor from overriding "the rights of certain creditors and assignees to reach a trust as provided in Part 5." S.C. CODE ANN. § 62-7-105(b)(5). Additionally, Part 5 of the SCTC protects the rights of the settlor's creditors in a self-settled trust. *See infra* notes 367–70 and accompanying text. Whether a choice of Alaska or Delaware law under section 62-7-107 would completely avoid the operation of SCTC section 62-7-105(b)(5) may well be a chicken-and-egg issue.

291. *See* S.C. CODE ANN. § 62-2-609 (1987).

292. S.C. CODE ANN. § 62-7-112.

293. Bowles v. Bradley, 319 S.C. 377, 382, 461 S.E.2d 811, 814 (1995). The *Bowles* court observed that the testator-settlor used the relevant term "issue" in similar dispositive provisions in both his will and trust, which were executed within a month of each other.

VI. ASSET PROTECTION TRUSTS

Part 5 of the SCTC covers the rights of a beneficiary's creditors to trust property. The UTC version of this part has generated considerable controversy, especially among proponents of so-called asset-protection trusts. Asset-protection trusts prevent a beneficiary's creditors from reaching the beneficiary's interest in trust property. The purposes of these types of trusts in estate planning range from the often-criticized purpose of protecting the settlor's property from creditors[294] to the generally accepted purpose of protecting a beneficiary with special needs. The SCTC eliminates much, if not all, of the controversial UTC provisions—generally retaining, with some refinement, pre-SCTC South Carolina law. Nevertheless, the SCTC does somewhat change pre-SCTC law. Before considering those changes, a brief review of the UTC controversy may prove instructive in discussing the impact of Part 5 of the SCTC.

A. The UTC's Effect on Discretionary Trusts

Although UTC opponents have expressed a number of different concerns with various provisions of the UTC, the main debate focuses on asset protection. Opponents suggest that the UTC dilutes the prophylactic effect of the discretionary trust. The discretionary trust serves as the backbone of the protection afforded by special needs trusts or those trusts protecting the assets of beneficiaries from the claims of creditors. And in some cases, the discretionary trust serves as a barrier to the inclusion of the trust assets in a calculation of the beneficiary's qualification for governmental assistance.[295]

A discretionary trust empowers a trustee with discretion to make distributions of principal or income to, or for the benefit of, a beneficiary. Under the general common law view, a beneficiary has no interest in the discretionary trust's assets unless and until the trustee decides to make a distribution to the beneficiary. Consequently, if a trustee chooses not to make a distribution to the beneficiary, that beneficiary has no interest in the trust assets that a creditor of that beneficiary could reach.[296] Further, the beneficiary has no interest in the trust assets that the government could consider as the beneficiary's property for purposes of

---

294. *See infra* notes 367–70 and accompanying text.

295. For discussions opposing certain controversial provisions of the UTC, see Marc Merric et al., *Malpractice Issues and the Uniform Trust Code*, 31 EST. PLAN. 586 (2004); Marc Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478 (2004) [hereinafter Merric & Oshins, *How Will Assets*]; Marc Merric & Steven J. Oshins, *UTC May Reduce the Asset Protection of Non-Self-Settled Trusts*, 31 EST. PLAN. 411 (2004); Marc Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 EST. PLAN. 375 (2004).

For a rebuttal, see Suzanne Brown Walsh et al., *What Is the Status of Creditors Under the Uniform Trust Code?*, 32 EST. PLAN. 29 (2005).

296. Merric & Oshins, *How Will Assets*, *supra* note 295, at 479.

determining eligibility for governmental assistance.[297] Only if the trustee decides to make a distribution can the beneficiary's creditor reach the trust assets or the government consider the assets as the beneficiary's property for assistance eligibility.[298] An exception to this general common law view occurs if the beneficiary is also the settlor; to the extent that the trust assets are available to benefit a settlor-beneficiary, a settlor-beneficiary's creditors can reach those assets in trust.[299]

According to an argument posed by UTC opponents, discretionary trusts provide asset protection because a beneficiary cannot compel the trustee to make a distribution.[300] If a beneficiary's creditor assumes the rights of the debtor-beneficiary, that is, stands in the beneficiary's shoes, that creditor has no more power than the beneficiary to compel the trustee to make a distribution.[301] Hence, the trust assets are protected from the beneficiary's creditors. Opponents also argue that only bad faith on the part of a discretionary trustee can override the trustee's failure to make a distribution.[302] Thus, only if the trustee acts or fails to act in bad faith (including arbitrariness, dishonesty, and misapprehension of the settlor's purpose) can a court review and judicially override the trustee's acts or failure to act.[303] A creditor standing in the shoes of the beneficiary therefore cannot assert the beneficiary's right to compel a distribution unless the trustee is engaged in bad faith.[304]

UTC opponents argue that the UTC lowers this bad faith standard because, according to the UTC preamble, "the Uniform Trust Code was drafted in close coordination with the writing of the Restatement Third."[305] The opponents contend that the *Restatement Third* changes the standard of review for a discretionary trustee to that of reasonableness, which they assert is a lower, or easier, standard to meet than that of bad faith, thereby making it easier to compel trustee distributions.[306]

Consequently, UTC opponents argue that the interplay between the *Restatement Third* and the UTC allows a beneficiary's creditor to compel a distribution if the court merely deems that a discretionary trustee is acting unreasonably.[307] Presumably, if this reasonableness standard, rather than the common law bad faith standard applies, more creditors will be able to successfully compel distributions and in effect reach trust assets.

---

297. *Id.* at 482.
298. *Id.* at 479.
299. *See* RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).
300. Merric & Oshins, *How Will Assets*, *supra* note 295, at 479.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. UNIF. TRUST CODE, prefatory note, 7C U.L.A. 180 (Supp. 2005).
306. Merric & Oshins, *How Will Assets*, *supra* note 295, at 481.
307. *Id.*

The opponents bolster their argument by observing that the UTC eliminates the common law distinction between discretionary trusts and support trusts.[308] The general operation of a common law support trust required the trustee to distribute as much income or principal as would be necessary to provide the necessities of life to the beneficiary. Thus, a creditor supplying necessities to the beneficiary of a support trust would effectively be entitled to payment from the trust assets. Moreover, to the extent trust assets were available to the support trust beneficiary, the government could consider those assets in the qualification calculation for governmental assistance. The UTC opponents opine that the UTC essentially changes discretionary trusts into support trusts, subject only to a reasonableness standard in actions to compel trustees to make distributions.[309] Again, according to the opponents, the UTC makes it easier for a creditor to reach, or a governmental provider to consider, discretionary trust assets.[310]

UTC proponents dispute the opponents' assumptions and analyses. The proponents refer to the specific language of UTC section 814(a), which provides the following:

> Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.[311]

Proponents of the UTC criticize the opponents' position that "trustees with extended discretion are held only to an absence of bad faith standard, which . . . is different from a good faith standard."[312] Citing the language of UTC section 814(a), which requires a discretionary trustee to act in good faith, proponents contend that under the existing common law, as interpreted by the courts and described by respected commentators, good faith is synonymous to the absence of bad faith.[313] In effect, proponents claim that the review standard in section 814(a) is merely a reiteration of the common law standard, rendering the opponents' position specious.[314]

Proponents additionally cite UTC section 504(b), which prohibits any creditor, other than certain "exception creditors" (such as a spouse, child, or former spouse

---

308. *Id.*

309. *Id.* at 481–82.

310. *Id.* at 481.

311. UNIF. TRUST CODE § 714(a), 7C U.L.A. 307 (Supp. 2005). *See* S.C. CODE ANN. § 62-7-814 (using this exact language).

312. Walsh et al., *supra* note 295, at 32.

313. *Id.*

314. *Id.* at 31–32.

in certain cases), from compelling a discretionary trustee to make distributions.[315] Section 504(b) provides:

> (b) Except as otherwise provided in subsection (c) [dealing with the spouse, child, and former spouse exception creditors], whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:
>
> (1) the discretion is expressed in the form of a standard of distribution; or
>
> (2) the trustee has abused the discretion.[316]

Proponents also claim that most trusts contain a spendthrift provision, a provision that prevents a beneficiary's creditors, other than certain exception creditors, from reaching the trust assets before the beneficiary receives the assets. In addition, proponents argue that the UTC eliminates the distinction between discretionary trusts and support trusts only with respect to creditors' rights, not with respect to the rights of beneficiaries and the duties of trustees to these beneficiaries regarding distributions.[317]

B. The UTC's Effect on Spendthrift Trusts

1. Debating the Effect of UTC Provisions

UTC opponents contend that the UTC's elimination of the distinction between support trusts and discretionary trusts means that asset protection is available only through spendthrift provisions.[318] Of concern to the opponents is UTC section 501, which provides that "[t]o the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means."[319]

---

315. *Id.* at 31.

316. UNIF. TRUST CODE § 504(b), 7C U.L.A. 256 (Supp. 2005).

317. Walsh et al., *supra* note 295, at 33.

318. Merric & Oshins, *How Will Assets*, *supra* note 295, at 482.

319. The relevant SCTC provision, section 62-7-501, uses different language and limits, to a certain extent, the applicability of the section. SCTC section 62-7-501 states:

> (a) Except as provided in subsection (b), the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.
>
> (b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary's interest:
>
> (1) is protected by a spendthrift provision, or

Opponents assert that the section 501 language allows an exception creditor to attach any present or future distributions that are to or for the benefit of a beneficiary.[320] The opponents contend that, consequently, any creditor can attach a beneficiary's interest and, standing in that beneficiary's shoes, demand payment of any distribution directly to that creditor instead of to the beneficiary.[321]

Opponents have also expressed concern that the state or federal government may convince a court to add the government as an exception creditor because, in their view, the UTC does not prevent a court from adding to the statutory list of exception creditors.[322]

Again, opponents claim that attaching creditors can require distributions directly to themselves rather than to the beneficiaries. The opponents offer their UTC section 501 "for the benefit of" argument[323] as the foundation for this claim. Proponents counter this argument by citing the language in section 501, which limits that section's application "[t]o the extent a beneficiary's interest is not protected by a spendthrift provision."[324] Additionally, proponents support their position by citing UTC section 502(c), which provides that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary."[325] Proponents contend that this language expressly prevents a creditor from demanding a distribution from a spendthrift trust before the beneficiary receives the distribution.[326]

Citing the common law list of typical exception creditors, UTC proponents assert that the UTC list is shorter.[327] UTC section 503(b) specifies which creditors are "exceptions" to the operation of a spendthrift provision:

> A spendthrift provision is unenforceable against:
> (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;

> (2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.

See also infra note 337 and accompanying text.

320. Merric & Oshin, *How Will Assets*, *supra* note 295, at 485.

321. *Id.*

322. *Id.* at 484.

323. *See supra* notes 319–21 and accompanying text.

324. UNIF. TRUST CODE § 501, 7C U.L.A. 250 (Supp. 2005). *See* Walsh et al., *supra* note 295, at 34.

325. UNIF. TRUST CODE § 502(c), 7C U.L.A. 252 (Supp. 2005). SCTC section 62-7-502 (c) uses this exact language.

326. Walsh et al., *supra* note 295, at 33.

327. Merric & Oshin, *How Will Assets*, *supra* note 295, at 483. *See also* Walsh et al., *supra* note 295, at 33 (arguing that of the states adopting the UTC, no state has added to the list of exception creditors but some states have deleted creditors from the list).

> (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and
> (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.[328]

Proponents observe that, under the majority common law view, children, spouses, and former spouses already enjoy exception creditor status.[329] Moreover, the common law allows exception creditor status to a provider of necessities to the beneficiary, an exception not recognized under the UTC.[330]

Responding to the opponents' contention that the UTC does not prohibit the addition of a state or federal government as an exception creditor, proponents argue that the UTC does not change or expand the existing law.[331] The proponents explain that the federal government is already empowered to preempt state law to include obligations of the United States in the list of exception creditors, which the proponents contend the federal government has already done in the income tax arena.[332] They further explain that a state legislature can always decide to amend state law, regardless of whether the UTC has been enacted, to include state claims in the list of exception creditors.[333] Thus, according to the proponents, the UTC has not provided the government with additional authority, beyond the authority it already retained, to expand the applicable list of exception creditors.

Additionally, proponents rely on the language of UTC section 502(c) in an attempt to dismiss the opponents' claim that the UTC allows courts to expand the list of exception creditors. The language expressly protects spendthrift trust interests from creditors "except as otherwise provided in this [article]"[334] and specifically prohibits a nonstatutory expansion of the exception creditors list.[335]

---

328. UNIF. TRUST CODE § 503(b), 7C U.L.A. 253 (Supp. 2005). SCTC section 62-7-503 recognizes only one creditor that would be an "exception" to the operation of a spendthrift provision:

> (b) Even if a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.
>
> (c) The exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

329. Walsh et al., *supra* note 295, at 32.
330. *Id.* at 34.
331. *Id.* at 33.
332. *Id.* (citing United States v. Cohn, 855 F. Supp. 572 (D. Conn. 1994)).
333. *Id.*
334. UNIF. TRUST CODE § 502(c), 7C U.L.A. 252 (Supp. 2005).
335. Walsh et al., *supra* note 295, at 33.

2. Changes to the SCTC in Light of the Debates

Cognizant of the debate over asset protection issues, especially with respect to spendthrift trusts and discretionary trusts, the drafters of the SCTC changed a number of the Part 5 UTC provisions to confirm the protection afforded by asset protection trusts,[336] other than those benefitting settlors.

SCTC section 501 adds the following language to the UTC version:

> (b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary's interest:
>
> (1) is protected by a spendthrift provision, or
>
> (2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.[337]

This additional language clarifies and confirms the protection from a beneficiary's creditors that spendthrift and discretionary trusts traditionally afford beneficiaries will continue under the SCTC.

SCTC section 62-7-502 confirms the operation of a spendthrift provision over both income and principal interests in the trust.[338] Section 62-7-501(b)(1), however, confirms the protection a spendthrift provision provides by stating that subsection (a), which generally recognizes the rights of a beneficiary's creditor or assignee, does not apply and expressly excepts a spendthrift trust from the rights of a beneficiary's creditor or assignee.[339] SCTC section 62-7-503 recognizes only one exception to the operation of spendthrift trusts—the attempted spendthrift protection will not prevent access to the beneficiary's interest in the trust by "a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance."[340]

SCTC section 62-7-503 also adds to the UTC version language that expressly prevents the "beneficiary's child exception" to a spendthrift provision from disqualifying the beneficiary of a special needs or supplemental needs trust[341] from

---

336. *See supra* notes 294–317 and accompanying text.

337. S.C. CODE ANN. § 62-7-501(b).

338. *See id.* § 62-7-502 cmt. An argument exists that spendthrift provisions, under pre-SCTC law, operated against only income interests and not principal interests. Although no case or statute directly dealt with this issue, the esteemed Professor Coleman Karesh amalgamated several older cases to formulate this rule. *See* COLEMAN KARESH, TRUSTS 34 (1977) (citing Spann v. Carson, 123 S.C 371, 116 S.E. 427 (1923); Lynch v. Lynch, 161 S.C. 170, 159 S.E. 26 (1931); and Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943)).

339. S.C. CODE ANN. § 62-7-51(b)(1).

340. *Id.* § 62-7-503(b).

341. *Id.* § 62-7-503(c). A special or supplemental needs trust operates to provide assistance to a disabled beneficiary without impinging on the ability of the disabled beneficiary to receive governmental support.

receiving governmental assistance, like Medicaid or Supplemental Security Insurance.[342]

Both SCTC section 62-7-504 and UTC section 504, dealing with discretionary trusts, expressly preclude the creditor of a beneficiary from compelling a distribution from the trust, even if the trustee fails to comply with a standard of distribution, which is typically good faith.[343] Both versions add an exception to this provision by allowing distribution to satisfy a court order or judgment against a beneficiary for support or maintenance. The UTC allows a child, spouse, or former spouse to seek such a distribution.[344] The SCTC, however, limits the exception to a beneficiary's child enforcing a court order or judgment for support or maintenance.[345] SCTC section 62-7-504 also changes the UTC version by adding language that affirms the existing exemptions under South Carolina law that protect certain insurance proceeds from creditors.[346]

Additionally, SCTC section 62-7-505 changes the UTC version to ensure that a creditor of a beneficiary who is also a trustee or co-trustee cannot reach the interest of that beneficiary if the interest is subject to an ascertainable standard.[347] This section thereby reinforces an almost identical provision in section 62-7-504(f).[348] However, SCTC section 62-7-505 does not affect the rights of a settlor's creditor from reaching the settlor's interest in the trust.[349] In contrast, UTC section 505 appears to treat the beneficiary-trustee the same as the settlor of the trust.

Although the SCTC seems to provide clear answers concerning the degree of protection afforded a discretionary trust beneficiary from the claims of creditors, a recent South Carolina Court of Appeals decision suggests that a trustee may properly consider a beneficiary's family's needs when deciding whether and how to distribute trust assets. In *Estate of Stevens*,[350] the settlor established a testamentary trust, which provided for the trustees to distribute principal and accumulated income in their discretion to his two children, for their health, education, maintenance, and support.[351] The settlor directed that, upon the death of a child beneficiary, the trustees would distribute that child's share to his or her issue or, if none, the deceased child's share would be added to the surviving child's share.[352] The settlor's daughter had no children.[353] The settlor's son asked the

342. *Id.*

343. *See id.* § 62-7-504(b); UNIF. TRUST CODE. § 504(b), 7C U.L.A. 256 (Supp. 2005).

344. UNIF. TRUST CODE § 504(b), 7C U.L.A. 256 (Supp. 2005).

345. S.C. CODE ANN. § 62-7-504(c).

346. *Id.* § 62-7-503(c). *See, e.g.*, S.C. CODE ANN. § 38-63-40 (1976) (establishing that life insurance proceeds, as well as certain other insurance proceeds, are exempt from creditors).

347. S.C. CODE ANN. § 62-7-505(b).

348. *Id.* § 62-7-504(f).

349. *See supra* notes 319, 328, 336, 341 and accompanying text. Consistent with the effect of SCTC section 62-7-505, the SCTC does not include a version of UTC section 603(b), which treats a holder of a power of withdrawal the same as a settlor.

350. 365 S.C. __, 617 S.E.2d 736 (Ct. App. 2005).

351. *Id.* at __, 617 S.E.2d at 737.

352. *Id.*

353. *Id.*

trustees to distribute trust funds to pay for the private school education of his children, who were remainder beneficiaries of the trust.[354] The trustees sought a declaratory judgment whether such a payment fell within their discretion.[355] A guardian ad litem for the settlor's unborn issue agreed with the son that the trustees could properly consider the educational needs of the son's children as part of their discretion to provide support to him.[356]

The court observed that it was "self-evident" that a settlor maintained a degree of confidence in the judgment of an appointed trustee, especially when the settlor gave the trustees discretion to carry out their duties.[357] Moreover, the court noted that when dealing with the exercise of a trustee's discretion, a court cannot interfere with the trustee's exercise of that discretion merely because the court would have exercised the power differently.[358] The court considered the argument that, because the settlor expressly provided for the trustees to exercise their discretion only to benefit the named beneficiaries, the trustees were not empowered to make distributions for a beneficiary's children.[359] Noting that the issue was novel in South Carolina, the court resorted to decisions from other jurisdictions and determined that the settlor must have intended for the trustees to consider the needs of the beneficiary's family as part of their discretion to make distributions for a beneficiary's "'support.'"[360]

The court rejected the daughter's argument that defining the term "support" so broadly contravened the settlor's intent as demonstrated by his inclusion of a spendthrift provision in the trust.[361] She argued that allowing distributions to non-beneficiaries would subvert the settlor's intent to protect the trust's assets from the claims of non-beneficiaries, especially creditors of a beneficiary.[362] The court carefully observed that its decision merely dealt with the trustees' power to consider family needs as part of a beneficiary's support and did not consider the claim of any non-beneficiary.[363] Making this observation, the court stated that "[t]here would be nothing inconsistent with this opinion in barring a claim asserted by a non-beneficiary, even if that claim was based on a beneficiary's familial obligations, on the basis that the trust does not authorize distributions to non-beneficiaries."[364] The court expressly rejected any future attempt to cite this decision as precedent for the proposition that a beneficiary's creditor can use a discretionary power to circumvent a spendthrift provision.[365] Moreover, the court stated that, although the trustees

354. *Id.*
355. *Id.*
356. Estate of Stevens, 365 S.C. __, 617 S.E.2d 736, 737–38 (Ct. App. 2005).
357. *Id.* at __, 617 S.E.2d at 738.
358. *Id.*
359. *Id.* at __, 617 S.E.2d at 739.
360. *Id.* at __, 617 S.E.2d at 738–39.
361. *Id.* at __, 617 S.E.2d at 739.
362. Estate of Stevens, 365 S.C. __, 617 S.E.2d 736, 739 (Ct. App. 2005).
363. *Id.*
364. *Id.*
365. *Id.*

could properly consider family needs when deciding whether and how to exercise their discretion to make distributions to support the son, they still maintained the power to refuse to make such a distribution, which would not be overturned unless made in bad faith.[366]

In light of the provisions of SCTC section 62-7-504 and the *Stevens* court's insistence that its decision did not open any doors for creditors, South Carolina law appears to walk the line between allowing and requiring a discretionary trustee to consider the needs of a beneficiary's creditors when determining whether and how distributions will be made.

C. The UTC's Effect on Self-Settled Asset Protection Trusts

Despite some rumblings, little, if any, serious debate exists as to the UTC's impact on asset protection afforded to self-settled trusts. The general common law rule allows a creditor of a settlor-beneficary to reach the trust assets to the extent that a trustee of a spendthrift, support, or discretionary trust could use those assets to benefit the settlor-beneficiary.[367] The common law rule is grounded in the notion that public policy should prevent settlors from retaining the benefit of their assets while protecting those assets from their creditors.[368]

Of course, a number of states, most famously Alaska and Delaware, have enacted statutes that, contrary to the general common law view, allow settlors to protect their assets by creating trusts in which they retain beneficial interests and rights.[369] Presumably, those statutes are intended to encourage settlors to situs trusts in those states, which in turn benefit trust companies in those jurisdictions.

SCTC section 62-7-505 is consistent with the UTC treatment of self-settled trusts, and thus South Carolina follows the general common law rule.[370]

VII. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

Part 10 of the SCTC codifies, for the first time in South Carolina, specific and general remedies available against trustees as well as methods for assessing damages. Although pre-SCTC statutory law did not provide similar coverage, the Part 10 provisions are generally consistent with the general common law and, where precedent exists, consistent with prior South Carolina case law.

---

366. *Id.*

367. RESTATEMENT (SECOND) OF TORTS § 156 (1959).

368. S.C. CODE ANN. § 62-7-505 cmt.

369. *See supra* notes 286–87 and accompanying text.

370. SCTC section 62-7-505 is consistent with the UTC version except as discussed at *supra* notes 347–49 and accompanying text.

A. *Remedies for Breach of Trust*

SCTC section 62-7-1001 lists the various penalties a court can impose for a breach of trust, including the suspension or removal of a trustee, or the appointment of a special fiduciary to possess and administer the trust property.[371] The statutory authorization for a court to appoint a special trustee is consistent with the power of a court to appoint a special administrator for a decedent's estate.[372] The use of a special trustee may be particularly appropriate when the trustee has a conflict of interest.[373]

B. *Damages*

SCTC section 62-7-1002 provides that a breaching trustee is liable for damages in the amount required to restore the trust to its status before the breach or in the amount of the profit[374] the trustee made as a result of the breach, whichever is greater.[375] Subsection (b) sets forth the rules regarding contributions among co-trustees: co-trustees are entitled to contribution from other co-trustees at fault, but a co-trustee who is "substantially more at fault" or whose breach is "in bad faith or with reckless indifference" is not entitled to contribution; nor may a co-trustee who profits from the breach receive contribution "to the extent of the benefit received."[376]

Section 62-7-1003 codifies several generally accepted common law rules regarding a trustee's responsibility absent a breach. Although a nonbreaching trustee is not liable for any loss or depreciation to the trust,[377] the trustee is liable for any profit[378] personally received from the trust.[379] Section 62-7-1004 codifies another common law rule that a court can award costs and attorney's fees for or against any party, including a trustee, or for or against the trust.[380]

---

371. S.C. CODE ANN. § 62-7-1001(b).

372. *See* S.C. CODE ANN. §§ 62-3-614 to -617 (1987 & Supp. 2004).

373. *See id.* § 62-7-814(c) (Supp. 2004) (recodifying the essence of former S.C. CODE ANN. § 62-7-603 (Supp. 2004) (repealed 2006)).

374. *See* S.C. CODE ANN. § 62-7-1002 cmt. Profit does not include the trustee's reasonable compensation for serving as trustee.

375. *Id.* § 62-7-1002(a). Although either of the alternative damages calculations seem to apply in any breach of trust situation, each damage calculation may be more appropriate than the other depending on the particular circumstances. The restoration remedy seems more likely to be appropriate when the trustee's breach does not involve self-dealing, while the profit disgorgement remedy seems more applicable to self-dealing situations.

376. *Id.* § 62-7-1002(b).

377. *Id.* § 62-7-1003(b).

378. As with section 62-7-1002, profit does not include the trustee's reasonable compensation for serving as trustee.

379. S.C. CODE ANN. § 62-7-1003(a).

380. *Id.* § 62-7-1004. *See* Floyd v. Floyd, 365 S.C. __, 615 S.E.2d 465 (Ct. App. 2005); Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001); Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001); First Union Nat'l Bank of S.C. v. Soden,

C. *Statute of Limitations*

SCTC section 62-7-1005 retains the essence of the pre-SCTC statute of limitations but also includes some modification.[381] The SCTC limitations period, beyond which a beneficiary is barred from suing the trustee, is "one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim."[382] If no such report is sent, the limitations period is the earliest of (1) the trustee's removal, resignation, or death; (2) the termination of the beneficiary's interest; or (3) the termination of the trust itself.[383]

Former SCPC section 62-7-307 provided for a one-year limitations period if the beneficiary received a final account or statement disclosing the breach or possible breach, and a three-year limitations period if the beneficiary received a final account or statement not disclosing the matter but was informed of the location and availability of the trust records.[384] As demonstrated by *Mayer v. M.S. Bailey & Son*,[385] determining what constituted a statute of limitations triggering event under the pre-SCTC rule was problematic. The testator in *Mayer*, who died in 1988, created several trusts.[386] Two of the trusts provided for the payment of income to his wife for her life and empowered the trustee to distribute the principal for her "medical care, comfortable maintenance, and welfare."[387] The testator gave his wife a testamentary power of appointment over the trusts and named his three children as takers in default of exercise.[388] Prior to 1993, one of the testator's children contacted an attorney and a probate judge about the possible waste of the trust assets resulting from distributions to the testator's wife—who allegedly suffered from alcoholism—but beyond this contact did not take any further action.[389] During the trust's administration, the trustee sent quarterly and annual statements to all the beneficiaries.[390] The final statements for both trusts indicated that the trust balances were zero and that the trustee had terminated the trusts on September 15, 1993 and January 10, 1994, respectively.[391] On November 5, 1995, one of the testator's children wrote the trustee to inquire about the trust accounts.[392] The trustee responded by letter dated November 27, 1995, which stated that the trustee distributed the entire principal, including the income payments from the trust, to the

---

333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

381. *See* former S.C. CODE ANN. § 62-7-307 (1987) (repealed 2006).
382. S.C. CODE ANN. § 62-7-1005(a).
383. *Id.* § 62-7-1005(c).
384. S.C. CODE ANN. § 62-7-307 (1987).
385. 347 S.C. 353, 555 S.E.2d 406 (Ct. App. 2001).
386. *Id.* at 355, 555 S.E.2d at 407.
387. *Id.*
388. *Id.* at 355–56, 555 S.E.2d at 407.
389. *Id.* at 356, 555 S.E.2d at 407.
390. *Id.*
391. Mayer v. M.S. Bailey & Son, 347 S.C. 353, 356, 555 S.E.2d 406, 407 (Ct. App. 2001).
392. *Id.* at 356, 555 S.E.2d at 408.

wife because her expenses exceeded her income.[393] The letter apologized for the delay in responding to the inquiry by noting that the trustee had to retrieve the trust records from the trustee's archives.[394]

The testator's wife died on February 28, 1997.[395] In February 1998, the children brought suit against the trustee, which the court eventually dismissed for lack of jurisdiction.[396] On November 5, 1999, the children again brought suit against the trustee alleging the same causes of action—breach of fiduciary duty and breach of contract.[397] The trustee asserted both the general and probate code statutes of limitations as defenses; the probate court determined that the probate code statute of limitations applied.[398]

The court reasoned that the final statements sent to the beneficiaries constituted a final accounting sufficient to trigger the running of the statute of limitations applicable to the trust.[399] The court noted that "[a]lthough a trust does not terminate or lapse merely by reason of the alleged misconduct or violation of the trust by the trustee, . . . clearly a trust is deemed terminated for the purpose of calculating the limitations period when the trust is depleted."[400] The court ruled that the final statements commenced the running of the one-year statute of limitations, which expired before the children brought their action.[401] Moreover, the court ruled that the letter from the trustee also served to trigger the one-year limitations period.[402]

The court also opined that the trustee's letter "inferentially informed" the children of the availability and location of the trust records, which commenced the three-year statute of limitations even if the final statements and letter were insufficient to commence the one-year limitations period.[403] The children failed to bring their action within three years of the letter.[404] Whether the letter actually commenced the three-year statute is questionable because the statute at issue requires that the trustee inform "the beneficiary of the location and availability of records for his examination."[405] Arguably, the letter did not "inferentially inform"[406] the children that the records were available for their examination.

SCTC section 62-7-1005, which provides that the event triggering the statute of limitations is the trustee's report, may not delineate what factual event commences the running of the one-year limitations period any more clearly than the

393. *Id.* at 357, 555 S.E.2d at 408.
394. *Id.*
395. *Id.*
396. *Id.*
397. Mayer v. M.S. Bailey & Son, 347 S.C. 353, 357–58, 555 S.E.2d 406, 408 (Ct. App. 2001).
398. *Id.* at 358–59, 555 S.E.2d at 409.
399. *Id.* at 359–60, 555 S.E.2d at 409–10.
400. *Id.* at 360, 555 S.E.2d at 410.
401. *Id.* at 360–61, 555 S.E.2d at 410.
402. *Id.* at 361, 555 S.E.2d at 410.
403. Mayer v. M.S. Bailey & Son, 347 S.C. 353, 361, 555 S.E.2d 406, 410 (Ct. App. 2001).
404. *Id.*
405. S.C. CODE ANN. § 62-7-307 (1987).
406. *Mayer* at 361, 555 S.E.2d at 410.

pre-SCTC rule. The SCTC does not explicitly define the term "report," but section 62-7-813 gives a sense of what is intended.[407] However, the second leg of the section 62-7-1005 limitations period should be more clearly applicable because it runs from the earliest of three expressly defined events.[408]

D. Constructive Fraud

Part 7 of the SCTC codifies the general common law, and probably the pre-SCTC approach to so-called constructive fraud. Constructive fraud arises when a trust's administration is dependent on the occurrence or non-occurrence of an event. Typically, this event entitles a beneficiary to receive distributions or disqualifies a beneficiary from receiving distributions. A trustee is deemed to have made a representation to all beneficiaries if he or she acts as though the event occurred or failed to occur. If this representation is inaccurate, the court may subject the trustee to liability. A common example involves a trust provision allowing trust distributions to a beneficiary, often the settlor's surviving spouse, as long as the beneficiary does not marry. If the trustee continues to make distributions to that surviving spouse, other beneficiaries may assume that the trustee conducted the appropriate amount of due diligence and can rely on the effective representation by the trustee that the surviving spouse remains unmarried. If the trustee failed to exercise a reasonable amount of due diligence to discover that the surviving spouse has remarried and is thus no longer entitled to distributions, a court may hold the trustee personally liable for any damage to the trust.[409]

Maintaining this general approach, SCTC section 62-7-1007 provides that a trustee is not liable for loss if the trustee exercised reasonable care to determine the relevant circumstances—even if the trustee is mistaken.[410] Although the statute does not expressly so provide, presumably the converse applies as well: a trustee who does not exercise reasonable care is liable.

E. Exculpatory Provisions

Section 62-7-1008 prohibits a trustee from relying on exculpatory provisions in the trust if the exculpatory language resulted from the trustee's abuse of a confidential or fiduciary relationship with the settlor[411] or if the trustee acts in bad faith or with reckless indifference.[412] Although this section does not expressly so provide, exculpatory language may otherwise protect a trustee by inference.

---

407. *See* S.C. CODE ANN. § 62-7-813(c).

408. *Id.* § 62-7-1005(c). *See supra* note 383 and accompanying text.

409. *See, e.g.*, Rodgers v. Herron, 226 S.C. 317, 335–36, 85 S.E.2d 104, 113 (1954) (holding trustee liable for failing to discover the surviving spouse's common law marriage); *see also* First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 563, 511 S.E.2d 372, 377 (Ct. App. 1998) (applying similar standards to a remainder beneficiary—a novel approach).

410. S.C. CODE ANN. § 62-7-1007.

411. *Id.* § 62-7-1008(b).

412. *Id.* § 62-7-1008(c).

F. Personal Liability

Section 62-7-1010 retains the essence of the pre-SCTC statute dealing with a trustee's personal liability for contract and tort matters.[413] However, SCTC section 62-7-1011 more specifically defines a trustee's personal liability by extending the general rules to a trustee of a trust that has an interest in a general or limited partnership, which is commonly used in modern estate planning.[414]

VIII. THE TRUSTEES'S RELATIONSHIPS WITH THIRD PARTIES

A. Protection of Persons Dealing with Trustees

Although the SCPC affords protection to persons dealing with trustees, Part 10 of the SCTC provides express statutory protection for persons innocently dealing with former trustees. SCTC section 62-7-1012 protects a person, other than a beneficiary, who assists a trustee or deals in good faith and for value with a trustee, without knowledge that the trustee is acting improperly.[415] Section 62-7-1012 also protects a non-beneficiary from having to inquire into the propriety of the trustee's actions or inquire as to whether the action falls within the trustee's powers.[416] In effect, section 62-7-1012 does not impose the consequences of constructive notice; it instead protects an innocent person without actual notice[417] who does not bother to inquire into the trustee's powers or authority. At first blush, it may appear that a third person dealing with a trustee is therefore in a better position by being innocently ignorant, thereby discouraging the person's exercise of due diligence. However, prudence would seem to dictate that the third person will nevertheless conduct reasonable due diligence. For example, whether the Recording Act[418] trumps the protection of section 62-7-1012 is problematic. Section 62-7-1012(e) provides that "[c]omparable protective provisions of other laws relating to commercial transactions . . . prevail over the protection provided by this section,"[419] but it is unclear whether the Recording Act is such a comparable provision. The

---

413. *See* former S.C. CODE ANN. § 62-7-307 (1987) (repealed 2006).

414. This practice is subject to constant attack from the Internal Revenue Service because the discounts for fractionalized interests can render significant transfer tax benefits. *See* Brant J. Hellwig, *Estate Tax Exposure of Family Limited Partnerships Under Section 2036*, 38 REAL PROP. PROB. & TR. J. 169 (2003); Brant J. Hellwig, *Revisiting Bynum*, 23 VA. TAX REV. 275 (2003).

415. S.C. CODE ANN. § 62-7-1012(a). The statute does not define good faith, but presumably good faith means that the non-beneficiary lacked any knowledge that the trustee acted improperly.

416. *Id.* § 62-7-1012(b).

417. SCTC section 62-7-104 provides: "[A] person has knowledge of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question has reason to know it." *Id.* § 62-7-104(a).

418. The South Carolina Recording Act, found at S.C. CODE ANN. § 30-7-10 (1976), protects an owner of real property who records a deed against those whose claims against the property may arise thereafter. The Recording Act effectively puts subsequent purchasers on constructive notice of information contained in the chain of title as recorded.

419. S.C. CODE ANN. § 62-7-1012(e).

Recording Act imputes constructive notice about matters on public record in a purchaser's chain of title. Thus, to be prudent, a purchaser of real property from a trustee should, at least, conduct the usual title search, not only to ensure that the title is otherwise good but also to ascertain that the public record does not prohibit the trustee from conducting the sale. From the search of the records, if a purchaser learns that a trustee does not have the authority to conduct the sale, section 62-7-1012 would no longer protect that purchaser. However, it seems better to know not to enter into the transaction than to later fight over whether the purchaser in the completed transaction enjoys statutory protection.

SCTC section 62-7-1013, another provision related to the protection of third parties, allows third parties to rely on information contained in a "certificate of trust."[420] This section codifies the practice of providing a memorandum or certificate of trust to a third person who wants documentation of the trustee's authority even though the trustee does not wish to publish the terms of the entire trust. Once again, this practice is probably most commonly used in real estate transactions when the trustee does not want to place all of the trust documentation in the public record, but the purchaser wants some recorded evidence of the trustee's authority to serve as a link in the chain of title. Unlike the UTC, SCTC section 62-7-1013 provides a sample "certificate of trust" form.[421]

B. Privileged Communications

Evidence determines whether a trustee has breached a duty under Part 10 and is accordingly liable. Although a trustee might be comfortable assuming that communications with the trustee's attorney will not be admissible evidence, a recent South Carolina case sends a warning to trustees. In *Floyd v. Floyd*,[422] the settlor created several inter vivos trusts. A QTIP[423] trust provided for the quarterly payment of net income to the settlor's wife and gave the trustees discretion to invade the principal for her medical care, education, support, and maintenance.[424] The settlor's son and another individual served as successor trustees to the settlor.[425] A charitable remainder trust provided for annual eight percent payouts to the wife for her lifetime.[426] The son was the sole trustee of that trust.[427] After the settlor's death, the son allowed the wife, his stepmother, to live in one of the beach houses held in trust for free, and he rented out the other beach house.[428] Eventually, they disagreed about who was responsible for paying for the maintenance, taxes, and

420. *Id.* § 62-7-1013.
421. *Id.* § 62-7-1013(j).
422. 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).
423. *See supra* text accompanying notes 180.
424. *Floyd*, 365 S.C. at 67, 615 S.E.2d at 471.
425. *Id.*
426. *Id.* at 67–68, 615 S.E.2d at 471.
427. *Id.* at 68, 615 S.E.2d at 471.
428. *Id.*

insurance on both the houses.[429] The wife brought an action for an accounting and for a declaratory judgment requiring the trustees to repay her for advances made on the houses and to reinstate the flood insurance.[430] Concerned about the preservation of the trust property, the trial court ordered the trustees to pay for the upkeep, insurance, and taxes on the trust real estate.[431] The bank, named as the next successor trustee, intervened in the case.[432]

When the trust failed to pay for a new heat pump in the beach house where the wife resided, she brought an action to show cause. The trial judge ruled that the son was in contempt of court for failing to abide by the previous order and approved the resignation of the individual trustees.[433] The trial court eventually conducted a hearing on the merits of the wife's complaint.[434] The son objected to the introduction of letters from her attorney and from his attorney on hearsay grounds and, in the case of the letters from his attorney, he claimed they were privileged communications.[435] The trial court admitted the letters.[436] Finding that the son "acted in bad faith and breached his fiduciary duties," the trial court assessed the son with the wife's attorney's fees of approximately $40,000 as well as the bank's attorney's fees, which exceeded $22,000.[437] The trial judge also removed the son as trustee of the charitable remainder trust.[438]

On appeal, the son argued that the trial court should not have held him in contempt.[439] He contended that the trust documents required him to pay all the trust income to the wife, which left no income to pay the expenses. An invasion of principal was thus necessary.[440] The son further argued that because the trust empowered him to invade the principal for the wife's benefit in his discretion, he properly chose not to invade the principal pursuant to that discretion.[441] Consequently, the son contended the trial judge's order to pay expenses was unlawful and could not serve as the basis for the subsequent contempt order.[442]

The South Carolina Court of Appeals ruled that the contempt order was the law of the case because the son did not timely appeal the trial court's ruling, which was immediately appealable.[443] Moreover, the assessment of fees was the law of the case because, although the trial court assessed the fees for both damages and as a

429. Floyd v. Floyd, 365 S.C. 56, 68, 615 S.E.2d 465, 471–72 (Ct. App. 2005).
430. *Id.* at 69, 615 S.E.2d at 472.
431. *Id.*
432. *Id.*
433. *Id.* at 69–70, 615 S.E.2d at 472.
434. *Id.* at 70, 615 S.E.2d at 472.
435. Floyd v. Floyd, 365 S.C. 56, 70, 615 S.E.2d 465, 472 (Ct. App. 2005).
436. *Id.* at 70, 615 S.E.2d at 472–73.
437. *Id.* at 71, 615 S.E.2d at 473.
438. *Id.*
439. *Id.*
440. *Id.*
441. Floyd v. Floyd, 365 S.C. 56, 71, 615 S.E.2d 465, 473 (Ct. App. 2005).
442. *Id.*
443. *Id.* at 72, 615 S.E.2d at 473.

contempt sanction, the son appealed only the issue of the contempt sanction.[444] Therefore, the unappealed ground was sufficient to support the fee assessment and became the law of the case.[445]

In addition to holding the trial court's ruling binding as the law of the case, the appellate court determined that the trial judge correctly ruled on both issues.[446] On the contempt issue, the appellate court noted the difference between criminal contempt, which is punitive, and civil contempt, which is punitive as well as remedial.[447] Because the son as trustee failed to obey the trial court's order to pay expenses when he did not pay for the heat pump, the appellate court reasoned that the trial court had cause to issue its contempt sanction.[448] The appellate court did not agree with the son's argument that the trust document did not expressly provide for the payment of expenses and that any such payment would fall within his discretion.[449] The appellate court held that the discretionary power cited by the son related to the wife's welfare and not to the payment of expenses.[450] Moreover, in the "Trustee Powers" section of the trust document, the settlor empowered the trustee to allow his wife or any other beneficiary to live in a residence rent-free and empowered the trustee to pay related expenses.[451] The trust document contained no language requiring the beneficiary to pay these expenses.[452] The court stated, "The trust, as owner, carries the responsibility for these items."[453] The appellate court determined that the son misconstrued the language of the trust to justify his refusal to pay expenses, thereby contravening the trial court's order.[454]

The appellate court also rejected the son's contention that the sanctions amount awarded was disproportionate to the contempt.[455] The appellate court reasoned that because the trial court assessed attorney's fees against the son not only as a sanction for contempt but also as a damages measure for breach of fiduciary duty, the actual damages stemming from the contempt need not limit the award.[456] Moreover, although the trial court did not assess the attorney's fees per se, it nevertheless examined the amount of the fees and determined they were reasonable.[457]

Of great concern for attorneys representing fiduciaries is the appellate court's holding that the trial court's decision to admit the letters from both attorneys was not an abuse of discretion. The appellate court rejected the son's hearsay objections

---

444. *Id.* at 72–73, 615 S.E.2d at 474.
445. *Id.*
446. *Id.* at 73, 615 S.E.2d at 474.
447. Floyd v. Floyd, 365 S.C. 56, 75–76, 615 S.E.2d 465, 475–76 (Ct. App. 2005).
448. *Id.* at 77, 615 S.E.2d at 476.
449. *Id.* at 77–78, 615 S.E.2d at 476–77.
450. *Id.*
451. *Id.*
452. *Id.* at 78, 615 S.E.2d at 477.
453. Floyd v. Floyd, 365 S.C. 56, 78, 615 S.E.2d 465, 477 (Ct. App. 2005). The court's pronouncement of this rule may clarify an unsettled issue in South Carolina.
454. *Id.*
455. *Id.* at 79, 615 S.E.2d at 477.
456. *Id.* at 81, 615 S.E.2d at 478.
457. *Id.*

by ruling that the wife did not introduce the letters to prove the truth of the matter asserted therein, but that she actually introduced the letters to demonstrate the trustees were on notice of her position regarding payment of the expenses.[458] In addition, the introduction of the letters from the son's attorney showed, despite his contentions to the contrary, that he disregarded his attorney's advice.[459] Finally, the appellate court reasoned that the introduction of the letters did not prejudice the son because the trial court had already ruled that the trustees should pay the trust's expenses.[460]

Most significantly, the appellate court agreed with the trial court that attorney-client privilege did not attach to the letters from the son's attorney.[461] The appellate court stated that the wife received entitlement to the information as the beneficiary of the trust. Alternatively, the court ruled that the son waived his privilege by introducing the letters and by opening the door on the issue of following his attorney's advice.[462]

On the issue of a beneficiary's entitlement to the opinions of a trustee's counsel, the court cited a well-known treatise, *Scott on Trusts*,[463] as well as two opinions from other jurisdictions. The court cited *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*[464] as "the leading American case addressing the non-applicability of the privilege to trust beneficiaries."[465] In *Riggs*, a Delaware court held that a beneficiary is entitled to the opinions of the trustee's counsel to ensure that the trustee is acting in accordance with the requirements of fiduciary duty.[466] Trust funds paid for the counsel's opinion; thus, the *Riggs* court found the beneficiaries' argument even more compelling.[467] "'The distinction has often been drawn between legal advice procured at the trustee's Own expense and for his Own protection and the situation where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake.'"[468]

The *Floyd* court distinguished *Barnett Banks Trust Co., N.A. v. Compson*,[469] in which a Florida court refused to compel disclosure of materials prepared by the trustee's counsel for the benefit of the trustee. In *Barnett*, the settlor's wife attempted to invalidate a transfer to the trust that if void, would pass outside of the trust to her individually.[470] The *Barnett* court described the dispute as between the

458. *Id.* at 84, 615 S.E.2d at 480.
459. Floyd v. Floyd, 368 S.C. 56, 84, 615 S.E.2d 465, 480 (Ct. App. 2005).
460. *Id.*
461. *Id.* at 88, 615 S.E.2d at 482.
462. *Id.*
463. *See id.* at 85, 615 S.E.2d at 480 (quoting 2A WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 173 (4th ed. 1987)).
464. 355 A.2d 709 (Del. Ch. 1976).
465. *Floyd*, 365 S.C. at 85, 615 S.E.2d at 480–81.
466. Floyd v. Floyd, 365 S.C. 56, 85–86, 615 S.E.2d 465, 481 (Ct. App. 2005) (quoting *Riggs*, 355 A.2d at 712).
467. *Id.* (quoting *Riggs*, 355 A.2d at 712).
468. *Id.* at 86, 615 S.E.2d at 481 (quoting *Riggs*, 355 A.2d at 712).
469. 629 So. 2d 849 (Fla. Dist. Ct. App. 1993).
470. *See Floyd*, 365 S.C. at 86, 615 S.E.2d at 481 (citing *Barnett*, 629 So. 2d at 850).

trustee and the wife as individuals. Because the wife "was asserting her rights to receive assets as an individual rather than as a beneficiary of the trust," the *Barnett* court determined she was not entitled to privileged material.[471] Distinguishing its decision from the decision in *Riggs*, the *Barnett* court asserted, "'The *Riggs* court's analysis hinges on a finding that the beneficiaries were the real clients of the trustee's attorney. Here, the real client is not [the wife].'"[472]

The *Floyd* appellate court accepted the rationale of the *Riggs* court.[473] Thus, because the litigation arose from a dispute between the trustee and a beneficiary, and because the trust paid the attorney's fees, the attorney-client privilege did not protect the letters to the son as trustee from his attorney.[474]

The appellate court buttressed its conclusion with its "waiver" and "door-opening" observations. Noting "that the attorney-client privilege is owned by the client,"[475] and even survives death, the appellate court recognized that the client can waive the privilege and that he did just that by introducing the letters to show he was acting in accordance with his attorney's advice.[476] For similar reasons, the appellate court determined that the son opened the door to admission of the letters when he argued that he was merely following the advice of his counsel.[477]

The problem with the court's opinion is its failure to mention SCPC section 62-1-109, which specifically and expressly provides that an attorney for a fiduciary does not owe a duty to any beneficiary unless a written employment contract provides to the contrary.[478] This section appears to undercut the court's reliance on the *Riggs* decision, which seemed to be based on the idea that the beneficiary is the "real client" of the fiduciary's attorney.[479] If section 62-1-109 precludes a finding that a beneficiary is the "real client," then it seems a court cannot rely upon *Riggs*. Unfortunately, the *Floyd* case settled after the appellate court opinion and before the case could be appealed to the South Carolina Supreme Court. Thus, at least for now, *Floyd* is the law in South Carolina, although the entire discussion about attorney-client communications is arguably dicta.

IX. EFFECTIVE DATE AND PROTECTION OF EXISTING RIGHTS

Part 11 of the SCTC compiles miscellaneous provisions. Of the sections found in Part 11, section 62-7-1106, applying the SCTC to existing relationships, offers the greatest cause for concern. Section 62-7-1106 is essentially an effective-date provision, defining which rights are affected by the SCTC.[480] Section 62-7-1106

471. *Id.*
472. *Id.* at 87, 615 S.E.2d at 481 (quoting *Barnett*, 629 So. 2d at 851).
473. Floyd v. Floyd, 365 S.C. 56, 87, 615 S.E.2d 465, 482 (Ct. App. 2005).
474. *Id.* at 88, 615 S.E.2d at 482.
475. *Id.* at 90, 615 S.E.2d at 483.
476. *Id.* at 90–91, 615 S.E.2d at 483–84.
477. *Id.* at 92, 615 S.E.2d at 484.
478. S.C. CODE ANN. § 62-1-109 (Supp. 2004).
479. *See supra* text accompanying note 471.
480. S.C. CODE ANN. § 62-7-1106.

purports to preserve rights existing before the effective date of the SCTC.[481] However, the appellate courts in South Carolina have misapplied similar effective date provisions of the SCPC in the past, resulting in one of the most egregious sins that a court can commit: the divesting of vested rights. A review of the pertinent history of the courts' treatment of the SCPC effective date provisions illustrates the present concern that a court might misapply the provisions of SCTC section 62-7-1106.

A. The Misapplication of the SCPC Effective Date

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.[482] Two of the policies supporting this rule include: (1) the decedent's will speaks as of the date of death and (2) substantive rights should be determined with certainty and not later rescinded. South Carolina has recognized this rule both in its case law[483] and by statute.[484] But in 1990, in *White v. Wilbanks*[485] and then in subsequent cases, there is an argument that the South Carolina appellate courts severely eroded, if not overturned, this rule. However, an amendment to the SCPC in 1997 may have corrected the problem.

In *White*, the decedent's later will revoked his earlier will, but the original of the later will could not be found after the decedent's death.[486] 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 the accompanying intent to revoke.[487] Apparently, insufficient evidence existed to overcome the presumption of revocation in *White*.[488]

However, because the later will was valid at some point, it sufficed to revoke the earlier will. Since the later will could not be probated because the proponent did not overcome the presumption of revocation, the issue became whether the earlier will could be probated—a question of revival. The concept of revival involves the situation in which a testator executes a later will that expressly revokes an earlier

---

481. *Id.* § 62-7-1106(a)(3)–(5), (6).

482. *See, e.g.*, Teague v. Dendy, 7 S.C. Eq. (2 McCord Eq.) 207, 211 (1827) ("The rights of the distributees are controlled and limited by the state of things that existed at the death of the ancestor."); Lutz v. Fortune, 758 N.E.2d 77, 81 (Ind. Ct. App. 2001) ("[A] will must be construed with regard to the law and statutes in effect at the time of the testator's death." (citing *In re* Spanley, 458 N.E.2d 289, 290 (Ind. Ct. App. 1984))).

483. *See* Patrick v. Parris, 303 S.C. 559, 562–63, 402 S.E.2d 664, 665 (1991); 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); *Teague*, 7 S.C. Eq. at 211.

484. S.C. CODE ANN. § 62-1-100 (Supp. 2004).

485. 301 S.C. 560, 393 S.E.2d 182 (1990).

486. *Id.* at 561, 393 S.E.2d at 183.

487. *See* Davis v. Davis, 214 S.C. 247, 261–62, 52 S.E.2d 192, 198–99 (1949).

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

will. If the testator subsequently revokes the later will, a question about the status of the earlier will arises. Under the pre-SCPC common law, "South Carolina followed the common law rule that a former will is presumed revived by the destruction of a subsequent will, unless there is clear evidence this was not the testator's intent."[489] SCPC section 62-2-508 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.[490]

If the pre-SCPC presumption regarding revival applied, then the earlier will would likely have been revived,[491] and the devisees under the earlier will would take the decedent's property. However, if the SCPC section 62-2-508 statutory presumption applied, then the earlier will would not be revived, and the decedent's intestate heirs would inherit the decedent's property. The decedent in *White* executed both wills and died before the effective date of the SCPC.[492] According to the law in effect at the decedent's death—the pre-SCPC presumption in favor of revival—the decedent's earlier will would have been revived and the devisees would have vested ownership of the decedent's property.[493] However, handing down its decision after the effective date of the SCPC, the supreme court applied the SCPC presumption against revival, thereby divesting the rights of the devisees that had been vested since the decedent's death.[494] Thus, the court engaged in an enterprise of the worst type, both from a property ownership and a commercial reliability standpoint: divesting the rights of vested owners.[495]

The *White* court apparently felt compelled to apply the SCPC law extant at the time of the decision, even though all significant events in the case, including most importantly the decedent's death, occurred before the SCPC was enacted or effective.[496] The court relied on the effective date provision in SCPC section 62-1-

---

489. *Id. See* Kollock v. Williams, 131 S.C. 352, 356–57, 127 S.E. 444, 445 (1925).

490. S.C. CODE ANN. § 62-7-508(a) (1987).

491. The opinion indicated no evidence of the decedent's contrary intent.

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

493. Assuming insufficient evidence of the decedent's contrary intent.

494. *White*, 301 S.C. at 562, 393 S.E.2d at 183 (reversing the court of appeals' decision which applied the pre-SCPC common law presumption).

495. Ironically, in an earlier opinion, that same court decried—correctly—the very practice of divesting vested rights. Boan v. Watson, 281 S.C. 516, 519, 316 S.E.2d 401, 403 (1984).

496. The effective date of the SCPC was deferred until July 1, 1987. South Carolina Probate Code, No. 539, 1986 S.C. ACTS 3982. As with the SCTC, the South Carolina General Assembly deferred the effective date of the Act to allow some time to study the monumental impact of the Act on the existing law.

100.[497] The court read SCPC section 62-1-100(b)(5) in a vacuum and out of context to reach its conclusion. At that time, SCPC section 62-1-100(b)(5) read as follows: "[A]ny . . . presumption provided in this Code applies to instruments executed . . . before the effective date unless there is a clear indication of a contrary intent."[498] Categorizing a will as an "instrument," the court applied the SCPC section 62-2-508 presumption to the will at issue in the case.[499]

Unfortunately, the *White* court ignored the preceding subsection, SCPC subsection 62-1-100(b)(4),[500] which at the time of the decision read as follows:

> [A]n act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right.[501]

The supreme court's decision in *White* overlooked the policy underlying the common law rule and SCPC section 62-1-100(b)(4): the decedent's will speaks as of the decedent's death and the law presumes the decedent knew the substantive law in effect at that time. Interestingly, only one month after the court issued its decision in White, an amended version of section 62-1-100(b)(4) became effective. The amended version clarified the previous version and codified the common law rule by adding the following sentence: "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."[502] Almost every decision involving a substantive rights issue involves a rule of construction. By relying on the "construction" provision, section 62-1-100(b)(5),[503] the supreme court opened the door for the application of SCPC law in virtually every case, even if the decedent

---

497. White v. Wilbanks, 301 S.C. 560, 562, 393 S.E.2d 182, 183 (1990).

498. *Id.* (quoting S.C. CODE ANN. § 62-1-100(b)(5) (Supp. 1988)).

499. *Id.*

500. One basic rule of statutory construction requires a court to read the provisions of a statute as consistently as possible. By limiting the effect of SCPC section 62-1-100(b)(5) to purely procedural issues, the court would have avoided establishing an inconsistency between that subsection and subsection (b)(4). Moreover, by construing SCPC section 62-1-100(b)(5) as it did, the court effectively rendered SCPC section 62-1-100(b)(4) meaningless. Even if those two sections are incontrovertibly inconsistent, the court should have used another basic rule of statutory construction to reach a different conclusion. If two statutory provisions are inconsistent, the more specific provision should control. In this case, SCPC section 62-1-100(b)(4) is more specific.

501. *Id.* § 62-1-100(b)(4) (Supp. 1989) (current version at S.C. CODE ANN. § 62-1-100(b)(4) (Supp. 2004)).

502. *Id.* § 62-1-100(b)(4) (Supp. 1990).

503. *Id.* § 62-1-100(b)(5) (Supp. 1989) (current version at S.C. CODE ANN. § 62-1-100(b)(5) (Supp. 2004)).

died before the effective date. The result in *McDaniels v. Gregory*[504] demonstrates the fallacy of the supreme court's rationale.

The testator in *McDaniel* died on June 18, 1986.[505] Two beneficiaries of the will commenced an action after July 1, 1987, the effective date of the SCPC, to construe the will under the Uniform Declaratory Judgments Act.[506] Central to the case was whether the SCPC statute concerning lapsed residuary devises would apply.[507] Citing its opinion in *White*, the supreme court held the SCPC lapse statute was a rule of construction and thus applied pursuant to SCPC section 62-1-100(b)(5).[508] By relying on that provision and refusing to recognize the clarifying amendment to SCPC section 62-1-100(b)(4), the court adversely affected substantive rights. By applying the law enacted after the decedent's death, the court again took away the vested property rights of beneficiaries. The law in effect at the time of the decedent's death in *McDaniel* provided that intestate heirs would take any lapsed share of the residue.[509] Consequently, from June 18, 1986, the date of the decedent's death, until the date of the court's opinion, the decedent's intestate heirs effectively owned the lapsed property. The court's decision, however, took the property from the decedent's heirs and subsequently awarded the property to the surviving residuary devisees as owners.[510] Not only did this decision disrupt established ownership of property, it contradicted the decedent's intent. The court deems a decedent's will 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, a court presumes that the decedent knew the extant law and presumes that the decedent[511] intended for that law to apply. Thus, in *McDaniel*, the court charged the decedent with the knowledge of the then-applicable no-residue-of-a-residue rule,[512] and because he did not indicate an intent to the contrary, it was presumed he must have intended for that rule to apply. The court thus fashioned a different result.

The effect of the *White* and *McDaniel* decisions undermined any certainty about the status of title in South Carolina. Under the rule espoused in those cases, the court would overturn substantive rights that presumably accrued to heirs and devisees of decedents dying before the SCPC if (1) an action is brought after the effective date of the SCPC and (2) the SCPC would reach a different substantive result.

---

504. 303 S.C. 500, 401 S.E.2d 863 (1990).

505. *Id.* at 500, 401 S.E.2d at 863.

506. S.C. CODE ANN. §§ 15-53-10 to -30 (1976).

507. SCPC § 62-2-604(b) presumes that the surviving residuary devisees take the share of a lapsed residuary devisee. 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).

508. *McDaniel*, 303 S.C. at 501, 401 S.E.2d at 864.

509. *Id.*

510. *Id.* at 501–02, 401 S.E.2d at 864.

511. *See* S.C. CODE ANN. § 62-1-100(b)(5) (Supp. 1990) (current version at S.C. CODE ANN. § 62-1-100(b)(5) (Supp. 2004)).

512. *McDaniel*, 303 S.C. at 501–02, 401 S.E.2d at 864.

In 1997, the legislature once again amended SCPC section 62-1-100 to confirm that the longtime general rule should apply: substantive rights in a decedent's estate should be determined according to the law in effect at the date of death.[513] The amendment to section 62-1-100(b)(5) deleted the words "instruments executed and,"[514] which were the words cited by the *White* and *McDaniel* courts that classified wills as instruments and brought wills within the perview of section 62-1-100(b)(5). By removing the words "instruments executed and," the legislature presumably precluded a court from looking to SCPC section 62-1-100(b)(5), instead of section 62-1-100(b)(4), to determine the applicable law because SCPC section 62-1-100(b)(5) clearly should now apply only to multiple-party bank accounts. Perhaps that amendment did its job. In *In re Estate of Boynton*,[515] the South Carolina Court of Appeals referred to SCPC section 62-1-100(b)(4) to apply the law in effect at the decedent's death—before the SCPC—to determine ownership.[516] However, the South Carolina Supreme Court has not decided a related case since the amendment of section 62-1-100(b)(4), and being the highest state court in South Carolina, it is not bound by the decision in *Boynton*.

B. SCTC Effective Date Provisions

The language in SCTC section 62-7-1106 is substantially similar to SCPC section 62-1-100. SCTC section 62-7-1106 provides as follows:

> (a) Except as otherwise provided in this article, on the effective date of this article:
>
> (1) this article applies to all trusts created before, on, or after its effective date;
>
> (2) this article applies to all judicial proceedings concerning trusts commenced on or after its effective date;
>
> (3) this article applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this article would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this article does not apply and the superseded law applies;
>
> (4) subject to subsections (a)(5) and (b), any rule of construction or presumption provided in this article applies to trust instruments executed before the effective

513. S.C. CODE ANN. § 62-1-100 (Supp. 1997) (current version at S.C. CODE ANN. § 62-1-100 (Supp. 2004)).

514. *See* Act of Jun. 11, 1997, No. 152, § 1, 1997 S.C. ACTS 831.

515. 355 S.C. 299, 584 S.E.2d 154 (Ct. App. 2003).

516. *Id.* at 302, 584 S.E.2d at 156.

date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done and any right acquired or accrued before the effective date of the article is not affected by this article. Unless otherwise provided in this article, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the article, that statute continues to apply to the right even if it has been repealed or superseded.[517]

Unlike its SCPC counterpart, SCTC subsection 62-7-1006(a)(4) is expressly subordinate to the provisions of subsection (a)(5). Hopefully, the language of SCTC section 62-7-1106 and the lesson learned in *Boynton* will eliminate appellate courts' practice of divesting rights in trusts.

X. CONCLUSION

As with the SCPC, time and experience will determine the true impact of the SCTC on the law of trusts in South Carolina. The SCPC provides a South Carolina paradigm for the enactment, operation, construction, and refinement of a substantial act. Presumably, the SCTC will evolve similarly. As expected with a state's adoption of a uniform law, the statutory provisions codify or recodify some old rules, change some other rules, and also create some new rules. The SCTC will continue the progression of the law of wills and trusts from mainly a common law perspective to a statutory one. Of course, no version of a uniform law can anticipate and answer all questions, so judicial gloss will also become an important part of the evolutionary process.

517. S.C. CODE ANN. § 62-7-1106.