South Carolina Law Review

Volume 65 | Issue 1 Article 4

Fall 2013

The South Carolina Probate Code Patched and Refurbished: Version 2013

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THE SOUTH CAROLINA PROBATE CODE PATCHED AND REFURBISHED: VERSION 2013

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I. INTRODUCTION

The enactment of the South Carolina Probate Code (SCPC), effective July 1, 1987,[1] and the South Carolina Trust Code (SCTC), effective January 1, 2006,[2] pervasively impacted the substantive law of will and trusts, as well as the administration of trusts and decedents' estates in South Carolina.[3]

As part of an ongoing process to revamp and improve the SCPC,[4] the South Carolina General Assembly, after extensive study, enacted omnibus legislation

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1. S.C. CODE ANN. § 62-1-100(a) (2009); *see generally* 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) (discussing the meaning and impact of substantive provisions of the South Carolina Probate Code).

2. S.C. CODE ANN. § 62-7-1106 (2009); *see generally* S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 140 (2005) (discussing the impact of the SCTC on common law and statutory trust law in South Carolina).

3. Articles 4 and 5 of the SCPC also extensively affected guardianships, conservatorships, and powers of attorney, relating to both property and health issues. *See* S.C. CODE ANN. §§ 62-4-101 through -401, 62-5-101 through -624 (2009).

4. For a history of amendments and additions to the SCPC, see S. Alan Medlin, *Result-Oriented Interpretations of the South Carolina Probate Code Create Estate of Confusion*, 44 S.C. L. REV. 287, 288 nn.1 & 4 (1993) (citing Act of June 9, 1986, No. 539, 1986 S.C. Acts 3446 (codified

in 2013—effective January 1, 2014[5]—that augmented, amended, and clarified the existing SCPC.[6] This Article discusses the most significant provisions of the 2013 amendments to the SCPC.[7]

II. SIGNIFICANT SUBSTANTIVE AMENDMENTS

A. Fair Allocation of Trust Receipts Among Beneficiaries

Perhaps the most significant 2013 amendment effected a substantial change to existing South Carolina trusts and estates law: it provided an additional tool to a trustee wrestling with the incessant fiduciary problem of fairly and properly allocating trust receipts among trust income and principal beneficiaries.[8] Although a trust beneficiary may have rights—depending on the intent of the settlor—to trust income and principal allocated as directed or authorized by the

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at S.C. CODE ANN. §§ 62-1-100 through -7-709 (Supp. 1993)); Medlin, *supra* note 2, at 139 n.11 (citing No. 539, 1986 S.C. Acts 3446).

5. No. 100, 2013 S.C. Acts __. The bill was initially filed as S. 0143 in 2012, but was not passed out of the Senate Judiciary Committee in 2012. *Id.* Because of the bill's length, some members of the committee preferred to allow more time for review of its provisions. Public hearings and workshops were conducted in the fall of 2012, and the bill, refined by that process, was prefiled in the Senate on December 18, 2012, for the 2013–2014 legislative session. *Id.* The Senate's version of the bill was passed on March 20, 2013, and the House passed its version on May 21, 2013. *Id.* After the Senate concurred in the House amendments, the bill was ratified and then signed by the governor on June 7, 2013.

6. This Article was published prior to the effective date of the act. The amendments are available on the South Carolina General Assembly's website. Act of June 7, 2013, No. 100, §§ 1–4, 2013 S.C. Acts 1, 1-498 (codified at S.C. CODE ANN. §§ 62-2-101 through -7-1106), *available at* http://www.scstatehouse.gov/sess120_2013-2014/bills/143.htm. However, for purposes of clarity and brevity, this Article cites provisions of the SCPC as they will appear in the South Carolina Code once the amendments go into effect. This Article refers to the SCPC amendments resulting from the act as "2013 amendments."

Citations to SCPC provisions amended by the 2013 amendments are designated as "2013 amendments." (S.C. CODE ANN. § 62-__-__ (2013 amendments)). SCPC provisions prior to the 2013 amendments are cited as they presently appear in the South Carolina Code and 2012 Supplement. (S.C. CODE ANN. § 62-__-__ (2009) *or* S.C. CODE ANN. § 62-__-__ (2009 & Supp. 2012)).

7. Two of the most significant amendments in the original version of the bill were removed at the Senate subcommittee level in early 2013: a proposed omnibus revamping of article 5 and a proposed repeal of the rule against perpetuities. *Compare* S. 1243, 119th Leg., 2d Sess. (S.C. 2012), *available at* http://www.scstatehouse.gov/sess119_2011-2012/prever/1243_20120312.htm (last updated May 12, 2012, 3:05 PM) (proposing to abolish the rule against perpetuities and significantly amend article 5), *with* No. 100, 2013 S.C. Acts 1, 1 (including no proposal to abolish the rule against perpetuities or amend article 5 in the final amended bill).

8. *See* S.C. CODE ANN. § 62-7-803 (2009); Johnson v. Thornton, 264 S.C. 252, 258, 214 S.E.2d 124, 127 (1975) (recognizing duty to deal impartially with two or more beneficiaries). Unless the settlor directs the trustee to treat beneficiaries partially—for example, preference might be afforded a surviving spouse—trust law requires a trustee to treat beneficiaries impartially. § 62-7-803 cmt. 1. The discussion in this Article assumes that the trustee is required to treat income and principal beneficiaries impartially.

settlor, analyses of the allocation of trust receipts issue typically distinguish between income beneficiaries and principal beneficiaries.[9] In this basic construct, trust income beneficiaries are analogous to life tenants of outright ownership interests—they are entitled to the income from the property for life—and trust principal beneficiaries are comparable to remaindermen of outright ownership interests.

A trustee has the basic duty to produce a reasonable return from the trust property.[10] Unless otherwise restricted by the settlor, trustees possessed the power to invest the trust property in any prudent investment, regardless of type.[11] Thus, for example, trustees could choose among different investment categories, such as stocks, bonds, real estate, and interest-bearing deposits in financial institutions.[12] The particular investment options fell into two general categories: (1) fixed-income investments, such as bank deposits, with receipts treated as income; and (2) equity investments, such as stocks, with receipts derived from capital gains treated as principal.[13]

Before the advent of modern portfolio theory investing, trustees attempting to comply with their responsibility to treat beneficiaries impartially could use only one allocation tool: apportioning the trust's investments between traditional income and principal categories.[14] However, in the 1990s, the modern portfolio theory of trust investing and receipt allocation began to gain acceptance.[15]

> [R]ather than focusing on traditional categories of income and principal receipts, [modern portfolio theory] considers the overall return of the trust investments, whether from interest or capital gains. Modern portfolio theory worries first about obtaining an optimum overall return and then about fairly allocating the receipts among income and principal beneficiaries. [Thus, modern portfolio theory] allows an approach to trust investing that moves from a category-based analysis to a total return viewpoint.[16]

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9. *See* No. 100, 2013 S.C. Acts 411; UNIF. PRINCIPAL & INCOME ACT § 104(a)–(b) (2000), 7A U.L.A. 434 (2006).

10. RESTATEMENT (THIRD) OF TRUSTS § 79(2) (2005).

11. S.C. CODE ANN. § 62-7-933(C)(5)(a) (2013 amendments); *see* S.C. CODE ANN. § 62-7-816(2)–(10) (2009).

12. *See* S.C. CODE ANN. § 62-7-816(2)–(10) (2009).

13. *See* S.C. CODE ANN. § 62-7-904A, reporter's cmt. (2013 amendments) (discussing traditional investment categories).

14. *See* No. 100, 2013 S.C. Acts 380 (discussing coordination with the Uniform Prudent Investor Act).

15. *See id.* at 380–81.

16. S. Alan Medlin, *Limitations on the Trustee's Power to Adjust*, 42 REAL PROP. PROB. & TR. J. 717, 719 & n.9 (2008) (citations omitted); *see also* Richard W. Nenno, *The Power to Adjust and Total-Return Unitrust Statutes: State Developments and Tax Considerations*, 42 REAL PROP. PROB. & TR. J. 657, 662 (2008) (discussing the trustee's role as a prudent-investor).

The nascent modern portfolio theory developed during a period when typical returns from the stock market significantly outpaced those from fixed-income investments.[17] Although modern portfolio theory also theoretically applies to periods during which fixed-income investing would outpace investments in equities, the foundation of modern portfolio investing is based on the notion that historical returns from the stock market exceed fixed-income returns.[18]

Using the modern portfolio theory, a trustee might choose to invest all, or a substantial portion, of the trust portfolio in equities—rather than fixed income assets—assuming there would be greater anticipated returns from the investment in equities.[19] Under this investment strategy, the trustee's goal would be to produce a greater overall return than that produced by a traditional apportionment of investments between income and principal categories.[20] Assuming that the trustee's reliance on the return from the equity market produces a greater overall return for the trust, the trustee must still fairly and properly allocate those returns between trust income and principal beneficiaries.[21]

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17. *See* No. 100, 2013 S.C. Acts 411; Medlin, *supra* note 16, at 724–25.

18. *See generally* Medlin, *supra* note 16, at 725. Market events that occurred subsequent to the initial tenets of modern portfolio theory may have tempered the notion that returns from equities exceed returns from fixed-income investments—e.g., the dot-com bubble burst of 2000 and the Great Recession of 2008. *See id.* The changing texture of the investment market, however, is further evidenced by the historical highs in the stock market that occurred later in 2013. *Market Update: 1st Quarter 2013*, MMBB FINANCIAL SERVICES, http://www.mmbb.org/funds-how-we-invest/market-updates/market-update-october-2013/ (last visited Nov. 8, 2013) (stating that in October 2013, the market saw an all-time high for the Dow, as well as for the S&P 500).

19. Of course, "[t]wo different general factors can affect the return on equity investments." Medlin, *supra* note 16, at 720. "First, general market conditions can impact the return. Second, the trustee's choice of specific investments within the general market can affect the return. Thus, a trustee can make money in a bear market or lose money in a bull market." *Id.*

20. *See id.* at 720–21.

21. *See id.* at 721–22; *see also* RESTATEMENT (THIRD) OF TRUSTS § 79(1)(a) (2007). Any discussion of investment strategy cannot focus only on returns. *See* RESTATEMENT (THIRD) OF TRUSTS § 90(a) (discussing how a prudent investor must consider "an overall investment strategy"). The Uniform Prudent Investor Act requires a prudent investor to consider additional factors as well. *See* UNIF. PRUDENT INVESTOR ACT § 2 (1994), 7B U.L.A. 20 (2006). A trustee cannot concentrate merely on gross receipts and not take into account expenses, such as trustee's fees and taxes, which may or may not pass through to the benefit or detriment of the beneficiaries. *See id.* § 2(c)(1)–(8). Moreover, investing in non-fixed-income assets typically requires conversion of the asset to realize any gain or loss (other than distributions such as dividends). *Cf. id.* § 2(c)(7) (discussing needs for liquidity). The prudent investor trustee must also consider risk, including the risk of lack of investment diversity, and specific market choice in determining a prudent course. *See id.* § 2(b). A theoretical discussion of returns is largely irrelevant if the trustee makes bad individual investment choices.

1. The Power to Adjust

Along with its counterpart uniform act titled the Uniform Prudent Investor Act (UPIA)[22]—as well as the Restatement (Third) of Trusts[23]—the Uniform Principal and Income Act (UPAIA) recognized the increasingly popular position that a trustee should invest for the greatest reasonable total return and allocate income and principal fairly, regardless of traditional notions of what constitutes income and principal.[24] South Carolina adopted versions of the UPAIA (SCPAIA) and the UPIA (SCUPIA) in 2001.[25]

However, assuming that a trustee—pursuant to modern portfolio theory—invests for a total return, the trustee needs a tool to fairly and properly allocate that total return between income and principal.[26] Similar to the uniform version, the pre-2013 SCPAIA provided the trustee with this tool: the power to adjust.[27] A trustee with the power to adjust could apportion total trust receipts between income and principal.[28]

Although the SCPAIA's introduction of the power to adjust afforded the trustee with additional investment flexibility by providing a receipt allocation tool, market experience between the SCPAIA's enactment and the 2013 amendments demonstrated that the power to adjust alone may not offer an adequate avenue for sufficient flexibility in the allocation of trust receipts.[29] For example, in the wake of the Great Recession of 2008, trustees were faced with virtually nil returns from traditional, fixed-income investments; risky volatility in the stock market; and depressed values and returns from real estate.[30] In such market conditions, trustees may find it difficult—if not impossible—to achieve a positive overall return for the trust. Indeed, even the power to adjust cannot allocate a fair return to income beneficiaries if little or no overall return exists.

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22. UNIF. PRUDENT INVESTOR ACT § 2 (1994), 7B U.L.A. 20 (2006).

23. RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

24. UNIF. PRINCIPAL & INCOME ACT prefatory n. (amended 2008), 7A U.L.A. 365 (2006 & Supp. 2013).

25. *See* No. 100, 2013 S.C. Acts 377–79 prefatory n. (discussing the history of South Carolina's adoption of the various versions of the Uniform Principal and Income Act); *id.* at 460–61 gen. cmt. (discussing South Carolina's adoption and recodification of the Uniform Prudent Investor Act).

26. Medlin, *supra* note 16, at 722 (stating the "most significant tool afforded to trustees by the UPAIA is the power to adjust").

27. S.C. CODE ANN. § 62-7-904 (2009 & Supp. 2012).

28. *See id.*

29. Arguably, a trustee with greater flexibility powers has a concomitantly greater potential for liability for failing to exercise, or improperly exercising, the flexibility powers. *See* Medlin, *supra* note 16, at 723–24. *But see* S.C. CODE ANN. § 62-7-904A (2013 amendments) (providing a trustee some statutory protection for the exercise or non-exercise of the power to adjust). A thorough discussion of whether the flexibility afforded by the power to adjust is beneficial or problematic to a trustee is beyond the scope of this Article.

30. *Cf.* Medlin, *supra* note 16, at 725 (discussing the volatility of the market from the 1990s to the turn of the millennium and the effect on returns).

2. Unitrust Conversions and Reconversions

Consequently, the 2013 amendments introduced yet another tool affording trustees flexibility to apportion distributions between income and principal: the ability to convert to a "total return unitrust" (unitrust).[31] A unitrust allocates distributions to an income beneficiary based on a percentage of the value of the trust.[32] Unlike traditional investment category allocations or total return allocations—both of which are based on trust receipts—unitrust allocations focus on distributions, rather than merely receipts.[33] For example, assume that a unitrust provides for an annual distribution to the income beneficiary of three percent of the value of the unitrust as of December 31 of the preceding year. If the total returns for the trust in the current year do not reach three percent, the trustee would nevertheless distribute three percent of the trust value to the income beneficiary, effectively reducing the amount of principal by the difference between three percent and the total return for the current year. In years during which the total returns of the trust exceed three percent, the unitrust allocation would be more akin in principle to the power to adjust because the unitrust actually allocates receipts in years when returns exceed the unitrust percentage.[34]

The 2013 amendments describe the methods by which a trustee can convert to a unitrust and reconvert from a unitrust (unitrust powers).[35] This statutory empowerment applies to a trust unless the settlor indicates a contrary intent.[36] However, the question of whether the statutory unitrust authority is conditioned on the trustee also having the power to adjust remains problematic. The 2013 amendments added the following language to the power to adjust provisions: "In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under sections 62-7-904A through 62-7-904P, in which case the unitrust amount becomes the net income of the trust."[37] If the "in lieu of" language establishes a condition that the trustee must have a power to adjust to have unitrust powers, then the trustee may not have either power in certain cases, even if the settlor has not expressly precluded the trustee's unitrust power. The power to adjust provisions impose preconditions upon granting a trustee the

31. S.C. CODE ANN. § 62-7-904C(1) (2013 amendments); *id.* § 62-7-904(B)(12).

32. *Id.* § 62-7-904B(15).

33. *Id.*

34. In such years, the 2013 amendments' unitrust provisions offer even greater flexibility to the trustee: the ability to reconvert from a unitrust to an income trust. *Id.* § 62-7-904C(A)(2).

35. *Id.* § 62-7-904C, -904D.

36. *Id.* § 62-7-904I. The trustee's unitrust authority, which stems from the 2013 amendments, presumes that the settlor has not already expressed an intention in the governing instrument to create a unitrust. *See id.* The 2013 amendments describe such a settlor-directed unitrust as an express total return unitrust (ETRU). *Id.* § 62-7-904B(3). Any unitrust limitations set forth by the settlor—in an ETRU, for example—override any unitrust authority otherwise granted by the unitrust statutes. *See id.* § 62-7-904I.

37. *Id.* § 62-7-904(A).

power to adjust.[38] A trustee does not have the power to adjust in certain cases, such as when the power to adjust is prohibited by the settlor or when the trustee can treat beneficiaries impartially without resorting to any power to adjust.[39] In such cases precluding a trustee from having the power to adjust, the "in lieu of" language in the 2013 amendments might also preclude a trustee from having unitrust powers.

A non-interested trustee,[40] or a majority of non-interested co-trustees, with unitrust powers can act without court approval to convert to a unitrust that allocates three to five percent of the trust's value to net income.[41] Thus, the 2013 amendments effectively presume that annual distributions to an income beneficiary within the range of three to five percent of the trust's value treat both the income beneficiary and, inferentially, the principal beneficiary impartially.[42] The trustee may also change the unitrust percentage,[43] as well as the method for valuing the trust's assets.[44] Accordingly, the continuing powers to change the distribution percentage and valuation methods enhance the trustee's flexibility to treat the trust beneficiaries impartially.[45]

The trustee must give written notice to the settlor—if alive—and to any qualified beneficiaries.[46] A qualified beneficiary is defined in SCPC section 62-7-103(12) as a living beneficiary who is entitled to or may permissibly receive distributions of income or principal, or who would be entitled to or may permissibly receive income or principal distributions if the current qualified beneficiaries were deceased or if the trust terminated.[47] Pursuant to SCPC section 62-7-303, any qualified beneficiary under a legal disability may be represented by a beneficiary representative.[48] If at least one qualified beneficiary

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38. *See id.*

39. *See id.* (requiring that a trustee apply section 62-7-903(A) and determining that the trustee is unable to comply with section 62-7-903(B) before utilizing the power to adjust).

40. An interested trustee is defined in section 62-7-904B(6) as a trustee who is a qualified beneficiary, or who is subject to removal by an interested distributee, or who may satisfy legal obligations of support by making distributions of trust income and principal. A non-interested trustee is simply a trustee other than an interested trustee. *See id.* § 62-7-904C(A).

41. *Id.* §§ 62-7-904C(A), -904E(B).

42. For an analogous use of the three-to-five percent range for presumptive reasonableness in a settlor-directed ETRU, see *id.* § 62-7-904N.

43. *Id.* § 62-7-904C(A)(3). The resulting percentage after change must remain within the three to five percent range. § 62-7-904E(B).

44. *Id.* § 62-7-904C(A)(3).

45. *But see supra* note 29 (discussing the potential for greater trustee liability as a consequence of increased flexibility powers). However, as with the power to adjust, *supra* note 29, trustees with unitrust powers are afforded some statutory protection. *See id.* § 62-7-904H; *infra* notes 68–69 and accompanying text.

46. *Id.* § 62-7-904C(A)(3)(b). The trustee must also adopt a written policy defining the unitrust distributions as unitrust amounts, and provide that any changes to the unitrust percentage or the method of trust valuation will be in accordance with the policy. *Id.* § 62-7-904C(A)(3)(a).

47. *Id.* § 62-7-103(12).

48. *Id.* §§ 62-7-303, -904C(A)(3)(b)(ii).

exists, and if no one receiving notice objects in writing within ninety days of the notice, the trustee may proceed with the proposed conversion.[49]

If the trust lacks a non-interested trustee, an interested trustee, or a majority of the interested co-trustees, may nevertheless effect a unitrust conversion or reconversion.[50] The interested trustee must follow the same steps required of a non-interested trustee,[51] and also must appoint a disinterested person—acting in a fiduciary capacity—who will determine for the trustee the unitrust percentages and the valuation methodology, including whether any trust assets will be excluded.[52]

The same process and requirements for a conversion also apply to a reconversion as well as to any change in the valuation method or the unitrust percentage.[53]

Following either the non-interested or interested trustee process, the 2013 amendments allow a trustee to do for a charitable trust—with charities as both income and principal beneficiaries—as the trustee could do for a private trust.[54] Of course, while the notice provisions are somewhat different for charitable trusts—under which the trustee must notify the charity or, in certain cases, the South Carolina Attorney General—the 2013 amendments include some attempted failsafe provisions designed to prevent a trustee from acting to disqualify a charitable trust for tax purposes.[55]

Although a trustee may exercise the unitrust powers after completing the required process,[56] the trustee without "the ability to"—because a qualified beneficiary timely objected after notice—or who "elects not to" exercise such powers may nevertheless seek court approval to convert, reconvert, or change the unitrust percentage or valuation method.[57] Thus, a trustee with unitrust powers may seek court approval to (1) overcome an objection by a qualified beneficiary; or (2) confirm the prudence of the action, even though court approval is not required for the exercise of such powers.[58] When only an interested trustee is serving,[59] the court may—upon the motion of a trustee or person interested in the

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49. *Id.* § 62-7-904C(A)(3)(d).
50. *Id.* § 62-7-904C(B).
51. *Id.* § 62-7-904C(B)(3)(a).
52. *Id.* § 62-7-904C(B)(3)(b). The 2013 unitrust amendments allow real property and certain tangible personal property to be excluded from the valuation of the trust. *Id.* § 62-7-904E(A). Presumably, this exclusion helps to avoid some of those types of valuations and appraisals that can be both subjective and expensive to obtain.
53. *Id.* § 62-7-904C(A)(2)–(3).
54. *Id.* § 62-7-904C(C).
55. *See id.*
56. *Id.* § 62-7-904C(A)–(B).
57. *Id.* § 62-7-904D(A).
58. *Id.*; *id.* § 62-7-904A(D).
59. Or a majority of co-trustees are interested.

trust, or sua sponte—appoint a disinterested person who, acting in a fiduciary capacity, can present relevant information to the court.[60]

A qualified beneficiary may ask the trustee to exercise unitrust powers, and if the trustee refuses, may then seek a court order requiring the trustee to act.[61]

The 2013 unitrust amendments impose requirements for valuation, but allow trustees to have discretion in averaging values over a period of years and excluding certain assets—such as a residence and tangible personal property—from the trust's value.[62]

In determining the unitrust percentage within the three-to-five-percent range, the trustee must take into account certain factors[63] that are reminiscent of those the trustee must consider when deciding whether to exercise the power to adjust.[64]

The 2013 amendments require that unitrust distributions be allocated in accordance with a tiered system.[65]

Conversion to a unitrust, however, does not otherwise affect the trust's provisions for principal distribution.[66] Unitrust distributions are classified as distributions of income.[67]

If acting in good faith, the trustee—as well as any disinterested person appointed to act in a fiduciary capacity when appropriate—is not liable for exercising or failing to exercise unitrust powers.[68] Instead, the exclusive remedy for an affected person is to ask the court to order the trustee to exercise the unitrust power.[69]

3. Express Total Return Unitrusts

The 2013 amendments recognize that a settlor may create a unitrust with its own rules.[70] However, unless the settlor provides otherwise, the 2013 amendments contain some default provisions for these settlor-directed unitrusts, such as prohibitions against changing the unitrust provisions or converting a

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60. *Id.* § 62-7-904D(A)(3). An interested person is defined as a person "having a property right in or claim against a trust estate." *Id.* § 62-1-201(23).

61. *Id.* § 62-7-904D(B)(1)–(3).

62. *Id.* § 62-7-904E(A).

63. *Id.* § 62-7-904E(B).

64. *See id.* § 62-7-904(B).

65. *See id.* § 62-7-904E(C).

66. *Id.* § 62-7-904G.

67. *Id.*

68. *Id.* § 62-7-904H.

69. *Id.* The protection afforded by this section is consistent with the more general protection provided by the pre-2013 amendment in S.C. CODE ANN. § 62-7-932 (2009), which was moved in the 2013 amendments to S.C. CODE ANN. § 62-7-904A (2013 amendments). Section 62-7-904A covers the exercise of discretionary acts by a trustee, which would now include not only the power to adjust—as before—but also unitrust powers. *See* S.C. CODE ANN. § 62-7-904A (2013 amendments).

70. *Id.* § 62-7-904M. For the definition of an ETRU, see *id.* § 62-7-904B(3).

unitrust to an income trust.[71] Any express total return unitrust (ETRU) with a three-to-five-percent payout presumptively apportions receipts between income and principal beneficiaries in a reasonable manner.[72]

4. *Updating the Power to Adjust Limitations*

In addition to enhancing flexibility for the allocation of trust receipts and distributions by introducing unitrust powers to South Carolina law, the 2013 amendments attempted to eliminate what was potentially a significant limitation on the receipt allocation flexibility of the power to adjust, which before the 2013 amendments probably did not take full advantage of the opportunities stemming from a liberalization of federal tax rules.[73]

Before the 2013 amendments, even if a trust met all of the requirements for a power to adjust, SCPC section 62-7-904(C) prohibited a trustee from exercising that power in certain situations.[74] These limitations, largely tax-related, were designed to prevent the unintentional creation of adverse tax consequences.[75]

An explanation of these tax-related limitations must take into account the redefinition of income under Internal Revenue Code (IRC) § 643(b).[76] The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the most recent version of the UPAIA in 1997.[77] South Carolina's version of the UPAIA became effective in 2001.[78] At the time of enactment, federal tax law based trust income and principal allocation rules on traditional notions of categorical apportionment.[79] Thus, South Carolina's tax-related

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71. *Id.* § 62-7-904O(B).

72. *Id.* § 62-7-904N.

73. *See* S.C. CODE ANN. § 62-7-904(C) (2009 & Supp. 2012).

74. *Id.*

75. *See, e.g.*, *id.* § 62-7-904(C)(1) (preventing adjustment that would reduce an income interest qualifying for a federal estate or gift tax marital deduction); *id.* § 62-7-904(C)(2) (preventing adjustment when it would reduce income interest in a trust containing transferred property when transfer is intended to qualify for a gift tax exclusion); *id.* § 62-7-904(C)(5) (preventing adjustment when it would cause individual to be treated as the owner of the trust for income tax purposes); *id.* § 62-7-904(C)(6) (preventing adjustment that would cause trust assets to be included for estate tax purposes in the estate of an individual with the power to appoint or remove a trustee).

76. *See generally* Nenno, *supra* note 16, at pt. III (discussing tax consequences of power to adjust and total-return unitrust statutes).

77. *See* UNIF. PRINCIPAL & INCOME ACT (amended 2008), 7A U.L.A. 363–64 (2006 & Supp. 2013). For a chart of states enacting some version of the power to adjust, see Nenno, *supra* note 16, at app.

78. S.C. CODE ANN. §§ 62-7-401 through -7-432 (Supp. 2001).

79. *See* Nenno, *supra* note 16, at 676–77 (citing I.R.C. § 643(b) (2006)) (noting that before the 2004 § 643 regulations were issued, the tax code definition of income "dated to a time when, under state statutes, dividends and interest were considered income and were allocated to the income beneficiary, whereas capital gains were allocated to the principal of the trust").

limitations on the power to adjust attempted to avoid the use of that power in any way that would run afoul of the federal tax rules.[80]

For example, the original version of the power to adjust statute prohibited adjustments that would reduce the income payable to a spouse from a trust qualifying for the estate or gift tax marital deduction, thereby preventing the diminution of the spouse's income interest and, with regard to the trust itself, avoiding disqualification from federal marital deduction treatment.[81] IRC § 2056(b)(7) requires that the spouse receive all of the income from a qualified terminable interest property (QTIP) trust.[82] A QTIP trust qualifies for the marital deduction under IRC § 2056(b)(7), even if the surviving spouse has no interest in the principal.[83] Although the estate of the deceased spouse benefits from the marital deduction for the full value of the QTIP trust, the remaining principal of the trust is includible in the estate of the surviving spouse for estate tax purposes.[84] Presumably, if the trustee could use the power to adjust to divert receipts that were typically considered income to principal, the spouse would not receive all of the income from the QTIP trust, and the trust would not be entitled to QTIP treatment.[85] Thus, the pre-2013 version of SCPC section 62-7-904(C)(1) eliminated the use of the power to adjust in such cases to prevent the Internal Revenue Service (IRS) from arguing that the power disqualified the trust from QTIP treatment.[86]

Other pre-2013 amendment tax-related limitations on the power to adjust similarly attempted to avoid negative tax consequences for trusts.[87] For instance, the pre-2013 version of SCPC section 62-7-904(C)(4) sought to preserve, without reduction, an income or principal interest to charity by prohibiting a use of the power to adjust that would reallocate "from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside."[88] Another example involved the attempt to avoid adverse tax consequences resulting from the inadvertent

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80. S.C. CODE ANN. § 62-7-904(C) (2009).

81. *Id.*

82. *See* I.R.C. § 2056(b)(7)(A) (2006).

83. *See id.* § 2056(b)(7)(B).

84. *See, e.g.*, Barbara A. Sloan et al., *When Income Isn't 'Income'—The Impact of the New Proposed Regulations Under Section 643*, 94 J. TAX'N 325, 334 (Nov. 2001) (discussing new tax regulations' redefinition of income).

85. *See generally* I.R.C. § 2056(b)(7) (listing the requirements to receive a marital deduction through use of a QTIP trust).

86. S.C. CODE ANN. § 62-7-904(C)(1) (2009). The recent expansion of the federal transfer tax exemption amount, coupled with the introduction of spousal portability of the exemption amount, has significantly diminished these tax concerns for many trusts. *See infra* Part III.B.

87. *See* S.C. CODE ANN. § 62-7-904(C)(4)–(8).

88. *Id.* § 62-7-904(C)(4). This limitation did not apply to a wholly charitable trust—one without a noncharitable beneficiary—because presumably no adverse tax consequence would occur if the trustee exercised a power to adjust in a way that reallocated income to principal, or principal to income, between qualified charitable beneficiaries. *See generally* I.R.C. § 170 (allowing tax deductions for charitable contributions).

creation of a general power of appointment through the exercise of the power to adjust.[89]

However, in 2004, the IRS issued final regulations that redefined "income" under IRC § 643(b).[90] The IRS's redefinition of income generally recognized the wide acceptance by the states of the total return trust and the power to adjust.[91] The redefinition of income in § 643(b) ripples throughout other pertinent sections of the IRC dealing with such issues as qualification for the marital and charitable deductions.[92]

Determining whether the IRS's redefinition of income affected the construction of South Carolina's original tax-related limitations on the power to adjust was problematic because the original version of those limitations—although intended to avoid adverse tax consequences—spoke in general terms and was not limited to situations that created tax problems.[93] Thus, even after the IRS liberalized the tax treatment of the exercise of powers to adjust,[94] the limitations contained in the pre-2013 amendment version of SCPC section 62-7-904(C) arguably continued to apply, even though the adverse tax concerns had been resolved by the IRS amendments.[95] In other words, even though the federal

89. *See* S.C. CODE ANN. § 62-7-904(C)(5)–(8) (2009). Any of these situations might cause a trustee to be treated as the holder of a general power of appointment, which for tax purposes would cause the trustee to be deemed the owner of the property subject to the power. *See* I.R.C. § 2041. Because an adverse tax consequence may not result if such a power was instead exercised by a co-trustee, the pre-2013 amendment version of SCPC section 62-7-104(D) did not restrict the co-trustee from exercising its power to adjust, which is consistent with the theory that a beneficiary, who is also a co-trustee with the discretion to make distributions to or for his or her own benefit, is prohibited by general fiduciary principles from exercising that discretion because that would constitute a conflict of interest. *See* S.C. CODE ANN. § 62-7-814(b)–(d) (2009). Thus, the co-trustee–beneficiary effectively does not have the power to make self-distributions, despite the trust's attempt to create that power. *See id.*; *see, e.g.*, First Union Nat'l Bank of S.C. v. Cisa, 293 S.C. 456, 463, 361 S.E.2d 615, 619 (1987) (finding trustee who was also beneficiary had no power to make self-distributions).

90. *See* Nenno, *supra* note 16, at 677–78 (quoting Treas. Reg. § 1.643(b)-1 (2013)).

91. *See generally* Nenno, *supra* note 16, at 677–78 (quoting Treas. Reg. § 1.643(b)-1 (2013)) (attributing the IRS's redefinition of income to an increasing number of states amending statutes that allow the power to adjust and total return trusts). The amended regulations also recognized the increasing use of the unitrust. *See generally id.* at 678 (quoting Treas. Reg. § 1.643(b)-1 (2013)) (providing a safe harbor for state unitrust statutes).

92. *See generally id.* at pt. III (discussing the implications of the § 643 regulations); Barbara A. Sloan, *§ 643 Regulations: Use of Non-Charitable Unitrusts and Other Issues Raised Under the Final Regulations*, 30 ACTEC L.J. 33 (2004) (discussing the IRS's final regulations redefining income in IRC § 643 and their impact on the modern portfolio theory). For an excellent, concise explanation and discussion of the interaction between the tax concepts of distributable net income and the fiduciary accounting concept of income, see generally Mackenzie P. McNaughton & Stephanie Anne Lipinski Galland, *What You Need to Know About Recent Changes to the Concept of "Trust Income" Under State Law and the Code*, THE PRACTICAL TAX LAWYER, Spring 2007, at 31.

93. *See* S.C. CODE ANN. § 62-7-904(C) (2009).

94. *See supra* notes 90–92 and accompanying text.

95. *See* S.C. CODE ANN. § 62-7-904(C) (2009).

tax law no longer contained certain prohibitions against the exercise of the power to adjust, the state law limitations remained.[96]

Consequently, the 2013 amendments updated the state law limitations with the intention of enabling a trustee to exercise the power to adjust to the full extent recognized by federal tax law, as amended in 2004.[97] Essentially, the updated language now expressly refers to the tax law and allows a trustee to exercise the power to adjust, "but only to the extent that making such an adjustment would cause adverse tax consequences under applicable tax laws and regulations."[98] Presumably, this update removes any concern about whether state law limitations on the power to adjust are more restrictive than the amended federal rules.

B. Decanting

1. Benefits of Decanting

Another significant addition to a trustee's flexibility arsenal came with the adoption of statutory rules allowing a trustee exercising a power of distribution to create a second trust[99]—a concept popularly known as decanting.[100] Decanting allows the trustee to pour assets from the old vessel (the original trust) into a new vessel (the second trust) even if the original trust was irrevocable and did not expressly authorize the creation of a second trust.[101]

Advocates argue that various benefits may be derived from decanting, such as the ability to modify administrative or dispositive provisions to accommodate a change in law,[102] to combine trusts for more efficient administration,[103] to limit

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96. *See id.*

97. *See* S.C. CODE ANN. § 62-7-904(C) (2013 amendments).

98. *Id.*

99. *See id.* § 62-7-816A.

100. Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 253 (2010) ("Trust decanting is the process of distributing a trust estate of an irrevocable trust to the trustee of a new trust."). Although the 2013 amendments use the term "special power to appoint to another trust," the Reporter's Comment to the amendments refers to the trustee's "decanting authority." S.C. CODE ANN. § 62-7-816A, reporter's cmt. (2013 amendments).

101. Simmons, *supra* note 100, at 254 (citing William R. Burford & Patricia H. Char, *Renegotiating the Irrevocable Trust: Amending, Decanting, and Judicially Modifying*, ALI-ABA Course of Study, Westlaw SP053 ALA-ABA 325, 333 (2009)).

102. *See* Simmons, *supra* note 100, at 255 (including "[a]mending administrative provisions" and other dispositve changes to a trust as reasons to decant); Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting—Obtaining and Preserving the Benefits*, 111 J. TAX'N 288, 291 (2009) (listing "[m]odifying administrative provisions" as a possible reason to decant a trust). Although the change in law accommodated by decanting might be tax law or property—non-tax—law, decanting advocates seem most interested in the use of decanting to accomplish beneficial tax consequences. *See, e.g.*, *id.* at 288 (focusing on preserving the tax benefits of decanting).

103. *E.g.*, Simmons, *supra* note 100, at 255. Prior to the 2013 amendments, the combination and division of trusts for efficiency of administration was allowed under South Carolina law. *See,*

the power of interested trustees to avoid adverse tax consequences or conflict of interest issues,[104] to reform scrivener's errors,[105] and to create qualifying trusts for beneficiaries with special needs.[106] Although many of these goals could have been accomplished through modification and reformation prior to the 2013 amendments, these actions typically required court approval and allowed narrower categories of beneficial uses.[107]

A trustee's power to decant stems from the trustee's power under a trust to make distributions of income or principal to one or more beneficiaries.[108] A trustee with such a discretionary power arguably already possessed the authority to accomplish results similar to decanting, even without the 2013 amendments.[109]

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e.g., S.C. CODE ANN. § 62-7-417 (2009) (allowing combining and dividing of trusts). Presumably, decanting would enable the combination of trusts for a broader range of situations than those previously allowed. *Compare id.* ("[A] trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust."), *with* S.C. CODE ANN. § 62-7-816A(b) (2013 amendments) ("The trustee of the original trust may exercise this power [to decant] whether or not there is a current need to distribute principal or income under any standard provided in the original trust.").

104. *See* Simmons, *supra* note 100, at 255; *see also* S.C. CODE ANN. § 62-7-816A(e) (2013 amendments) (prohibiting a trustee who is also a beneficiary of the original trust from decanting the original trust). A trustee with the power to distribute trust property to himself may have a general power of appointment, which can cause tax inclusion problems, as well as fiduciary conflict of interest concerns. *See id.*; *see also* I.R.C. § 2041 (2006) (noting the tax implications of powers of appointment); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.13 (2011) (defining a general power of appointment). *But see supra* note 89 (discussing statutory and case law protections for a trustee who is a beneficiary).

105. *See* Simmons, *supra* note 100, at 255. Prior to the 2013 amendments, reformation of trust documents was allowed under South Carolina law. S.C. CODE ANN. § 62-7-415 (2009). Previously, however, a court had to approve the reformation. *See* S.C. CODE ANN. § 62-7-415 (2009) ("The *court* may reform . . . ." (emphasis added)). Decanting allows for reformation without court involvement. S.C. CODE ANN. § 62-7-816A(a) (2013 amendments).

106. *See* Simmons, *supra* note 100, at 255. Beneficiaries with special needs commonly seek to qualify for governmental assistance, such as Medicaid. If the governmental assistance qualification is means-based, a beneficiary's trust interest may disqualify the beneficiary under the means-based test. *See id.* (indicating that decanting may be necessary to preserve eligibility for government assistance). Simply put, although the practice is greatly nuanced and complex, limiting the beneficiary's distributions to the discretion of the trustee may avoid disqualification. *See id.*

107. *See generally* S.C. CODE ANN. §§ 62-7-410 through -417 (2009) (dealing with various modifications of trusts). Some of these provisions, however, did allow for modification without court approval. *See, e.g.*, *id.* § 62-7-417 (allowing division or combination of trusts without court approval). For a more complete list of possible benefits from decanting, see Simmons, *supra* note 100, at 255.

108. S.C. CODE ANN. § 62-7-816A (2013 amendments).

109. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.13–.14 (2011) (identifying the appointment powers of donees). The Restatement describes the trustee's power as a fiduciary distributive power. *See id.* § 19.14 cmt. f ("[A] trustee or other fiduciary can exercise a fiduciary distributive power such as a power of invasion to create another trust."). The Reporter's Note to comment f shows that such a power is also known as a decanting power. *Id.* § 19.14 reporter's note 4. However, relatively little case law discussed the fiduciary distributive

The discussion presaging the statutory grant of decanting powers involved musings about whether a power holder—without specific restriction by the donor—could exercise the power of appointment by creating a trust with beneficiaries including some or all of the objects of the power of appointment.[110] A general theme seemed to provide that, unless the donor prohibited the creation of a trust, no harm resulted from allowing the power holder to do so.[111] The decanting provisions of the 2013 amendments follow this general theme with specificity.[112]

2. Statutory Decanting Powers

The new version of SCPC section 62-7-816A empowers a trustee with the discretion to distribute principal or income to exercise that discretion by creating a new trust, called a "second trust," without court approval.[113] The trustee may decant regardless of the existence of a current need to distribute income or principal.[114] The trustee of the original trust may serve as trustee of the second trust or may appoint a different trustee for the second trust.[115] By creating the second trust, the decanting trustee is not considered the settlor of the second trust; this is consistent with the treatment of the decanting trustee as the holder of

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power. *Id.* (noting only one case in support of the fiduciary distributive power to create another trust). Although technically distinct, the discretionary power of a trustee to distribute income or principal is analogous to, and in some cases effectively the same as, a power to appoint. The holder of a power of appointment has the discretion to complete a gift from the donor of the power of appointment in accordance with whatever rules for appointment are mandated by the power's donor. *Id.* § 19.14 cmt. a ("Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power has the same breadth of discretion in appointment to permissible appointees that the donee has in the disposition of the donee's owned property to permissible appointees of the power."). Thus, the power holder has a power to complete the gift, but not an accompanying duty. *See id.* By contrast, a trustee with discretion to distribute income or principal has both a power and a duty: without additional requirements imposed by a settlor, the discretionary trustee's duty is to conduct appropriate due diligence to determine whether to make any distributions. *See* S.C. CODE ANN. § 62-7-815(b) (2009) ("The exercise of a power is subject to the fiduciary duties prescribed by this part."). Nevertheless, for purposes of discussing the pre-2013 amendments' theoretical ability to decant, the distinction between the power held by the power of appointment power holder and the discretionary trustee is a distinction without a difference.

110. *See, e.g.*, 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 3.1.2 (5th ed. 2006) (citations omitted) (discussing the exercise of the power of appointment).

111. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 cmt. e ("Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power has the authority to exercise the power by an appointment in trust.").

112. *See* S.C. CODE ANN. § 62-7-816A (2013 amendments).

113. *Id.* § 62-7-816A(a). If, however, the terms of the original trust expressly prohibited the trustee's creation of a second trust, even the 2013 statutes authorizing decanting would not override the settlor's expression that no second trust could be created. *Id.* ("This power [to decant] may be exercised without the approval of a court, but court approval is necessary if the terms of the original trust expressly prohibit the exercise of such power or require court approval.").

114. *Id.* § 62-7-816A(b).

115. *Id.* § 62-7-816A(c).

a special power of appointment, rather than a general power of appointment.[116] Similarly, the trustee of the original trust cannot exercise the decanting power to distribute income or principal to the trustee as beneficiary.[117]

The 2013 amendments preclude a decanting trustee from reducing or eliminating any rights of beneficiaries.[118] Consequently, a beneficiary with a power to withdraw[119] must have no less of a power under the second trust.[120] Nor can a decanting trustee negatively impact the tax status of a beneficiary of the original trust.[121]

Similarly, the decanting trustee cannot expand the rights of an original trust beneficiary.[122] Thus, the trustee cannot accelerate any beneficial right that is delayed or deferred in the original trust.[123] Nor can the decanting trustee reduce or eliminate any ascertainable standard in the original trust that would govern the exercise of the trustee's discretion.[124]

The trustee can, however, exercise the power to decant by creating a second trust with fewer discretionary beneficiaries than the original trust if the beneficiaries who are eliminated did not have vested rights under the original

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116. *Id.* § 62-7-816A(f)(2). Although non-tax factors exist, an important reason for treating the decanting trustee as a special power holder, and not the settlor of the second trust, is for tax purposes: the holder of a general power of appointment is generally considered the owner, and tax consequences may result from an owner transferring its own property. *See* I.R.C. § 2041 (2006); *see also supra* notes 89, 104.

117. S.C. CODE ANN. § 62-7-816A(e) (2013 amendments). This restriction is consistent with existing South Carolina law that prohibits such a distribution as a conflict of interest. *See* S.C. CODE ANN. § 62-7-814 (2009); First Union Nat'l Bank of S.C. v. Cisa, 293 S.C. 456, 461–62, 361 S.E.2d 615, 618 (1987); *supra* note 89. Consistent with the existing law, the new section 62-7-816A(e) allows a co-trustee to exercise the decanting power to benefit the other co-trustee as beneficiary. *See* S.C. CODE ANN. § 62-7-814 (2009); S.C. CODE ANN. § 62-7-816A(e) (2013 amendments). Moreover, if the trust lacks such an independent co-trustee, the court can appoint a special fiduciary to make the decision whether to decant, which is also consistent with the existing law. *See id.*

118. S.C. CODE ANN. § 62-7-816A(d) (2013 amendments).

119. To the extent that the power to withdraw would allow, the beneficiary would be deemed a general power holder: the IRC defines a general power of appointment as giving the power holder the authority to appoint property to the power holder, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. I.R.C. § 2041(b)(1)(C) ("[A] power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.").

120. S.C. CODE ANN. § 62-7-816A(d)(5)(A) (2013 amendments). This limitation does not apply if the original trust retains sufficient property to fund that power of withdrawal to the full extent that the beneficiary could exercise it. *Id.* § 62-7-816A(d)(5)(B).

121. *Id.* § 62-7-816A(d)(3).

122. *See id.* § 62-7-816A(d). Allowing a decanting trustee to enhance the rights of an original trust beneficiary creates the possibility that other beneficiaries will have their rights concomitantly reduced or eliminated, and that the original trust beneficiary might suffer adverse tax consequences. *See id.*

123. *Id.* § 62-7-816A(d)(2).

124. *Id.* § 62-7-816A(d)(6). Reducing or eliminating an ascertainable standard effectively increases the power of the trustee to make a distribution to a beneficiary that the original trust would not allow, thereby enhancing the rights of the beneficiary. *See id.*

trust; otherwise, of course, excluding an original trust beneficiary with vested rights would violate the rule that the decanting trustee cannot reduce or eliminate a beneficiary's rights.[125]

The decanting statute also empowers a trustee to give a power of appointment to any one or more of the beneficiaries of the original trust.[126] The creation of such a power would endue the new power holder—the beneficiary of the original trust—with the discretion to invade income or principal to the same or lesser degree that the beneficiary was able to as a permissible distributee under the original trust.[127] The 2013 amendments even allow the new power holder to exercise the power in favor of an appointee who was not within the group of permissible distributees of the original trust.[128] At first blush, this would seem to contravene the restriction placed on the trustee of the original trust from distributing income or principal outside the class of permissible distributees of the original trust.[129] However, upon deeper examination, this power simply recognizes that if the original trustee had distributed income or principal to a beneficiary of the original trust, the distributee could, as absolute owner, then distribute that property to anyone.[130]

3. *Process for Decanting*

Section 62-7-816A delineates the process a decanting trustee must follow to effect the exercise of the power to appoint principal or income.[131] The decanting trustee must give at least ninety days' notice of the intended decanting to all qualified beneficiaries.[132] The SCPC definition of a qualified beneficiary[133] is based on the concept of a beneficiary being entitled to a trust distribution,

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125. *See id.* § 62-7-816A(a), -816A(d). However, a beneficiary whose potential distributions of income or principal are subject to a trustee's discretion has no vested rights to income or principal, unless and until the trustee decides to make such a distribution. Medlin, *supra* note 2, at 177.

126. *Id.* § 62-7-816A(d)(7). Although relatively little prior law existed, the general view expressed by commentators was that the holder of a power of appointment could exercise the power by creating a new, or second, power of appointment in one or more of the original group of objects. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 19.13–.14 (2011).

127. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. f.

128. S.C. CODE ANN. § 62-7-816A(d)(7) (2013 amendments).

129. *Id.* § 62-7-816A(d)(1).

130. This recognizes the difference between a donor's ability to control property while it is in trust and the inability to control that property once it is distributed outright to a beneficiary, who is then free to deal with the property as it wishes. For an analogous recognition that a beneficiary of a decedent's estate is free to enter into a binding contractual arrangement with another concerning the eventual ownership of that property without court approval, see S.C. CODE ANN. § 62-3-912 (2009) (authorizing so-called binding private settlement agreements).

131. *See* S.C. CODE ANN. § 62-7-816A(g) (2013 amendments).

132. *Id.* § 62-7-816A(g)(2).

133. *Id.* § 62-7-103(12).

whether mandatory or at the discretion of the trustee—the latter of which would be a "permissible distributee."[134] A qualified beneficiary includes current permissible distributees, those beneficiaries who would be permissible distributees upon the termination of the current permissible beneficiaries' potential to receive a distribution, and those who would be a permissible distributee if the trust terminated.[135] The notice must be given in a signed writing and include "the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power."[136] If no qualified beneficiary objects[137] within the ninety-day period, the trustee may proceed with decanting without court approval.[138] The trustee may decant sooner if the qualified beneficiaries waive their right to the ninety-day notice period in writing.[139]

The 2013 amendments empower the trustee to seek court approval for a proposed decanting.[140] The apparent mechanism by which a qualified beneficiary may object to a proposed decanting is to commence a court proceeding;[141] a trustee in such a case could ask that court to nevertheless give its approval. However, in certain cases, a trustee might seek court approval even if no qualified beneficiary objects. As with other fiduciary powers, the exercise of a power is not necessarily a prudent one, and an imprudent exercise of a power could lead to an eventual determination of fiduciary liability. Presumably, if a court approves a trustee's proposed decanting, it would be difficult for a qualified beneficiary to subsequently prevail on a breach of duty claim.

The inclusion of a spendthrift provision in the terms of the trust does not preclude the exercise of the decanting power.[142] Nor do the statutory decanting provisions limit broader decanting powers granted by the terms of the original trust.[143]

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134. *Id.* § 62-7-103(21), (25).

135. *Id.* § 62-7-103(12). The definition of qualified beneficiary recognizes the modern estate planning template of multiple beneficiaries in multiple generations. For example, in the case of a trust giving the trustee discretion to make distributions of income or principal to the settlor's children until the last surviving child dies, then to make distributions of income or principal to the settlor's grandchildren until the last surviving grandchild dies, and then to the School of Law, the children, grandchildren, and the School of Law would all be qualified beneficiaries.

136. *Id.* § 62-7-816A(g)(1).

137. Presumably, the objection would be in the form of a qualified beneficiary's timely commencement of a court proceeding to disapprove of the proposed exercise of the decanting power. *See id.* § 62-7-816A(i).

138. *Id.* § 62-7-816A(a). This assumes that court approval is not otherwise required. *See supra* note 113.

139. *See id.* § 62-7-816A(g)(3).

140. *Id.* § 62-7-816A(i).

141. *Id.*

142. *Id.* § 62-7-816A(f)(3). A spendthrift provision prevents the alienation of a beneficiary's interest in trust property. *Id.* § 62-7-502.

143. *Id.* § 62-7-816A(h).

C. *Elective Share and Family Protection*

1. *Spousal Protection in South Carolina*

Perhaps no other provisions of the SCPC have generated more controversy than those dealing with the spousal elective share. Historically, surviving spouses in South Carolina were protected from disinheritance by common law rights of dower and curtesy. While a dower provided a surviving wife with a life estate in one-third of the real estate owned during the marriage by the deceased husband, curtesy gave the surviving husband a life estate in the lands owned by the deceased wife if the husband and wife had children surviving from their marriage.[144] In 1883, curtesy was abolished,[145] and in 1984, dower was held unconstitutional.[146] Thus, after the abolition of curtesy and until the effective date of the SCPC in 1987, a wife could disinherit her husband, while from 1984 to 1987, a husband could disinherit his wife.

This ability to disinherit a spouse ended with the enactment of the SCPC.[147] For the first time, South Carolina provided a statutory elective share right to a surviving spouse.[148] Similar to the elective share statutes in most states, South Carolina's version was idiosyncratic and significantly different from the Uniform Probate Code (UPC) version.[149] One substantial difference was that South Carolina charged only probate assets with the elective share,[150] while the UPC included nonprobate assets, as well as property owned independently by the surviving spouse—the so-called "augmented estate approach."[151]

Prior to the 2013 amendments, the SCPC calculation was relatively simple. The elective share was one-third of the probate estate—defined as those assets passing under the deceased spouse's will[152]—less claims and administrative

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144. *See* Medlin, *supra* note 4, at 290 n.7.

145. *Id.* (citing Gaffney v. Peeler, 21 S.C. 55, 62 (1883)).

146. Boan v. Watson, 281 S.C. 516, 519, 316 S.E.2d 401, 403 (1984).

147. *See generally* S.C. CODE ANN. § 62-2-201 through -207 (1987) (governing the elective share of a surviving spouse).

148. *See* Medlin, *supra* note 1, at 661.

149. *See* Donna Litman, *The Interrelationship Between the Elective Share and the Marital Deduction*, 40 REAL PROP. PROB. & TR. J. 539, 540 (2005) (stating that elective share statutes vary considerably from state to state). The original UPC version involved an augmented estate calculation, which took into account probate transfers and nonprobate assets, as well as property owned by the surviving spouse. UNIF. PROBATE CODE § 2-202 (1969). Subsequent amendments to the UPC included a complex calculation based in part on the length of the marriage. UNIF. PROBATE CODE §§ 2-202 through -203 (amended 2013), 8 U.L.A. 102–04 (1998 & Supp. 2013).

150. S.C. CODE ANN. §§ 62-2-201 through -202 (2009). The statutory limitation to only probate assets was manipulated as to revocable trusts by South Carolina Supreme Court decisions. *See* Seifert v. S. Nat'l Bank of S.C., 305 S.C. 353, 409 S.E.2d 337 (1991); Dreher v. Dreher, 370 S.C. 75, 82, 634 S.E.2d 646, 649–50 (2006).

151. UNIF. PROBATE CODE § 2-201 through -202 (1969).

152. S.C. CODE ANN. § 62-2-201 through -202 (2009). SCPC section 62-2-202 defines the probate estate to include assets passing by will or by intestacy. *Id.* § 62-2-202. However, if the deceased spouse died intestate, the elective share would not be an issue because, in any event, the

expenses.[153] This calculation rendered a gross amount (gross elective share or gross amount) for the elective share claimant, but the gross amount was reduced by the value of any probate transfers to the surviving spouse.[154] If the gross elective share minus the value of probate transfers to the surviving spouse resulted in a positive amount (net elective share), the spouse could take the net elective share from the probate estate.[155] Thus, the elective share claimant would be entitled to a total of one-third of the value of the deceased spouse's probate estate.[156]

Despite the apparent simplicity of the elective share calculation—which, according to the prior statutory language, excluded nonprobate transfers from any aspect of the calculation—the South Carolina Supreme Court effectively changed the calculation in certain revocable trust situations. In *Seifert v. Southern National Bank of South Carolina*,[157] the South Carolina Supreme Court determined that a revocable *inter vivos* trust created by the deceased spouse was illusory because the settlor retained excessive control over the revocable trust, thereby rendering it invalid.[158] Because the court concluded that the settlor failed to transfer his assets to the revocable trust, which was effectively *void ab initio*, he still owned the assets at the time of his death.[159] Therefore, those assets were probate assets subject to the elective share.[160]

The *Seifert* decision not only affected elective share planning, but possibly called into question the validity of revocable trusts as a planning tool, even when used for purposes other than elective share avoidance and despite the common acceptance of revocable trusts as valid nonprobate transfers.[161] The South Carolina General Assembly responded to this latter concern by enacting SCPC section 62-7-112, which confirmed that revocable trusts were valid

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surviving spouse's intestate share would exceed the one-third amount provided by the elective share statutes. *See id.* § 62-2-102. Granted, the inclusion of assets passing under intestacy could be relevant to the elective share calculation in the event of a partial intestacy. When the testator has a will that does not dispose of all the probate assets, the assets not covered by the will pass by partial intestacy. *See id.* § 62-2-101.

153. *Id.* § 62-2-202.

154. *Id.* § 62-2-201 ("If a married person domiciled in [South Carolina] dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate . . . ."); *id.* § 62-2-207(a) ("In the proceeding for an elective share, all property (including beneficial interests) which passes or has passed to the surviving spouse under the decedent's will or by intestacy . . . is applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the probate estate.").

155. *See id.* § 62-2-207.

156. *Id.* § 62-2-201. Of course, valuation of the probate estate assets could be contentious.

157. 305 S.C. 353, 409 S.E.2d 337 (1991).

158. *Id.* at 355–56, 409 S.E.2d at 338.

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

160. *Id.* For a more thorough discussion of *Seifert* and its impact on the elective share, see Medlin, *supra* note 4, at 289–327.

161. *See id.* at 325–27.

nontestamentary transfers.[162] When the General Assembly enacted South Carolina's version of the Uniform Trust Code,[163] section 62-7-112 was moved to section 62-7-401(c).[164]

Although the legislative reaction to *Seifert* appeared to assuage possible concerns about the general validity of revocable trusts as nonprobate transfers, section 62-7-112 did not prevent the court from continuing to subject the assets of revocable trusts to the elective share.[165]

One of the issues remaining undecided in the wake of *Seifert* involved the treatment of assets passing to the surviving spouse under a revocable *inter vivos* trust. The court in *Seifert* held that, at least in certain cases, the assets of an *inter vivos* revocable trust were includible in the elective share calculation of the probate estate—a total that would be multiplied by one-third to determine the gross value of the elective share before offset for any probate assets received by the surviving spouse.[166] Prior to an amendment in 2010, section 62-2-207 did not appear to specifically include assets passing to the surviving spouse under the revocable trust as an offset against the gross elective share.[167] Thus, at least in theory, the assets of a revocable *inter vivos* trust could be included in the calculation of the surviving spouse's gross elective share, yet the surviving spouse would not be charged for assets received under that revocable trust. While the 2010 amendment to section 62-2-207 attempted to include revocable trust assets passing to the surviving spouse as part of the offset against the gross

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162. S.C. CODE ANN. § 62-7-112 (Supp. 1992) (current version at S.C. CODE ANN. § 62-7-401(c) (2009)). Section 62-7-112 arguably eliminated the court's rationale in *Seifert* by confirming the validity of revocable trusts as nonprobate transfers. *Id.* Although that section provided that "[a] finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse's elective share rights . . . shall not render that revocable inter vivos trust invalid, but would allow inclusion of the trust assets . . . only for the purpose of calculating the elective share," a court considering the *Seifert* issue after the enactment of section 62-7-112 would seemingly have to find the transfer illusory for some reason other than the fact that the *inter vivos* revocable trust was never valid. *Id.*; *Seifert*, 305 S.C. at 356, 409 S.E.2d at 339 ("[N]othing in the Probate Code prohibits a trust, declared invalid as illusory, from reverting to the probate estate and being included in it for elective share purposes."). The South Carolina Supreme Court subsequently recognized this issue in *Dreher v. Dreher*, 370 S.C. 75, 83, 634 S.E.2d 646, 650 (2006), effectively continuing to use the *Seifert* rationale to subject the assets of a revocable *inter vivos* trust to the elective share calculation by finding that "the Dreher Trust is illusory and thus invalid for elective share purposes, but remains valid for all other purposes."

163. Uniform Trust Code, No. 66, 2005 S.C. Acts 280. For a thorough discussion of the substantive provisions of that act, see Medlin, *supra* note 2.

164. *See* S.C. CODE ANN. § 62-7-401(c) (Supp. 2012).

165. *See Dreher*, 370 S.C. at 81, 634 S.E.2d at 649.

166. *See Seifert*, 305 S.C. at 357, 409 S.E.2d at 339 ("Since nothing in §§ 62-2-201 and 62-2-202 prohibits the proceeds of a trust, once declared invalid or illusory from being included in the probate estate, we hold that the proceeds of the trust should be included in Husband's estate for the purpose of calculating Widow's elective share.").

167. *Compare* S.C. CODE ANN. § 62-2-207 (2009) (containing no specific provision that includes assets passing to the surviving spouse through a revocable trust as an offset), *with* S.C. CODE ANN. § 62-2-207 (Supp. 2012) ("A beneficial interest . . . includes an interest as a beneficiary in property passing under the decedent's will to an inter vivos trust created by the decedent.").

elective share, no court has considered whether the language of the amendment accomplished that goal.[168]

2. A New Elective Share Calculation

The 2013 amendments substantially change the elective share calculation methodology and clarify some of the previously unclear issues.

Most significantly, the 2013 amendments expand the list of assets included in the section 62-2-207 calculation of the offset against the gross elective share, as calculated under sections 62-2-201 and 62-2-202.[169] The surviving spouse will now be charged with probate assets, as well as certain specified nonprobate assets received as a result of the deceased spouse's death: those nonprobate assets passing under a revocable *inter vivos* trust or by a beneficiary designation in a life insurance policy or retirement plan.[170] Thus, a deceased spouse may provide for the surviving spouse, at least in part, by nonprobate transfers that will reduce the gross elective share amount.[171]

> Example 1. A deceased spouse's probate estate is valued at $750,000. Multiplying that amount by one-third renders a gross elective share of $250,000. The deceased spouse's will devises a house worth $100,000 to the surviving spouse, who is also the beneficiary of the deceased spouse's life insurance proceeds of $60,000. The value of the house and the life insurance proceeds are charged against the gross elective share, leaving the surviving spouse a net elective share of $90,000, which can be taken from the probate estate.

> Example 2. A deceased spouse's probate estate is valued at $750,000. The deceased spouse was the settlor of a revocable *inter vivos* trust worth $150,000. The surviving spouse is not a beneficiary of the revocable trust. If a court—pursuant to *Seifert*, *Dreher*, and apparently section 62-7-401(c)—includes the value of the revocable trust for

168. S.C. CODE ANN. § 62-2-207 (Supp. 2012).

169. S.C. CODE ANN. § 62-2-207 (2013 amendments); *see also id.* §§ 62-2-201 through -202.

170. *Id.* § 62-2-207(a). The 2013 amendments do not amend the language of section 62-7-401(c), the successor to section 62-7-112; thus, a court may ostensibly—pursuant to *Dreher*—continue to include the assets of a revocable *inter vivos* trust in the total amount subject to the gross elective share. *See* S.C. CODE ANN. § 62-7-112 (Supp. 1992) (current version at S.C. CODE ANN. § 62-7-401(c) (2009)); S.C. CODE ANN. § 62-7-401(c) (2013 amendments); *Seifert*, 305 S.C. at 357, 409 S.E.2d at 339; *Dreher*, 370 S.C. at 81, 634 S.E.2d at 649.

171. Whether this system is any fairer than the previous method is debatable. Perhaps the fairest system, a UPC-like augmented share system, *see supra* notes 149–51 and accompanying text, involves extensive administrative and potential litigation costs, as well as complications, which could effectively constitute an equitable distribution system at death. Presumably, the General Assembly rejected this approach when enacting the 2013 amendments because, inter alia, clawing back previous nonprobate transfers from third parties could be problematic, if not impracticable, especially if the nonprobate transferee is in another jurisdiction.

purposes of the elective share calculation, the "deemed" probate estate would be $900,000. Multiplying that amount by one-third renders a gross elective share of $300,000. The deceased spouse's will devises a house worth $100,000 to the surviving spouse, who is also the beneficiary of the deceased spouse's life insurance proceeds of $60,000. The value of the house and the life insurance proceeds are charged against the gross elective share, leaving the surviving spouse a net elective share of $140,000, which can be taken from the probate estate.

Example 3. A deceased spouse's probate estate is valued at $750,000. The deceased spouse was the settlor of a revocable *inter vivos* trust worth $150,000. The surviving spouse is a beneficiary of the revocable trust, with that beneficial interest being valued at $30,000. If a court—pursuant to *Seifert*, *Dreher*, and apparently section 62-7-401(c)—includes the value of the revocable trust for purposes of the elective share calculation, the deemed probate estate would be $900,000. Multiplying that amount by one-third renders a gross elective share of $300,000. The deceased spouse's will devises a house worth $100,000 to the surviving spouse, who is also the beneficiary of the deceased spouse's life insurance proceeds of $60,000. The value of the house, the life insurance proceeds, and the value of the beneficial interest in the revocable trust are charged against the gross elective share, leaving the surviving spouse a net elective share of $110,000, which can be taken from the probate estate.

Example 4. A deceased spouse's probate estate is valued at $750,000. The deceased spouse was the settlor of a revocable *inter vivos* trust worth $150,000. The surviving spouse is a beneficiary of the revocable trust, with that beneficial interest being valued at $141,000. If a court—pursuant to *Seifert*, *Dreher*, and apparently section 62-7-401(c)—includes the value of the revocable trust for purposes of the elective share calculation, the deemed probate estate would be $900,000. Multiplying that amount by one-third renders a gross elective share of $300,000. The deceased spouse's will devises a house worth $100,000 to the surviving spouse, who is also the beneficiary of the deceased spouse's life insurance proceeds of $60,000. The value of the house, the life insurance proceeds, and the value of the beneficial interest in the revocable trust are charged against the gross elective share, leaving the surviving spouse a net elective share of zero because the total of the nonprobate assets charged against the surviving spouse exceeds the gross elective share.

As demonstrated by Examples 3 and 4, the 2013 amendments allow the deceased spouse to use the revocable *inter vivos* trust to provide for the surviving spouse and to accomplish a consistent treatment of the value of the trust and the

beneficial interest of the surviving spouse.[172] Both values are included in the elective share calculation: the former for purposes of the gross elective share, and the latter for calculation of the offset reducing the gross elective share.[173]

3. *Right to Demand Conversion to Unitrust*

The 2013 amendments provide another innovation to South Carolina elective share law: giving the surviving spouse the right to demand the conversion of a trust to a unitrust.[174]

The SCPC allows a deceased spouse to partially avoid the elective share by devising to the surviving spouse a beneficial interest in a trust that qualifies for federal tax purposes as a QTIP trust.[175] Generally, a trust qualifies for QTIP treatment if the surviving spouse is entitled to income for life and does not share the income with anyone.[176] Section 62-2-207, which reduces the gross elective share by the value of the property interest received by the surviving spouse,[177] has a special valuation rule that applies to a beneficial interest qualifying for federal tax QTIP treatment: for purposes of offsetting the gross elective share, the surviving spouse is charged with the full value of the trust property subject to the beneficial interest, even though that beneficial interest is for income only and does not include an entitlement to trust principal.[178] Clearly, a beneficial interest in only income is not worth the full value of the underlying trust property,[179] yet section 62-2-207 deems the income interest to be worth the full value of the underlying property for elective share offset calculation purposes.[180] Thus, a

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172. *See* S.C. CODE ANN. §§ 62-2-207, -401(c) (2013 amendments).

173. *See id.* §§ 62-2-201 through -202, -207. As discussed previously, such a consistent treatment was not certain in the wake of the *Seifert* and *Dreher* decisions before the 2013 amendments. *See supra* notes 161–168 and accompanying text.

174. S.C. CODE ANN. § 62-2-207(c)(3) (2013 amendments). See *supra* Part II.A.2. for a discussion of unitrusts.

175. *See* Medlin, *supra* note 1, at 662 n.231 (citing S.C. CODE ANN. § 62-2-207 (1976)).

176. I.R.C. § 2056(b)(7)(B) (2006). Of course, as is typical of tax rules, the actual requirements for QTIP treatment are more complex and detailed. *See* § 2056.

177. S.C. CODE ANN. § 62-2-207(a) (2013 amendments). As discussed previously, prior to the 2013 amendments, only probate assets were included in this amount, but the 2013 amendments include certain specified nonprobate transfers as well. *See supra* notes 169–71 and accompanying text.

178. *See* S.C. CODE ANN. § 62-2-207(c)(1) (2013 amendments) ("For purposes of this provision, the value of the electing spouse's beneficial interest in property which qualifies for the federal estate tax marital deduction pursuant to § 2056 of the IRC, as amended, . . . must be computed at the full value of the qualifying property.").

179. The actual value of the income interest—similar to a life estate in property not in trust—is dependent on the life expectancy of the beneficiary. The IRC provides tables that delineate these life expectancies and the related values of the life estates. *See* I.R.C. § 7520 (2006).

180. S.C. CODE ANN. § 62-2-207(c)(1) (2013 amendments). This section thus provides a simpler—albeit inexact—method of valuing the beneficial interest. This simpler treatment harkens back to the method for the admeasurement of dower: if the wife so chose, a life estate in one-third of the deceased husband's real estate was deemed to be one-sixth of the property's value. Estate of

deceased spouse could partially avoid the full impact of the elective share by giving the surviving spouse a QTIP interest, which would result in the surviving spouse being charged with a greater value than what was actually received.[181]

Regardless of whether the value methodology for QTIP interests under section 62-2-207 is fair, the recent economic conditions surrounding low fixed-income returns[182] adds additional difficulty for a surviving spouse with only an income interest. In the past, an income interest might produce a decent annual return for the surviving spouse—for example, five percent. The more recent economic conditions make it difficult to guarantee such a return for an income beneficiary, unless the trustee uses tools such as the power to adjust or the unitrust.[183] By giving the surviving spouse the right to demand a unitrust conversion for a QTIP interest, a more reasonable three-to-five-percent return for that income interest can be assured.[184] However, by allowing the surviving spouse to demand conversion to a unitrust, the value of the principal beneficiaries' (or remaindermen's) interests will likely be diminished.[185] In effect, the principal beneficiaries would be giving back some of the benefit derived from the valuation methodology under section 62-2-207.[186]

Kennedy v. United States, 302 F. Supp. 343, 346 (D.S.C. 1969) ("[I]n South Carolina, . . . it is traditionally assumed that the widow may, by way of dower, claim either a one-third life estate in her deceased husband's lands or a one-sixth interest in fee simple."); Geiger v. Geiger, 57 S.C. 521, 529, 35 S.E. 1031, 1035 (1900) ("The rule is to allow *one-sixth absolutely* in lieu of one-third for life.").

181. *See* Medlin, *supra* note 1, at 662 n.231 (citing S.C. CODE ANN. § 62-2-207 (1976)). This "semi-avoidance" technique also allows the deceased spouse to control the remainder interest, which would not be possible for probate assets taken by the surviving spouse pursuant to section 62-2-207. *See* S.C. CODE ANN. § 62-2-207 (2013 amendments).

182. *See supra* notes 17–18 and accompanying text.

183. *See supra* Part II.A.

184. *See* S.C. CODE ANN. § 62-2-207(c)(3) (2013 amendments). This statute provides the spouse with "the right to require a conversion of the income trust to a total return unitrust as defined in the South Carolina Uniform Principal and Income Act." *Id.* Presumably, the trustee with the unitrust powers would have the discretion to choose the appropriate unitrust percentage, within the statutory three-to-five-percent range, as with other statutory unitrusts. *See id.* § 62-7-904E(B). And presumably, a surviving spouse who is dissatisfied with the chosen percentage may seek redress, subject to the protections afforded to a trustee with unitrust powers. *See id.* § 62-7-904H; *supra* notes 68–69 and accompanying text.

185. *See generally id.* § 62-7-904P reporter's cmt. (discussing the background for enacting the UPIA and recognizing that "[t]here is a fundamental distinction . . . between needs of trust income beneficiaries and those of trust principal or remainder beneficiaries" that may cause the value of those various interests to be at odds with one another).

186. *See generally supra* notes 174–181 and accompanying text (discussing QTIP treatment and the valuation methodology under section 62-2-207).

4. Classification and Distribution Rules

The 2013 amendments to the elective share statutes clarify some issues that remained unresolved since the original implementation of the elective share right.

Two connected issues involve (1) whether the elective share, once allowed, is a fractional share or a pecuniary share, and (2) whether the elective share is satisfied with date of death or date of distribution values of probate property.

In the parlance of estate planners, a fractional share entitles the surviving spouse to one-third of each asset of the probate estate, while a pecuniary share entitles the surviving spouse to a dollar value.[187] Prior to the 2013 amendments, the elective share statutes arguably created a fractional share for the surviving spouse because section 62-2-201 described the elective share as one-third of the probate estate.[188] However, section 62-2-207(b) provided that the elective share would be "satisfied from the probate estate with devises abating in accordance with section 62-3-902 [South Carolina's order of abatement statute]."[189] The statutory order of abatement specifies which assets are more hierarchically protected when the probate estate is insufficient to satisfy the testator's intended devises: generally, specific devises are most protected, followed by pecuniary devises, and then residuary devises.[190] The reference in section 62-2-207 to the order of abatement supports a counterargument that the pre-2013 amendment's elective share was pecuniary, rather than fractional: if the elective share was fractional, giving the surviving spouse a one-third interest in every probate asset, reference to the order of abatement would be unnecessary.[191]

Whether a share is fractional or pecuniary could affect whether the surviving spouse's elective share is entitled to income or appreciation during the estate's administration,[192] particularly when juxtaposed with the issue of when the assets used to satisfy the elective share are valued. If assets satisfying the elective share are valued at the date of death, then presumably no consideration would be

187. *See* S. Alan Medlin, Howard M. Zaritsky & F. Ladson Boyle, *Construing Wills and Trusts During the Estate Tax Hiatus in 2010*, 36 ACTEC L.J. 273, 276–78 (2010); F. Ladson Boyle, *Distinguishing Pecuniary and Fractional Devises*, 5 PROB. PRAC. REP., May 1993, at 1.

188. *See* S.C. CODE ANN. § 62-2-201 (2009).

189. *Id.* § 62-2-207(b).

190. *See id.* § 62-3-902(a)(2). A demonstrative devise is a devise of a total value to be paid to the extent possible from a specific fund or source. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.1(3) (1999). The order of abatement treats a demonstrative devise as a specific devise, to the extent the specific fund or source exists, and as a general devise for the difference. *See* S.C. CODE ANN. § 62-3-902(a)(2) (2009).

191. Thus, although the pre-2013 amendment elective share was most likely fractional, the existence of the counterargument created possible confusion. The rebuttal to the counterargument would be that reference to the order of abatement was necessary, even if the elective share was fractional, because the deceased spouse's will may have devised some probate assets to the surviving spouse so that the surviving spouse would not need to take a one-third share in each of the remaining probate assets, thereby requiring the spouse to resort to the order of abatement.

192. Whether a share is subject to expenses and depreciation may also have an effect.

given to appreciation or depreciation in value. Because neither the fractional versus pecuniary nor the date of death versus date of distribution issues were specifically addressed in the pre-2013 version, some uncertainty persisted.[193]

The 2013 amendments attempt to clarify those issues. Section 62-2-207(c)(2) provides that the elective share is pecuniary, and assets used to satisfy the elective share are valued at the date of distribution.[194] Therefore, the amount of the elective share is determined as a dollar amount according to the estate's value at the deceased spouse's date of death, and the assets used to pay that dollar amount are valued at the date of distribution.[195]

5. Time to Assert

The 2013 amendments eliminate a potential time limit trap for the electing spouse. Prior to the amendments, the surviving spouse had to file a summons and petition within the later of eight months after the deceased spouse's death or "six months after the probate of the decedent's will."[196] The 2013 amendments add a third leg to the "later of" alternatives: "thirty days after a surviving spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of [the] decedent's will."[197] Under the various time limits of the SCPC, a will proponent might present a will for probate (new will) later than the pre-2013 amendments time limit for commencing an elective share claim.[198] In such a case, the surviving spouse

193. *See generally* S.C. CODE ANN. § 62-2-207 reporter's cmt. (2013 amendments) (noting how the 2013 amendments clarify many of these issues).

194. *Id.* § 62-2-207(c)(2). Because the pre-2013 amendment elective share was most likely fractional, *see supra* note 191, the specific provision of the 2013 amendments treating the elective share as pecuniary is perhaps better described as an amendment, rather than a clarification.

195. *Id.* The resulting matrix could still lead to positive and negative consequences to the surviving spouse and the other devisees. For example, the surviving spouse's share will not be liable for costs and expenses during administration, other than funeral and administration expenses, and enforceable claims, *see id.* § 62-2-202, but would not benefit from any appreciation of an asset between date of death and date of distribution. Of course, this matrix could change based on individual facts and circumstances involving individual probate assets.

196. S.C. CODE ANN. § 62-2-205(a) (Supp. 2012). Since the term "probate" is not specifically defined, it might mean the qualification of the decedent's will as valid, or the administration of the decedent's estate; both meanings are common to probate jargon. *See, e.g.*, BLACK'S LAW DICTIONARY 1239 (8th ed. 2004) (providing that one definition of probate is "[t]o administer (a decedent's estate)"). If the latter meaning applied to pre-2013 amendment section 62-2-205, then the six months would expire after the conclusion of the administration of the decedent's estate, which would not seem to be a reasonable result. The 2013 amendment attempts to make it clear that the former meaning applies—the qualification of the decedent's will as valid—by commencing the six-month leg of the time limit at the "informal or formal probate of the decedent's will." S.C. CODE ANN. § 62-2-205 (2013 amendments). Whether the attempt was successful is problematic. *See generally id.* § 62-1-201(17), (22) (defining formal and informal proceedings).

197. S.C. CODE ANN. § 62-2-205(a) (2013 amendments).

198. *Compare* S.C. CODE ANN. § 62-2-205 (2009) (describing the time limits for filing a petition to receive the elective share), *with* S.C. CODE ANN. § 62-1-308 (2013 amendments) (governing appeals from the probate court), *id.* § 62-3-108(A)(1)–(2) (describing time limits for

might have eschewed an elective share because the decedent either appeared to die intestate or the will being administered was satisfactory to the surviving spouse. If the new will failed to devise a satisfactory amount to the surviving spouse, it might have been too late to then commence an elective share proceeding. The 2013 amendments allow the surviving spouse some time to assert an elective share claim in any new will situation.[199]

D. Revocation by Divorce

The SCPC includes several sections that revoke a testator's will—in whole or in part—based on assumptions about the testator's intent, rather than the expression of an intent to revoke.[200] These situations include a testator who is divorced after the execution of a will (the revocation by divorce statute),[201] a testator who marries after the execution of a will and is survived by that spouse,[202] and a testator who has a child after the execution of a will.[203] Because these statutes are based on presumptions about a testator's intentions, they are rules of construction that can be overridden by the testator's expression of a different intention.[204] When applicable, these statutes revoked a testator's will[205] to the extent necessary to omit an ex-spouse, give an intestate share to a surviving spouse married after the will's execution, and give an intestate share to a child born or adopted after the will's execution.[206]

Prior to the 2013 amendments, the revocation by divorce statute applied only to devises under a testator's will.[207] Although section 62-7-607 applied similarly to revocable trusts by assuming that a deceased settlor did not want to transfer revocable trust property to an ex-spouse, South Carolina law did not otherwise presumptively revoke any other nonprobate transfer to an ex-spouse.[208] Because substantial value transfers today by nonprobate means, the lack of a statutory presumption revoking nonprobate transfers other than revocable trusts created a trap for the unwary.

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commencing informal proceedings), *and id.* § 62-3-412 (describing time limit for commencing formal proceedings).

199. The 2013 amendments make similar adjustments to the applicable time period for asserting an omitted spouse's claim, S.C. CODE ANN. § 62-2-301(c) (2013 amendments), and an omitted child's share, *id.* § 62-2-302.

200. The ability to revoke is a right granted by statute. *See id.* § 62-2-506 (requiring an expression of intent to revoke accompanying an act of revocation).

201. *See* S.C. CODE ANN. § 62-2-507 (2009); *id.* § 62-7-607.

202. *Id.* § 62-2-301.

203. *Id.* § 62-2-302.

204. *See id.* §§ 62-2-301(a)(1), -302(a)(1).

205. And, in the case of S.C. CODE ANN. § 62-7-607, a revocable trust.

206. *See supra* notes 201–03.

207. S.C. CODE ANN. § 62-2-507 (2009).

208. *See id.* § 62-7-607.

> Example 5. Testator, while married, executes a will naming Spouse as devisee and obtains a $1 million life insurance policy naming Spouse as beneficiary. Testator and Spouse then divorce. Spouse thus becomes Ex-Spouse. Testator dies without changing the will or the life insurance beneficiary designation. Prior to the 2013 amendments, section 62-2-507 would presumptively revoke the testamentary devise to Ex-Spouse, but not the life insurance beneficiary designation. Ex-Spouse would receive a $1 million windfall, unless Testator intended for Ex-Spouse to remain the life insurance beneficiary, even after the divorce.

The 2013 amendments broaden the scope of section 62-2-507 to include not only wills, but also nonprobate transfers.[209] As amended, that section presumptively revokes any revocable transfer, whether probate or nonprobate.[210]

Although section 62-2-507, as amended, eliminates the trap for the testator and nonprobate transferor who would not want an ex-spouse to benefit, a testator and nonprobate transferor who wants to benefit an ex-spouse must express that intention.[211]

E. Survivorship Requirement

Before the 2013 amendments, South Carolina followed the basic common law rule that a beneficiary had to survive the decedent to take from a testator's probate estate or by revocable nonprobate transfer.[212] However, section 62-2-104 carved out an exception for intestacy: the heir had to survive the intestate decedent by at least 120 hours.[213] South Carolina followed the Uniform Simultaneous Death Act (USDA) for situations in which it could not be determined whether the decedent or a beneficiary survived—for example, in a common disaster.[214]

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209. S.C. CODE ANN. § 62-2-507 (2013 amendments). As a result, section 62-7-607 becomes redundant because section 62-2-507 now presumptively revokes revocable trusts as one of the nonprobate transfers also covered by that section. *See id.* § 62-2-507(c); *id.* § 62-7-607.

210. *Id.* § 62-2-507(c).

211. *See id.* Of course, best lawyering practices would not rely on rules of construction, which can change or be applied in a way that renders a result different from actual intent, but would proactively and specifically express the intent of the testator and nonprobate transferor to avoid having to resort to rules of construction.

212. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. a (1999) ("Because testamentary transfers take place at the testator's death, not when the will was executed, they cannot be made to individuals who fail to survive the testator.").

213. S.C. CODE ANN. § 62-2-104 (2009). This rule did not apply if an escheat would result. *See id.* ("This section is not to be applied where its application would result in a taking of the intestate estate by the State under [s]ection 62-1-105.").

214. *See id.* § 62-1-501 through -508. The most recent iteration of South Carolina's version of the USDA could be found in sections 62-1-501 through -508. That iteration followed the 1940 version of the USDA. *See* UNIF. SIMULTANEOUS DEATH ACT §§ 1–11 (1940), 8B U.L.A. 164 (2001). The new USDA version contains survivorship requirements similar to those in the 2013

The 2013 amendments apply the policy of section 62-2-104 to all transfers—both probate and nonprobate—and require a probate or nonprobate beneficiary to survive the decedent by 120 hours, which must be proven by clear and convincing evidence.[215] Because the amendments to part 5 of article I operate as a rule of construction, the 120-hour survivorship requirement would not apply if the decedent indicates a contrary intent.[216] Similarly, the 120-hour survivorship requirement would not apply if its application would cause the invalidation of a vested right, effect a negative tax consequence, or cause an escheat.[217]

F. Disclaimers

The SCPC allows any person, or one who has authority to act on a person's behalf, to disclaim any interest in property transferred by any means whatsoever to the disclaimant.[218] Disclaimers are used for tax purposes[219] and non-tax purposes, such as the attempted avoidance of the disclaimant's creditors.[220] However, to be effective for tax purposes, a disclaimer must not only be effective under state property law, but must also satisfy the requirements of the applicable federal tax law.[221] In some states, the failure to satisfy tax requirements while accomplishing a disclaimer for state property law purposes could lead to the worst possible result for the disclaimant: the disclaimant would have effectively renounced any interest in the property for ownership purposes, but would still suffer the adverse tax consequences the disclaimant intended to avoid. Before the 2013 amendments, such a disastrous result was apparently not possible in South Carolina because of two appellate decisions.[222] In the *In re*

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amendments. *See* UNIF. SIMULTANEOUS DEATH ACT § 1–12 (1993), 8B U.L.A. 147 (2001). Because of S.C. CODE ANN. § 62-2-104, the South Carolina version of the USDA was irrelevant for intestacy situations.

215. *See* S.C. CODE ANN. §§ 62-1-501 through -504 (2013 amendments).

216. *See id.* § 62-1-506.

217. *Id.* § 62-1-506(3), (5)–(6).

218. *Id.* § 62-2-801(c)(1). Prior South Carolina law was similar in many respects, but also differed in several significant areas. *See generally* S.C. CODE ANN. §§ 21-37-10 through -80 (1976) (repealed 1986) (governing the disclaiming of property interests).

219. *See, e.g.*, I.R.C. § 2518 (2006) (treating a disclaimed interest as if it had never been transferred to the disclaimant). The discussion of the use of the disclaimer as a tax tool is beyond the scope of this Article. For a discussion of the history of disclaimers in South Carolina, see Albert L. Moses, *Renunciations and Disclaimers Under South Carolina Law*, 31 S.C. L. REV. 667 (1980).

220. For an example of a disclaimer for other than tax purposes or the avoidance of creditors, see *Pate v. Ford*, where the decedent's son disclaimed his interest in an attempt to accelerate the distribution of the estate to the decedent's grandchildren. 293 S.C. 268, 280, 360 S.E.2d 145, 152 (Ct. App. 1987), *rev'd*, 297 S.C. 294, 376 S.E.2d 775 (1989). The concept of an effective disclaimer, whether for tax or other purposes, has been muddied by the United States Supreme Court. Drye v. United States, 528 U.S. 49, 52 (1999) (holding that a disclaimer was ineffective to avoid a federal tax lien).

221. *See, e.g.*, I.R.C. § 2518 (providing federal tax provisions for disclaimers).

222. *See infra* notes 223–226 and accompanying text.

Will of Hall[223] case, the state court of appeals concluded that a disclaimer had to satisfy the tax law requirements to be valid in South Carolina, even for non-tax purposes.[224] In *In re Estate of Holden v. Holden*,[225] the state court of appeals construed the applicable disclaimer section of the SCPC to require compliance with federal tax law.[226] Under this view, a disclaimant who fails to complete a qualified disclaimer for federal tax purposes does not relinquish ownership of the property because the attempted disclaimer fails for state law purposes as well.[227] This at least avoids the worst case scenario of having a disclaimer deemed invalid for tax purposes, yet valid for state law purposes. In such a case, the disclaimant would fail to accomplish the desired tax result, yet also lose ownership of the property—a disclaimant's nightmare.

The 2013 amendments clarify not only that disclaimers qualifying under the IRC are valid for state law purposes as well—unless otherwise barred by state law[228]—but also that, despite the apparent result under *Hall* and *Holden*, disclaimers could be valid for state law purposes, even if the federal tax requirements were not met.[229] A disclaimer made for the avoidance of creditors

223. 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995).

224. *See id.* at 192, 456 S.E.2d at 441 (quoting I.R.C. § 2518 (2006)) (citing S.C. CODE ANN. § 12-16-1910 (Supp. 1993)). The opinion pointed to a stated purpose of the applicable state law disclaimer statute as the basis for dovetailing federal tax law requirements with state law validity. *Id.* at 190 n.1, 456 S.E.2d at 440 n.1 (quoting S.C. CODE ANN. § 62-2-801(f) (1987)) ("It is the intent of the legislature of the State of South Carolina by this provision to clarify the laws of the state with respect to the subject matter hereof in order to ensure the ability of persons to disclaim interests in property without the imposition of federal and state estate, inheritance, gift, and transfer taxes."). The court apparently disregarded the express language of the state law disclaimer statute. *See id.* at 192, 456 S.E.2d at 441 (quoting S.C. CODE ANN. § 62-2-801 (Supp. 1993)) (providing that a disclaimer can be made according to the statute "[i]n addition to any methods available under existing law, statutory or otherwise"). The gist of the opinion was to limit valid disclaimers to only those complying with the state disclaimer statute, and to interpret that statute to include only those disclaimers that qualified under I.R.C § 2518. Thus, although the result in this case may be proper, the court may have unnecessarily restricted the application of the state law disclaimer statute to only those situations qualifying for tax purposes. For a discussion of disclaimers in South Carolina prior to the disclaimer statute, see Moses, *supra* note 219, at 671–72 (citations omitted).

225. 336 S.C. 456, 520 S.E.2d 322 (Ct. App. 1999).

226. *See id.* at 460–61, 520 S.E.2d at 324–25 (quoting I.R.C. § 2518(b) (1994)); S.C. CODE ANN. § 12-16-1910 (Supp. 1998); Treas. Reg. § 25.2518–2(e)(1) (1997)).

227. *See id.* (quoting I.R.C. § 2518(b); S.C. CODE ANN. § 12-16-1910; Treas. Reg. § 25.2518–2(e)(1)).

228. S.C. CODE ANN. § 62-2-801(c)(10) (2013 amendments).

229. *See id.* § 62-2-801(a). The separation of tax requirements from state law disclaimer requirements is further demonstrated by the clarification that a disclaimer for non-tax purposes can be made within a reasonable time of the transfer, with a presumption—based on tax law—that nine months is a reasonable time within which to disclaim. *See id.* § 62-2-801(c)(2) ("Unless barred, a disclaimer must be made within a reasonable time after the disclaimant acquires actual knowledge of the interest. A disclaimer is conclusively presumed to have been made within a reasonable time if made within nine months after the date of effectiveness of the transfer as determined under subsection (d)(3).").

is not a fraudulent transfer if the disclaimer complies with the requirements of the disclaimer statute.[230]

The 2013 amendments also clarify when a fiduciary or representative can disclaim and the process for doing so.[231] Notably, a parent can disclaim on behalf of a child, unless the disclaimer results in the disclaimed interest passing outright to the parent.[232]

G. Multiple Party Accounts

The 2013 amendments continue the statutory recognition of multiple party accounts held in a financial institution, covering the basic categories of the rights of parties among themselves—both during lifetime and at death—and the responsibilities of financial institutions.[233] The amended multiple party account provisions simplify, clarify, and enhance the pre-amendment rules.

1. Types of Accounts and Persons Involved

Under the 2013 amendments, a party is a person who has a present right to be paid from the account.[234] A party is not an agent or a beneficiary, as neither is presently entitled to payment from the account.[235] An account may be for a single party or for multiple parties.[236] Of course, the sole accountholder of a single-party account may withdraw some or all of the funds in the account,[237] and any funds remaining at the accountholder's death will pass as a probate asset.[238] If an account has multiple parties, each party is entitled to withdraw from the account to the extent of that party's net contribution, "unless there is

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230. *Id.* § 62-2-801(c)(7).

231. *See id.* § 62-2-801(e)(1)–(3).

232. *Id.* § 62-2-801(e)(4). The restriction prohibits a parent with a conflict of interest from acting on behalf of a child, as do similar restrictions on a parent's representation of issue found elsewhere in the SCPC. *See* S.C. CODE ANN. §§ 62-1-403(2)(iii), 62-3-1102(1), 62-7-303(a)(6) (2009).

233. S.C. CODE ANN. §§ 62-6-101 through -307 (2013 amendments).

234. *Id.* § 62-6-101(7). Although the amended section 62-1-201(32) defines a person to include entities other than individuals, the amended multiple-party account rules do not apply to accounts established for a business or charitable purpose, or for a fiduciary account when the fiduciary relationship is established other than by the terms of the account—for example, a bank account established by the trustee of a testamentary trust. *See id.* §§ 62-1-201(32), 62-6-102.

235. *See id.* § 62-6-101(7). An agent is not entitled to the account, either presently or subsequently. *See id.* § 62-6-201(C). A beneficiary may be entitled to the account subsequently. *See id.* § 62-6-201(B).

236. *Id.* § 62-6-103(a).

237. *See id.* § 62-6-201(A). Because the financial institution and the accountholder may agree to other contractual terms of the account, the withdrawal by a single party may have consequences beyond the scope of article 6, such as a premature withdrawal penalty. *See id.* § 62-6-106.

238. *Id.* § 62-6-202(c).

clear and convincing evidence of a different intent."[239] Upon the death of a party, that party's net contribution in a multiple-party account passes to the remaining parties in equal shares, unless the terms of the account specify a non-survivorship arrangement.[240] However, if the deceased party is the spouse of a surviving party, the deceased party's net contribution passes to the surviving spouse to the exclusion of any non-spouse party.[241]

A party may designate an agent, or a beneficiary, or both to an account.[242] An agent is authorized to make transactions for a party,[243] but has no beneficial right to the account.[244] Thus, the 2013 amendments recognize that some parties may wish to create what may be described as a "convenience account," having an agent who is able to act for the party but not be an owner of the funds.[245] Unless the account terms provide otherwise, an agent's account authority survives a party's disability or incapacity, but terminates at the death of a sole party or, in the case of multiple parties, at the death of the last surviving party.[246] A beneficiary is entitled to the account funds upon the death of a party or, if the account has multiple parties, upon the death of the surviving party.[247]

The 2013 amendments provide a sample check-the-box form to create the various types of multiple party accounts.[248] A financial institution using a form substantially similar to the statutory sample "is protected in acting in reliance on the form of the account."[249] Even if the financial institution uses a form not substantially similar to the sample, the statutory provisions applicable to an account "most nearly conform[ing] to the depositor's intent" apply.[250]

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239. *Id.* § 62-6-201(A). If a party withdraws more than that party's net contribution, any other party may have a claim against the withdrawing party, but with certain exceptions, *infra* notes 251–54 and accompanying text, the financial institution will not be liable for the excess withdrawal. *Id.* § 62-6-306(a).

240. *See id.* § 62-6-202(a).

241. *See id.* § 62-6-202(a). For example, Husband (*H*), Wife (*W*), and Adult Child (*C*) establish a multiple-party account. *H*'s net contribution is 2X, *W*'s net contribution is 2X, and *C*'s net contribution is X. Upon *H*'s death, his net contribution of 2X passes entirely to *W*. The deemed net contribution of *W* becomes 4X, while *C*'s net contribution remains X.

242. *Id.* § 62-6-105.

243. *See id.*

244. *Id.* § 61-6-201(C).

245. For instance, an elderly parent might designate an adult child as an agent to help conduct account transactions.

246. S.C. CODE ANN. § 62-6-105 (2013 amendments). Even though the agent's authority may have terminated, a financial institution dealing with the agent may nevertheless not be liable. *See id.* § 62-6-304 reporter's cmt. The permissible continuation of an agent's authority, despite a party's incapacity, provides a simple alternative to a durable power of attorney or conservatorship.

247. *See id.* §§ 62-6-101(3) & -202(b)).

248. *See id.* § 62-6-104(a).

249. *Id.* § 62-6-104 reporter's cmt.

250. *See id.* § 62-6-104(b).

2. Financial Institution Responsibility

As with the pre-2013 amendment multiple-party statutes,[251] a financial institution is not responsible for allowing withdrawals, except in certain cases, such as (1) paying to the personal representative of a decedent's estate without proof that the decedent was the survivor of all persons on the account, whether as party or beneficiary, unless the account was non-survivorship;[252] (2) paying to a beneficiary without proof that the beneficiary survived all parties;[253] or (3) after receiving written notice from a party—or from the party's personal representative, conservator, or attorney in fact under a durable power of attorney—failing to allow a withdrawal.[254]

The 2013 amendments continue to allow the creditor of a deceased party's estate to reach the decedent's interest in an account if the probate assets are otherwise insufficient to pay the claim, but reduce the time limit to assert the claim from two years—under the pre-amendments statute—to only one year from the decedent's death.[255]

H. Conformance and Clarifications

A number of the 2013 amendments clarify existing statutory provisions or allow some statutes governing wills to conform with those governing trusts.

1. Will Reformation and Modification

For both tax and non-tax reasons, the modification and reformation of donative transfer instruments is fairly common in the estate planning and probate arenas.[256] Modification involves a change to the document and to the donor's intention.[257] By contrast, reformation merely changes the language of the document to reflect the original intentions of the donor.[258] Unlike modification, reformation does not change intent, but merely corrects the document so that it accurately reflects intent.[259] The SCTC introduced several statutory methods for

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251. *See* S.C. CODE ANN. §§ 62-6-101 through -113 (2009).

252. *See* S.C. CODE ANN. § 62-6-302(2) (2013 amendments).

253. *See id.*

254. *Id.* § 62-6-306(b). The written notice is effective only if the financial institution has a reasonable opportunity to react. *Id.* Moreover, a financial institution with reason to believe that a dispute exists may withhold payment. *Id.* § 62-6-306(c).

255. *Compare id.* § 62-6-205 (one year time limit), *with* S.C. CODE ANN. § 62-6-107 (2009) (two year time limit). The one-year time limit is consistent with the ultimate time limit for presenting a claim against a decedent's estate, with certain exceptions. *See id.* S.C. CODE ANN. §§ 62-3-803(a) (2013 amendments).

256. *See* Medlin, *supra* note 2, at 154–64.

257. *See* S.C. CODE ANN. § 62-7-410 through -414, -416, -417 (2013 amendments).

258. *See id.* § 62-7-415 reporter's cmt.

259. *See id.*

modification, either with or without court involvement, depending on the circumstances.[260]

The pre-2013 amendment version of section 62-7-415 allowed judges to reform trusts with court approval for mistakes of fact or law:

> The court may reform the terms of a trust, even if unambiguous, 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.[261]

Because reformation, as a remedial tool, merely corrects mistakes in the document, and because it does not change intent, reformation is not as expansive a tool as modification can be. The 2013 amendments add a conforming reformation provision for wills, using language similar to the reformation statute for trusts.[262]

As with trusts, the will reformation statute does not authorize a change of intention, but only a correction of the document language to accurately reflect intention.[263] However, in conformance with section 62-7-416—which allows the modification of trusts for tax reasons—the 2013 amendments also provide statutory authority to modify a testator's will to accomplish the testator's tax objectives.[264]

2. Postmortem Property

SCPC section 62-2-602 recognized what may be obvious: a testator's will passes all the property or probate assets owned at death, whether the property was acquired before or after the will's execution.[265] Because a will has historically been described as speaking at the testator's death, what was not as obvious was whether a will could transfer property acquired by the testator after

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260. *See* Medlin, *supra* note 2, at 156–64.

261. S.C. CODE ANN. § 62-7-415 (2009). A classic mistake seen in reformation cases is the scrivener's error. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4–6, cmt. j (2003) (providing explanations and examples of a scrivener's error, though referring to it as a mistake in expression).

262. *See* S.C. CODE ANN. § 62-2-601(B) (2013 amendments) (reformation provision for wills); *see also id.* § 62-7-415 (reformation provision for trusts).

263. *See id.* § 62-2-601(B); *see also id.* § 62-7-415 (allowing reformation of a trust to conform to the settlor's intention).

264. *See id.* § 62-2-806; *see also* S.C. CODE ANN. § 62-7-416 (2009) (allowing modification of wills for tax reasons). Perhaps the most common and liberal use of will and trust modification has been to achieve beneficial tax results consistent with the testator's and settlor's tax objectives. *See* Medlin, *supra* note 2, at 160.

265. S.C. CODE ANN. § 62-2-602 (2009).

death.[266] The 2013 amendments clarify that a testator's will also transfers "all property acquired by the testator's estate after the testator's death."[267]

3. *Conversion of a Specific Devise by an Attorney-in-Fact*

A specific devise—a devise of a particular item or fund—is the most protected category of devise under the order of abatement,[268] but is the only type of devise subject to ademption.[269] Ademption occurs when the specifically devised asset is not owned by the testator at death—that asset is not part of the probate estate.[270] Under the general common law identity theory, a specific devisee was not entitled to a substitute for an adeemed asset.[271]

SCPC section 62-2-606(a) changed the general common law rule for ademption in certain cases.[272] If the specifically devised asset was converted[273] by the testator and an amount was owed to the testator from the conversion, the specific devisee received a substitute for the adeemed property: the right to collect the debt.[274] The specific devisee would not be entitled to any amounts actually paid to the testator, if competent.[275] However, if the testator was incapacitated at the time of the conversion and protected by a conservator, section 62-2-606(b) provided an additional substitute for the specific devisee: the amount paid to the testator.[276] The pre-2013 amendment version of section 62-2-

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266. *See, e.g.*, Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (discussing whether Marilyn Monroe's will devised a postmortem right of publicity).

267. S.C. CODE ANN. § 62-2-602 (2013 amendments).

268. *See id.* § 62-3-902(a).

269. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2 cmt. c (1999).

270. *See id.* § 5.2.

271. *See id.* § 5.2 cmt. b. The more recently recognized intent theory might provide a substitute for the adeemed asset if a court concluded that the testator intended for a substitute. *See id.* Moreover, some courts have prevented an ademption by finding that the specifically devised asset was part of the probate estate because the change to the asset was one of form rather than substance. *See, e.g.*, Pepka v. Branch, 294 N.E.2d 141 (Ind. Ct. App. 1973) (adopting and applying the "form and substance test"). *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2 cmt. d. For example, the specific devise of a testator's savings account in X Bank, Account # 12345, might not be adeemed if, after the will's execution, the testator transferred the savings account to a certificate of deposit in the same bank. *See generally* Medlin, *supra* note 1, at 656 n.202 (discussing South Carolina's treatment of changes effected on property during a testator's lifetime).

272. *See* S.C. CODE ANN. § 62-2-606(a) (2009).

273. More specifically, the types of conversion covered by the statute are sales, losses covered by casualty or fire insurance, condemnations, and foreclosures. *See id.* § 62-2-606(a).

274. *See id.* Typically, this situation would involve a purchaser giving a note to the testator–seller evidencing the unpaid purchase price. *See id.* § 62-2-606(a)(1). Under section 62-2-606(a), the specific devisee would receive the note as a substitute for the converted property. *See id.*

275. *See id.*

276. *See id.* § 62-2-606(b). Of course, if there were unpaid amounts, the specific devisee would also be entitled to the right to collect the debt under section 62-2-606(a). *See id.* § 62-2-

606(b) did not specifically address the situation in which a conversion occurred while an incapacitated testator was represented by an attorney-in-fact under a durable power of attorney.[277] The 2013 amendments clarify section 62-2-606(b) by applying its provisions to conversions occurring while the testator was incapacitated, but represented by an attorney-in-fact under a durable power of attorney.[278]

4. Overriding the Anti-Lapse Statute by Words of Survivorship

South Carolina's anti-lapse statute—yet another statutory rule of construction—attempts to prevent the lapse of a devise when the devisee predeceases the testator.[279] Unless the testator indicates an intention for the anti-lapse statute not to apply, the anti-lapse statute allows the issue of the predeceased devisee to take that devise by representation if the predeceased devisee is "a great-grandparent or a lineal descendant of a great-grandparent of the testator."[280]

Courts and commentators have disagreed about whether a devise that merely contains words of survivorship, such as "to *B* if *B* survives me," with no other indication of intent, is sufficient to override the application of an anti-lapse statute.[281] On one hand, the use of such words of survivorship might simply state the obvious—that *B* has to survive the testator to take the devise—and, therefore, do not override the anti-lapse statute. The contrary argument is that recognized will construction principles give meaning to all language in the

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606(a)(1). The additional right to the amount paid was limited only to the case when the conversion occurred while the testator was protected by a conservator. *See id.* § 62-2-606(b). The additional benefit conferred by section 62-2-606(b) was based on the traditional principle that only a competent testator may change a will. *See generally* Medlin, *supra* note 2, at 143–44 (citations omitted) (discussing the requisite mental capacity to create a valid will). Converting an asset that results in an ademption effectively changes a testator's will. Section 62-2-606(b) did not apply if the testator regained capacity for at least a year after the conversion. *See id.* § 62-2-606(d). Presumably, if that testator did not make a change to the will to compensate, the conversion and consequent ademption suited the testator.

277. *Id.* § 62-2-606(b). Allowed by every state, a durable power of attorney changes the general rules of agency and authorizes a principal to appoint an attorney-in-fact, or agent, to act for the principal even during the principal's incompetency. *See id.* § 62-5-501; Medlin, *supra* note 2, at 145 (citing *id.* § 62-5-501).

278. *See* S.C. CODE ANN. § 62-2-606(b) (2013 amendments). The 2013 amendments, therefore, adopt the theory that the specific devisee should be protected because the testator was unaware of the conversion and unable to react. *See id.*

279. Or is deemed to have predeceased the testator. *See supra* Part II.E and accompanying discussion.

280. *See* S.C. CODE ANN. § 62-2-603(A) (2013 amendments). A testator could, for example, indicate the intent not to apply the anti-lapse statutes by naming a substitute beneficiary or simply stating that the anti-lapse statute is not to apply. *See id.* § 62-2-603 reporter's cmt.

281. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. h (1999). South Carolina has no case precedent on point.

document if feasible; a conclusion that the words of survivorship merely state the obvious renders that language meaningless and superfluous.[282]

The 2013 amendments to the anti-lapse statute clarify that the use of words of survivorship, without additional evidence, presumptively indicates the testator's intent to override the application of the anti-lapse statute.[283]

5. Awarding Costs and Fees in Will Cases

SCPC section 62-7-1004 allows a court to award costs and fees for or against parties in trust matters.[284] The 2013 amendments add a parallel statutory authority allowing the court to award costs and fees in will matters.[285]

6. Signing Trusts by Proxy

SCPC section 62-2-502, which contains the requirements for executing a valid will, requires that—among other things—a testator sign the will.[286] This section also allows a proxy to sign on behalf of a testator if in the presence and at the direction of the testator.[287] The 2013 amendments authorize a similar proxy procedure for the settlor's execution of a trust document.[288]

7. Exempt Property Set-Aside

The SCPC introduced the concept of an exempt property set-aside to South Carolina law.[289] Section 62-2-401 protects certain assets from claims of creditors—which was not new to South Carolina law[290]—but also allows the statutory beneficiaries to claw back certain assets from other beneficiaries.[291] The exempt property set-aside beneficiaries are the surviving spouse or, if none, any minor or dependent children of the decedent.[292] Prior to amendment, the set-

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282. *See id.* § 5.5 cmt. a. The Restatement (Third) of Property: Wills and Other Donative Transfers opines that the majority view agrees with the position of the 2013 amendments. *See id. But see* UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010), 8 U.L.A. 165 (Supp. 2012) (taking the opposite position).

283. *See* S.C. CODE ANN. § 62-2-603(C) (2013 amendments).

284. S.C. CODE ANN. § 62-7-1004 (2009).

285. *See* S.C. CODE ANN. § 62-1-111 (2013 amendments).

286. *Id.* § 62-2-502.

287. *See id.*

288. *See* § 62-7-402(b).

289. *See* S.C. CODE ANN. § 62-2-401 reporter's cmt. (2009).

290. *See* S.C. CODE ANN. § 15-41-30 (Supp. 2012) (creating homestead exemptions from creditors' claims for debtors); Scholtec v. Estate of Reeves, 327 S.C. 551, 554, 490 S.E.2d 603, 604 (Ct. App. 1997) (citing S.C. CODE ANN. § 15-41-30(1)–(11) (2009)) (explaining which categories of the homestead exemption statute apply to a decedent's estate).

291. S.C. CODE ANN. § 62-2-401 (2013 amendments).

292. *Id.*

aside amount was $5,000.[293] The 2013 amendments, however, increase this amount to $25,000.[294]

8. Interested Witness

The law of wills accepts the basic evidentiary notion that an interested witness is less credible.[295] Consequently, even prior to the enactment of the SCPC, South Carolina long had a so-called "purging statute," which removes the interest of an interested witness.[296] The purpose of the purging statute is to create disinterested witnesses by purging any profit that an otherwise interested witness might take from the will submitted for probate.[297] By converting interested witnesses into disinterested witnesses, the purging statute attempts to create enough credible witnesses to satisfy the statutory execution formalities.[298] Whether a witness is deemed *interested* is determined by comparing the value that the witness would take under the will submitted for probate with the value that the witness would take if the will submitted for probate was not valid.[299] The witness would profit to the extent the devise to that witness is greater under the will submitted for probate than what the witness would take if that will was not valid. The purging statute cleanses the witness of any interest by removing any profit.[300]

Prior to the 2013 amendments, the purging statute considered an interested witness to be anyone who profited from the will submitted for probate or that witness's spouse.[301] The 2013 amendments also consider a witness to be interested if that witness's issue would profit from the will.[302]

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293. *Id.*

294. *Id.* The 2013 amendments increased other dollar limits as well. *See infra* Part III.D.

295. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. o (1999).

296. *See* Davis v. Davis, 208 S.C. 182, 184, 37 S.E.2d 530, 531 (1946) (citing CODE OF LAWS OF S.C. § 8919 (1942)). The SCPC purging statute is found at S.C. CODE ANN. § 62-2-504 (2013 amendments).

297. *See id.* § 62-2-504 reporter's cmt. (2013 amendments).

298. *Id.* Section 62-2-502 requires a minimum of two attesting witnesses. *Id.* § 62-2-502. Prior to the SCPC, South Carolina required a minimum of three attesting witnesses. S.C. CODE ANN. § 21-7-50 (1976 & Supp. 1986) (repealed 1986).

299. *See* S.C. CODE ANN. § 62-2-504(a) (2013 amendments).

300. *See id.* The purging statute operates only to the extent necessary to create a disinterested witness. *See id.* Thus, a witness may take from the will being submitted for probate to the extent the witness would have taken without that will. *Id.* Moreover, if there are at least two disinterested witnesses without applying the purging statute, any interested supernumerary witness may take the entire devise under the will being submitted for probate because the supernumerary witness is not necessary to satisfy the execution requirements of section 62-2-502. *See id.* §§ 62-2-502, 62-2-504(a).

301. S.C. CODE ANN. § 62-2-504 (2009).

302. *See* S.C. CODE ANN. § 62-2-504(a) (2013 amendments).

9. No Stepchild Intestate Inheritance

The SCPC created a hierarchy of blood relatives who share the intestate estate if the decedent is not survived by a spouse or issue.[303] The eventual heirs are fairly broad-ranging. The order of priority under the SCPC is: (1) parents, but if none surviving then (2) issue of parents,[304] but if none surviving then (3) grandparents and their issue,[305] but if none surviving then (4) great-grandparents and their issue,[306] but if none surviving then to (5) stepchildren and their issue.[307] Problematically, a stepchild is the child of the decedent's spouse but not the decedent.[308] The pre-amendment statute did not separately define *stepchild* for purposes of intestacy. The decedent's intestate estate would pass to blood relatives other than the decedent's issue only if the decedent was not survived by a spouse.[309] And if the decedent had no surviving spouse, then who would be a stepchild for inheritance purposes?[310]

Because the SCPC had no clear answer to the question regarding who qualifies to take as a stepchild or issue of a stepchild, the 2013 amendments eliminate a stepchild and issue of a stepchild as intestate heirs.[311]

10. Creation of Inter Vivos *Trusts by Agent or Conservator*

Whether a conservator or attorney in fact can create, revoke, or amend a revocable *inter vivos* trust for the settlor is an unresolved question in many jurisdictions.[312] Because the revocable *inter vivos* trust is, for many purposes, considered a will substitute in modern estate planning,[313] granting the authority to an agent or conservator to create or change a revocable trust could practically be considered tantamount to allowing the agent or conservator to amend the

303. *See* S.C. CODE ANN. § 62-2-103 (2009). Section 62-2-102 describes the intestate share of any surviving spouse. *See id.* § 62-2-102.

304. S.C. CODE ANN. § 62-2-103(2)–(3) (2013 amendments).

305. *Id.* § 62-2-103(4). At this level, the intestate estate is divided, with half passing to the maternal grandparent side and half to the paternal grandparent side. *Id.*

306. *Id.* § 62-2-103(5). As with the grandparent level, the estate is divided with half passing to the maternal and paternal sides. *Id.*

307. S.C. CODE ANN. § 62-2-103(6) (2009).

308. *See id.* § 62-1-201(40).

309. *See id.* § 62-2-103.

310. Possible answers include the children of the decedent's spouse who most recently predeceased the decedent, the children of the decedent's spouse who was most recently divorced from the decedent, the children of all of the decedent's spouses who predeceased him, the children of all of the decedent's spouses who were divorced from him, or some combination.

311. *Compare* S.C. CODE ANN. § 62-2-103 (2013 amendments), *with* S.C. CODE ANN. § 62-2-103 (2009). Similarly, the 2013 amendments eliminated the definition of stepchild previously found at section 62-1-201(40). *Compare* S.C. CODE ANN. § 62-1-201 (2013 amendments), *with* S.C. CODE ANN. § 62-1-201(40) (2009).

312. *See, e.g.*, Medlin, *supra* note 2, at 146 (discussing the debate that exists over the power of the attorney-in-fact to revoke or amend the trust).

313. *See id.* at 140–41.

settlor's will: if the revocable trust and will work together to constitute a testator's estate plan, changing the trust will necessarily and concomitantly change the will.[314] For example, revoking the trust will return the trust property to the settlor's ownership, allowing those assets to eventually become probate assets governed by the will.[315] Conversely, creating and funding a revocable trust with the settlor's assets will remove those assets from the probate estate and, eventually, from control by the will.[316] Thus, if a conservator creates, revokes, or amends a revocable trust, the effect may be a change to the settlor's will, thus contravening the general rule of will revocation allowing only a competent testator—not an agent or conservator—to change or revoke a will.[317]

Prior to the 2013 amendments—and echoing the policy from some cases allowing an agent or conservator to revoke or amend a revocable trust for an incompetent settlor—the SCPC empowered an agent[318] or a conservator[319] to revoke or amend a revocable trust.[320] Significantly, the SCPC was silent as to whether an agent or conservator could create a revocable trust.

The 2013 amendments clarify the powers afforded to an attorney-in-fact under a durable power of attorney.[321] The amendments retain the limitation that the attorney-in-fact is restricted to the extent authorized by the trust or the power of attorney, and retain the powers to revoke or amend the revocable trust.[322] In addition, the amendments expressly authorize the agent to create a revocable trust.[323] However, the amendments also retain and clarify the prohibition against using these powers to change the settlor's estate plan: "[E]xercise of the powers . . . shall not alter the amount of property beneficiaries are to receive on the settlor's death under the settlor's existing will or other estate planning documents or in the absence thereof in accordance with the law of intestate succession."[324]

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314. *See id.* at 146 (recognizing the argument that changing a trust can effectively change a will).

315. *See id.* at 150.

316. *See id.* at 150.

317. *See id.* at 143, 145–46.

318. An agent could act to the extent authorized by the trust or the power of attorney "provided 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." S.C. CODE ANN. § 62-7-602(e) (2009).

319. If no conservator was appointed, a guardian could act. *See* S.C. CODE ANN. § 62-7-602(f) (2009). In either case, for a conservator or guardian, the court had to approve the exercise of the power. *See id.*

320. *See id.* § 62-7-602(e)–(f) (2009).

321. *See* S.C. CODE ANN. § 62-7-602A reporter's cmt (2013 amendments).

322. *See id.* § 62-7-602A(a)(1)–(2).

323. *See id.* § 62-7-602A(a)(5).

324. *See id.* § 62-7-602A(c).

The 2013 amendments also clarify that, subject to the same rules and restrictions for revocable trusts, the agent can create or add property to an irrevocable trust.[325]

III. SIGNIFICANT ADMINISTRATION AND PROCEDURE AMENDMENTS

A. Creditors' Claims

1. Creditors Applying for Appointment as Personal Representatives

The 2013 amendments made several significant changes to the SCPC process for presenting and handling claims by the decedent's creditors. The amendments clarify that, with the exception of a creditor applying for appointment as personal representative, a creditor can present a claim against the decedent's estate only after the appointment of a personal representative.[326] Because the lack of a personal representative thus stymies a creditor from presenting a claim, that creditor may choose to apply for appointment, or to nominate another person as personal representative.[327]

The 2013 amendments recognize the problem that can arise if a creditor seeks appointment but the time to present a claim expires before the court appoints the creditor.[328] Because a claim not timely presented is barred by the probate claims process, the creditor in such a case could be appointed at a time during which it is too late to pursue the claim—a Pyrrhic victory.[329] Consequently, despite the general prohibition against presenting a claim prior to the appointment of a personal representative, the amendments allow the creditor seeking appointment to attach the claim to the appointment application or petition[330] and effectively toll the running of the claims-barring time limits.[331]

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325. *See id.* § 62-7-602A(b).

326. *See id.* § 62-3-104 (citing *id.* § 62-3-804(1)(b)).

327. *See id.* §§ 62-3-104, -203(8). A creditor has priority for appointment as personal representative if no other personal representative has applied within forty-five days after the decedent's death. *See id.* § 62-3-203(a)(6). A creditor may nominate another person to serve, and that person will acquire the same priority for appointment as the nominating creditor. *See id.* § 62-3-203(a)(8).

328. *See* §§ 62-3-802 through -804, -806. SCPC article 3, part 8 creates a rather Byzantine set of time limits for presenting and contesting claims involving a decedent. *See id.* A detailed explanation of those time limits is beyond the scope of this Article.

329. *See* S.C. CODE ANN. §§ 62-3-203(a)(6), -801, -803 (2009) (amended 2013).

330. Under the SCPC, a personal representative can be appointed in an informal or a formal proceeding, depending on the circumstances. *See id.* §§ 62-3-203(a), -301, -414. An informal proceeding does not require notice, while a formal proceeding requires notice before a hearing. *See id.* § 62-1-201(17), (22). One seeking approval from the court presents an application in an informal proceeding and a petition in a formal proceeding. *See id.*

331. *See id.* §§ 62-3-104, -804(1)(b).

2. Allowance or Disallowance of Claims

The probate claims process permits a creditor whose claim has been disallowed to contest or object to the disallowance.[332] A creditor receiving notice of the disallowance has thirty days to contest or object, unless the notice of disallowance fails to include a warning of the thirty-day time limit.[333] If the creditor fails to timely contest or object to the disallowance, the claim will be barred.[334] Prior to the 2013 amendments, the SCPC did not impose a time limit for the personal representative to decide whether to allow or disallow a claim. The only procedure available to a creditor in limbo was to petition the court to require the personal representative to allow the claim.[335] The 2013 amendments impose a time limit for the personal representative to act on a claim: the later of sixty days from the presentation of the claim or fourteen months after the decedent's death.[336] The amendments also clarify that the allowance of a claim does not guarantee payment.[337]

3. Publication of Notice

Before the 2013 amendments, the probate claims process apparently required the personal representative to publish notice to creditors "notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred."[338] Because the publication might occur, in certain circumstances, after claims have been barred,[339] the publication of notice indicating that a creditor has eight months to present a claim could be deceptive. Consequently, the 2013 amendments

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332. *See id.* § 62-3-804(5).

333. *See id.* §§ 62-3-804(5), -806.

334. *See supra* note 329 and accompanying text.

335. *See* S.C. CODE ANN. § 62-3-806(b) (2009).

336. *See* S.C. CODE ANN. § 62-3-806(a) (2013 amendments).

337. *See id.* § 62-3-806(e). This might appear to be obvious, but presumably this language was included to obviate the perceived need by some personal representatives to disallow a valid claim merely because the estate lacks assets to pay it. The payment of claims is prioritized under SCPC section 62-3-805. *See id.* § 62-3-805.

338. *See* S.C. CODE ANN. § 62-3-801(a) (2009). Despite the apparent mandate to publish notice in (a), section 62-3-801(c) exculpated the personal representative for failing to give notice. *See id.* § 62-3-801(c). This inconsistency, part of the Byzantine probate claims-barring process, is partially due to the United State Supreme Court ruling in *Tulsa Professional Collection Services, Inc. v. Pope*. 485 U.S. 478, 479, 491 (1988) (holding that termination of a creditor's claim after providing notice only by publication violated due process when a creditor's identity is known or reasonably ascertainable). This decision prompted amendments to the UPC and similarly to the SCPC process. *See* UNIF. PROBATE CODE § 3-801 cmt. (amended 1989), 8 U.L.A. 129 (1998) (citing *Tulsa*, 485 U.S. 478); UNIF. PROBATE CODE § 3-803 cmt. (amended 1997), 8 U.L.A. 133–34 (Supp. 2013) (citing *Tulsa*, 485 U.S. 478).

339. *See* S.C. CODE ANN. § 62-3-803(a)(1) (2013 amendments). For example, claims could already be barred when a personal representative is appointed more than one year after the decedent's death. *See id.* § 62-3-803(a)(1).

eliminate the requirement to publish notice when the personal representative is appointed more than a year after the decedent's death.[340]

4. Event of Compliance with the Time Limit

Before the amendments, a creditor tolled the time period to present a claim by either filing the claim with the court or, alternatively, delivering or mailing a copy to the personal representative—whichever occurred first.[341] Thus, if the personal representative received notice of the claim within the requisite time period, the claim was timely presented—regardless of when the creditor filed the claim with the court.[342] The 2013 amendments provide that the only action that will serve to timely present a claim is filing a written statement of the claim with the court.[343]

5. Suspension of Action on Death of Party

The 2013 amendments also clarify that, when a party dies while an action is pending, the action is suspended until a personal representative is appointed for the deceased party.[344]

B. Tax Apportionment

The American Taxpayer Relief Act of 2012 (ATRA)[345] provides some finality to the ambiguous and ephemeral federal transfer tax issues that have lingered since 2001.[346] Although the ATRA, through a generous $5 million

340. *See id.* § 62-3-801(d).

341. S.C. CODE ANN. § 62-3-804(1) (2009).

342. *See, e.g.*, *In re* Estate of Tollison, 320 S.C. 132, 136, 463 S.E.2d 611, 614 (Ct. App. 1995) (citing S.C. CODE ANN. § 62-3-804 (2009)) (holding that the hospital creditor's providing of records to attorney for decedent's personal representative for evidence in a wrongful death and survival action served as timely presentation of a claim, even though the hospital did not file the claim until nearly two years later).

343. *See* S.C. CODE ANN. § 62-3-804(1)(a) (2013 amendments).

344. *See id.* § 62-3-804(7)(A). While this requirement does not apply to a secured creditor for purposes of an action involving any security interest, such as a foreclosure, the exception for a security interest is inapplicable to an action for a default judgment. *See id.* § 62-3-804(7)(B).

345. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2315–18 (2013).

346. *See id.*; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 ("EGTRRA"). Although publicly proclaimed to have repealed the federal estate tax, EGTRRA instead incrementally increased the amount of value exempt from the estate tax through 2010. *See id.* §§ 501, 511, 521, 115 Stat. at 69–72. The EGTRRA temporarily repealed the estate tax for 2010, but re-imposed that tax in 2011, with only a $5 million exemption amount. However, signed into law by the President on December 17, 2010, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 reinstated the estate tax, albeit with a $5 million exemption, although that too was considered temporary. *See* Tax Relief, Unemployment Insurance

exemption—indexed for inflation from 2010, along with portability of any unused exemption from the deceased spouse to the surviving spouse[347]—eliminates transfer tax concerns for many people, tax apportionment issues remain significant for those with potential transfer tax liability.[348] Generally, federal law defers to a decedent's intent for apportioning transfer taxes against the property being transferred.[349] South Carolina law provides a statutory default system for allocating estate taxes against certain probate and nonprobate assets—basically, an asset is responsible for the aliquot share of tax caused by the inclusion of that asset in the estate tax calculation.[350] However, South Carolina law defers to the allocation of taxes expressed by the decedent.[351] Generally, probate assets, as well as nonprobate assets—such as those passing under a revocable trust—are subject to the federal estate tax.[352] The assessment of estate tax against a devise can substantially affect the value passing to the devisees and beneficiaries of the decedent.

> Example 6. Testator devised $500,000 to *A* and the residue of the probate estate to *B*. The estate tax attributable to the devise to *A* is $X. If the testator did not indicate a contrary intent, the South Carolina apportionment statute would allocate $X of the estate tax against *A*'s devise, leaving *A* with a net devise of *$500,000 - $X*. If, however, Testator had expressed the intent to allocate all estate taxes against the residue of the estate, then *A*'s devise would be $500,000, without reduction for any tax, and *B*'s share of the residue would be reduced by $X, as well as any other tax otherwise attributable to the value of the residue.

Because of the importance of tax apportionment, well-drafted estate plans express the decedent's intent about allocation of the tax against the various probate and nonprobate transfers, rather than defaulting to the federal and state systems. However, as revocable trusts become more commonplace as will

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Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 301–02, 124 Stat. 3296, 3300–01.

347. The ATRA allows a surviving spouse to add to the surviving spouse's exemption amount any unused exemption amount of the deceased spouse—the Deceased Spouse's Unused Exclusion Amount, or DSUE. *See id.*; *see also* I.R.C. § 2010 (Supp. 2012).

348. Effectively, a married couple can exempt as much as $10 million—subject to increase for inflation since 2010—from federal transfer tax. As with much of the ATRA and the concomitant transfer and income tax planning issues, portability is highly-nuanced and complex. A substantive discussion of the ATRA is beyond the scope of this Article.

349. *See, e.g.*, I.R.C. §§ 2207A(a)(2) (2006) (providing that a right of recovery for certain marital deduction property is waived if a decedent indicates an intent to do so by will).

350. *See* S.C. CODE ANN. § 62-3-916 (2009) (providing South Carolina's version of the Uniform Estate Tax Apportionment Act).

351. *Id.* § 62-3-916(b).

352. *See, e.g.*, I.R.C. § 2036(a) (2006) (providing that the gross estate shall include the value of property passed under trust).

substitutes and will partners,[353] the coordination of the tax apportionment preferences of the decedent's probate and nonprobate transfers gained increasing importance.[354] Notably, before the 2013 amendments, the state tax apportionment statute deferred to the decedent's expression of intent in a will.[355] The statute made no mention of deferring to the decedent's expression of intent in a revocable trust, nor did it explain how to coordinate a decedent's expression of intent in both a will and a revocable trust, if different.[356] The 2013 amendments clarify that (a) the expressed intention in a will controls; (b) to the extent that intent is not expressed in a will, the expressed intention in a revocable trust controls; and (c) to the extent that two or more revocable trusts contain conflicting expressions of intent, the most recently dated document controls.[357]

C. Powers and Duties of Fiduciaries

1. Inventory and Appraisement

A basic duty of a personal representative is to inventory and value assets.[358] The SCPC requires the personal representative to file an inventory and appraisement with the court[359] and, before the 2013 amendments, it required the personal representative to mail a copy to any interested person requesting one.[360] The 2013 amendments clarify that the inventory list must include only probate property and not property passing by nonprobate transfer.[361] An interested person wanting a copy of the inventory and appraisement must file a demand for notice.[362] However, if an interested person demands an inventory of nonprobate property, the personal representative must provide a list of that property "so far as is known to the personal representative . . . ."[363]

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353. *See* Medlin, *supra* note 2, at 140.

354. Tax apportionment of transfer taxes may not be the only tax fairness issue that affects testators or settlors. While other tax choices, especially postmortem, achieve tax savings, they may create inequities among beneficiaries. The discussion of these situations is beyond the scope of this Article, but for a detailed discussion of such issues, see F. Ladson Boyle, *Tax Consequences of Equitable Adjustments*, 37 S.C. L. REV. 583 (1986).

355. *See* S.C. CODE ANN. § 62-3-916(b) (2009).

356. *See id.*

357. *See* S.C. CODE ANN. § 62-3-916(b)(1)–(2) (2013 amendments).

358. *See id.* § 62-3-706(A)(1).

359. *See id.*

360. S.C. CODE ANN. § 62-3-706(3) (2009). It also allowed the court to grant an extension of time for filing. *See id.* Qualification as an interested person under the SCPC varies from time to time, depending on circumstances. *See* S.C. CODE ANN. § 62-1-201(23) (2013 amendments).

361. *See id.* § 62-3-706(A)(1). The 2013 amendments also delete the previous requirement that the personal representative include in the inventory and appraisement any information required by the South Carolina Department of Revenue. *Compare id.* (omitting the requirement), *with* S.C. CODE ANN. § 62-3-706(1) (2009) (requiring information required by the South Carolina Revenue Department).

362. *See* S.C. CODE ANN. § 62-3-204 (2013 amendments).

363. *Id.* § 62-3-706(B)(1).

Before the 2013 amendments, SCPC section 62-3-704—which lists specific duties of the personal representative—imposed a possible $1,000 penalty if the personal representative failed to comply with the inventory and appraisement requirements of section 62-3-706.[364] The 2013 amendments remove the specific penalty and leave the appropriate remedy to the discretion of the court.[365]

2. Distribution of Intestate Property

Before the 2013 amendments, the SCPC authorized the personal representative to distribute intestate property to the heirs if the personal representative was unaware at the time of distribution of a pending action to probate a will or, alternatively, of a pending action to question the personal representative's authority or appointment.[366] The 2013 amendments clarify that the personal representative must have received actual notice of such an action to prevent distribution.[367]

3. Digital Property

The 2013 amendments clarify that a personal representative has the power to access the decedent's digital assets—including files and accounts—and to obtain passwords and user identifications to allow the personal representative to gain access to those digital assets.[368]

4. Trust Protectors and Trust Advisors

Generally, settlors use trust protectors and trust investment advisors—depending on the circumstances—to guide a trustee, to override a trustee, to achieve favorable tax results, and to act when a trustee should not.[369] The 2013 amendments add specific provisions governing the powers and duties of trust protectors and trust investment advisors.[370] Most importantly, the amendments exculpate a trustee from liability for following the direction of a trust protector or a trust investment advisor—if required by the trust—unless the trustee engages in willful misconduct.[371] When a trust requires a trustee to make decisions with the consent of a trust protector or a trust investment advisor, the trustee is not liable if the trust protector or trust investment advisor fails to

364. *See* S.C. CODE ANN. § 62-3-704(f) (2009) (citing *id.* § 62-3-706).
365. *See* S.C. CODE ANN. § 62-3-704(g) (2013 amendments).
366. *See* S.C. CODE ANN. § 62-3-703(b) (2009).
367. *See* S.C. CODE ANN. § 62-3-703(b) (2013 amendments).
368. *See id.* § 62-3-715(26).
369. *Id.* § 62-7-808 reporter's cmt.
370. *See id.* §§ 62-7-818, -819, -1005A, -1005B.
371. *See id.* §§ 62-7-1005A(A), -1005B(A).

provide consent after the request.[372] Trust protectors and trust investment advisors are fiduciaries for the powers granted to them, except in any capacity as a beneficiary.[373]

5. Removal of a Personal Representative for Cause

The amendments also clarify that, if a personal representative is removed for cause, the personal representative's attorney of record owes no further duties to the court.[374]

6. Closing Estates

The 2013 amendments clarify that, when closing an estate, a personal representative may avoid the requirements for filing an accounting, filing a proposal for distribution, or filing a notice of right to demand a hearing if all interested persons waive the filing requirement.[375]

7. Bond Requirement

The 2013 amendments clarify that a court, in its discretion, may eliminate the duty of a personal representative to provide a bond.[376] Prior to the amendments, the SCPC empowered the court to reduce a bond, but did not specifically address whether the court could dispense with a bond.[377]

D. Increase of Amounts

The 2013 amendments increase dollar limits in several sections of the SCPC: (1) the amount of personal property that a personal representative can sell without the authorization of either the testator's will or the court increases from $5,000 to $10,000;[378] (2) the amount of net value qualifying an estate for small or summary estate administration increases from $10,000 to $25,000;[379] (3) the amount qualifying for the exempt property set-aside increases from $5,000 to

372. *See id.* §§ 62-7-1005A(B), 1005B(B).

373. *See id.* §§ 62-7-1005A(D), 1005B(D).

374. *See id.* § 62-3-611(c).

375. *See id.* § 62-3-1001(e).

376. *See id.* § 62-3-604. For situations in which the personal representative is not required to provide a bond, see *id.* § 62-3-603.

377. *See* S.C. CODE ANN. § 62-3-604 (2009).

378. *Compare* S.C. CODE ANN. § 62-3-711(b) (2009) ($5,000 of property), *with* S.C. CODE ANN. § 62-3-711(b) (2013 amendments) ($10,000 of property).

379. *Compare* S.C. CODE ANN. § 62-3-1203(a) (2009) ($10,000 to qualify), *with* S.C. CODE ANN. § 62-3-1203(a) (2013 amendments) ($25,000 to qualify).

$25,000;[380] and (4) the amount of the value of an interested person's apparent interest in the estate to require a bond increases from $1,000 to $5,000.[381]

IV. EFFECTIVE DATE AND PROTECTION OF EXISTING RIGHTS

As with the enactment of the SCPC and the SCTC, the 2013 amendments contain effective date provisions that generally apply the amendments retroactively, except when that would divest otherwise vested rights.[382] Several South Carolina cases misapplied the effective date provisions of the SCPC, resulting in a divestment of vested rights.[383] In response to these cases, the General Assembly amended the SCPC effective date provisions—found in section 62-1-100—which eventually led to the appellate courts reaching correct results on that issue.[384] Moreover, the effective date provisions of the SCTC, while substantially similar to the effective date provisions of the SCPC, were crafted to avoid further misapplication by the courts.[385] The effective date provisions of the 2013 amendments mirror those of the SCTC.[386]

V. CONCLUSION

The 2013 amendments continue the evolution of the South Carolina law of wills, trusts, and fiduciary administration—a progression from the common law to a statutory codification of substantive rules and administrative procedures. Of course, the legislative involvement is only part of this evolutionary process. Judicial interpretations and the practices of estate planning and probate lawyers, as well as the experiences of the citizens and institutions affected by these laws, will continue to impact the law's development.

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380. *Compare* S.C. CODE ANN. § 62-3-401 (2009) ($5,000 to qualify), *with* S.C. CODE ANN. § 62-2-401 (2013 amendments) ($25,000 to qualify).

381. *Compare* S.C. CODE ANN. § 62-3-605 (2009) ($1,000 apparent interest), *with* S.C. CODE ANN. § 62-3-605 (2013 amendments) ($5,000 apparent interest).

382. *See* No. 100, 2013 Acts __, § 4.

383. *See* Medlin, *supra* note 2, at 197–200 (citations omitted).

384. *See* Medlin, *supra* note 2, at 201 (citing S.C. CODE ANN. § 62-1-100(b)(5) (2009); *In re* Estate of Boynton, 355 S.C. 299, 302, 584 S.E.2d 154, 156 (Ct. App. 2003)).

385. *See* Medlin, *supra* note 2, at 201–02 (citing S.C. CODE ANN. 62-7-1106 (2009)).

386. *See* No. 100, 2013 Acts __, § 4.