South Carolina Law Update

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This is a limited review of significant cases, statutory changes, and proposed statutory changes to South Carolina law with respect to estate planning, fiduciary, and related matters.

I. South Carolina NAACP Housing Advocacy Program

The South Carolina NAACP Housing Advocacy Program ("Advocacy Program") was initiated to assist tenants facing eviction proceedings without legal representation. The Advocacy Program uses trained volunteers who are nonlawyers ("Advocates") to assist tenants facing eviction. Advocates must complete twelve (12) hours of training and pass a series of tests prior to certification. NAACP lawyers review information submitted by Advocates to ensure program requirements are adhered to. The scope of Advocate assistance is limited to confirmation that the tenant has a pending eviction, to advise the tenant to seek a hearing and the procedure for doing so, and to identify common defenses to eviction that the tenant may raise. Advocates are trained to identify when issues arise that are outside the scope of the Advocacy Program.

The South Carolina Attorney General's Office deemed the use of nonlawyers in this context to be the unauthorized practice of law. The NAACP appealed, and the matter came before the South Carolina Supreme Court.

A. *In re S.C. NAACP Hous. Advoc. Program* 897 S.E.2d 691 (S.C. 2024).

Petitioners asked the South Carolina Supreme Court to authorize the use of certified Housing Program nonlawyer volunteers to provide free, limited assistance to tenants facing eviction in South Carolina.

The basis for the petition was a "critical need to assist persons facing eviction proceedings in South Carolina magistrates courts." According to a report by the South Carolina Access to Justice Commission, more than 99% of defendants in South Carolina eviction cases are not represented by lawyers in proceedings.[1] The Housing Advocacy Program was created to address this critical need in South Carolina.

[1] Elizabeth Chambliss, Will Dillard & Hannah Honeycutt, *Measuring South Carolina's Justice Gap: A Report of the SC Access to Justice Commission 5* (2021), https://www.scaccesstojustice.org/the-sc-justice-gap [https://perma.cc/9ELR-CQQA].

Based on this public need, and the NAACP's materials describing the vetting and certification processes, the Court approved a three-year pilot program, finding there was "sufficient training, safeguards, and lawyer supervision such that advocates certified under the Housing Advocacy Program and working with in the strict limits set forth in the training manual do not engage in the unauthorized practice of law." *In re S.C. NAACP Hous. Advoc. Program* 897 S.E.2d 691, 697 (S.C. 2024). During the trial period, the Advocacy Program must provide annual reports to the Court. Each tenant that participates in the program must give informed consent to such representation, which also acknowledges that the tenant understands Advocates are not lawyers. *Id*.

The court held that nonlawyers may provide a limited scope of legal advice with proper training and sufficient oversight by a licensed attorney. Public need appeared to be paramount in this decision, but is that *required* for nonlawyers to provide legal assistance? Is proper training, a clear and limited scope of authority, and adequate attorney oversight enough? In South Carolina, paralegals may do legal work without a license. Obviously, close oversight by an attorney is a critical aspect of a paralegal's position, but there is no comparable public benefit. There is a plethora of other instances in which the court's reasoning could be applicable, and it will be interesting to see the impact of this decision.

II. Proposed Statutory Changes

In January 2024, the South Carolina Board of Governors voted to submit the following proposed statutory changes for legislative vote.

A. Increase of Fixed Period for the Rule Against Perpetuities (RAP)

This proposal would change the statutory fixed period for the rule against perpetuities from 90 years to 360 years. PROP. S.C. CODE § 27-6-20. The principal argument for increasing the permissible vesting period is to keep trust business, and the associated assets, in South Carolina. Several states have already changed their fixed period to 360 years or longer or abolished the rule against perpetuities altogether. The drafters assert the change is necessary to keep South Carolina relevant and attractive when grantors are choosing a trust situs. In 2018, Georgia increased its permissible vesting period from 90 years to 360 years, and in 2022, Florida increased its permissible vesting period to 1,000 years for any trust created after July 1, 2022. GA. CODE § 44-6-201 and FLA. STAT. § 689.225(2)(g). It is understandable that South Carolina practitioners want to remain competitive in the region. Dynasty trusts created in a common law RAP jurisdiction are not nearly as desirable as those created in jurisdictions that have statutorily extended the RAP fixed period. Dynasty trusts generally have significant assets since they are intended to support multiple generations and South Carolina can attract more of them through this proposed change.

B. Discretionary Trusts - Effect of Standard

The proposed change to S.C. Code section 62-7-504 provides that a beneficiary's testamentary power of appointment does not enable the beneficiary's creditors to reach trust assets subject to the same power of appointment. If a beneficiary with a testamentary power of appointment does not retain dominion and control over the trust assets during his or her life, then it follows that a creditor may also not obtain dominion and control over the assets during the beneficiary's life.

C. Discretionary Tax Reimbursement to Settlor of Grantor Trust

The proposed amendment provides that a "trustee's discretionary authority to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or trust principal that is payable by the settlor under the law imposing the tax shall not be considered to be an amount that can be distributed to or for the settlor's benefit." There are several reasons for this change that are offered by the drafters of the proposed reformation. One reason is the unintended consequences of a grantor trust when life changes occur. Where an irrevocable trust is created for a spouse, and there is a divorce after creation and funding of the trust, the Grantor can be burdened with continuing taxes for the benefit of the ex-spouse. In their memorandum to the South Carolina Board of Governors, the drafters note that I.R.C. Sections 672 and 677 impute powers to the ex-spouses even after divorce, resulting in tax liability to the nonbeneficiary ex-spouse despite the trust continuing only for the benefit of the beneficiary ex-spouse. The drafters also refer to the burden (often referred to as the "burn") of the grantor's growing tax liability on trust income. As trust assets grow tax free the grantor's remaining assets are diminished by paying tax on income not actually received.

1. Chief Counsel Advisory - C.C.A. 2023-52-018 (Nov. 28, 2023)

On November 28, 2023, the IRS Chief Counsel issued an advisory opinion which held the addition of an income tax reimbursement clause to an existing grantor trust resulted in a taxable gift from the beneficiaries to the grantor. There, the trust was modified in state court to allow the trustee to make discretionary reimbursement payments to the grantor for income taxes paid by the grantor. The IRS found that the modification to include discretionary reimbursement for taxes paid by the grantor was a gift from the beneficiaries of the trust to the grantor because the beneficiaries had an interest and relinquished it by allowing the trustee to reimburse the grantor (even if discretionary and not mandatory). The IRS explained that the holding was not inconsistent with prior decisions in which the discretionary authority to reimburse the grantor for incomes taxes paid was held at trust creation, because here it was added after creation through trust modification.

2. Prop. S.C. Code § 62-7-508 and C.C.A. 2023-52-018

Based on the IRS's distinction between a trustee having tax reimbursement discretion at trust creation versus adding such discretion through modification, it appears the CCA does not conflict

with the Proposed Statute. The Proposed Statute would allow discretionary reimbursement without the need to modify the trust. Retroactive application is the default unless an exception applies. PROP. S.C. CODE § 62-7-508(b). No modification would be necessary for a trustee to have the discretion to reimburse the grantor for income taxes paid (and beneficiaries would not need to consent to such modification or "relinquish" their interests) because the trustee's discretion to reimburse the grantor would be imputed by the statute and apply to all trusts existing prior the statute's effective date. Without the need for trust modification (or beneficiary consent to trust modification), it appears the IRS would not be able to credibly assert that trust beneficiaries relinquished or gifted an interest in the trust.

The proposed statute would apply to all trusts governed by South Carolina law whether created before or after its effective date. The exceptions to the rule of discretionary reimbursement are 1) if the terms of the trust explicitly prohibit such reimbursement, 2) if the trustee affirmatively elects out of such treatment, or 3) if the application of the statute would cause estate inclusion for the grantor. *Id*.

III. Electronic Notary Public Act - S.C. Code § 26-2-80

On May 18, 2021, the South Carolina Electronic Notary Public Act was signed into law. Regulations for the Act were finalized in 2022. The South Carolina Secretary of State provides an online application for commissioned notaries to be approved for electronic notarization through its electronic notary portal. To register, notaries must watch a required educational video on the electronic notarization process and successfully complete statutorily required testing. After registration, the notary receives all necessary technology for electronic notarization, which includes an electronic seal and signature.

Electronic notaries must keep an electronic journal for all electronic notarial acts. The journal entry must include the date and time of the electronic notarial act, the type of notarization, the title or description of the record being notarized, the full names of the parties, description of the evidence used for identification of the parties, the address where the notarial act was performed, a description of the electronic notarization system used, and the fee charged, if any. The electronic journal must be protected by a password or other authentication process. S.C. CODE § 26-2-90.

It will be interesting to see if the electronic notarization process becomes the preferred method for notarization in South Carolina. At first blush, the requirements of the Act put a considerable burden on the electronic notary by requiring the use of the electronic journal. The extent to which this is an issue for notaries remains to be seen. For estate planning attorneys, it seems unlikely that electronic notarization would take the place of in person notarization since the South Carolina Uniform Electronic Transactions Act does not apply to any law governing the creation and execution of wills, codicils, or testamentary trusts. S.C. CODE § 26-6-30(B)(2)(a). However, in circumstances where time is of the essence, it could provide a useful tool.

IV. Bennett v. Est. of King, 436 S.C. 614, 875 S.E.2d 46 (2022), Court Opinion

The relevant issue in *Bennett* was whether two personal representatives and beneficiaries of an estate breached their fiduciary duty to the other residuary beneficiary by awarding themselves the "prized" Lake Summit property even though the distributions were of equal monetary value. The Court found there was no breach of fiduciary duty because the will gave the personal representatives broad authority regarding asset distribution, and the distributions were of equal monetary value. *Bennett v. Est. of King* 436 S.C. 614, 626-27, 614 S.E.2d at 46, 52-53 (2022).

It is not uncommon for personal representatives to have broad power to administer an estate; however, that does not absolve them of their fiduciary duty to each beneficiary. The Court's chief argument for finding no breach was due to the uncontested fact that the residuary distributions were of equal monetary value. *Id.* The record made clear that of the three properties, the Lake Summit property was the most desirable, and the personal representatives secured it for themselves, while giving the other beneficiary a larger portion of the two undeveloped properties. Also notable is the fact that the personal representatives gave themselves an interest in all three properties while effectively disinheriting the other beneficiary as to the Lake Summit property. *See Id.* at 634, S.E.2d at 57-58. (Kittredge, J., dissenting).

The probate court, circuit court, and court of appeals found that the personal representatives breached their fiduciary duty.

The impact of the *Bennett* decision could be significant. Personal representatives with broad authority to distribute residuary assets, who are also residuary beneficiaries, can effectively pick and choose the residuary assets they receive so long as the distributions are of equal monetary value (if so required). There are circumstances where distributions of equal monetary value may not be equal in other respects. When considering real property, the location, nature, and use of the properties may provide vast differences beyond economic value. The Court rejected any consideration of value beyond economic, citing the burden in determining such values as a fiduciary and the difficulty in reviewing such valuations as the judiciary. *Id.* at 626-27, 875 S.E.2d at 52-53. This decision seems to clarify the role of a beneficiary serving as personal representative with broad powers over residuary distributions (a common scenario). By restricting the analysis of fiduciary distributions to monetary value the Court made the roles of the fiduciary, and judiciary, significantly easier.

For practitioners, this decision highlights the importance of making sure the client understands and is comfortable with the trustee or personal representative picking and choosing assets for himself or herself. In a scenario where there are siblings as residuary beneficiaries, it seems that the client would not intend that the trustee or personal representative self-deal to the detriment of the client's other children. If there is a prized house or possession, drafters should either have the client explicitly explain how the asset is to be distributed in the planning document or confirm that the client is comfortable with the possibility that the trustee or personal representative claims the most

desirable assets. Another possible solution is to name all children as co-trustees, though that can come with its own complications.

V. Seels v. Smalls, 437 S.C. 167, 877 S.E.2d 351 (2022)

The issue before the South Carolina Supreme Court was whether a wife's family court action for marital property allocation by a wife for a determination of marital property was abated due to her death during the proceedings.

The petitioner argued that the death of his wife abated her claim and jurisdiction was properly found with the probate court. The petitioner pointed to several cases of abatement of divorce proceedings in which a spouse died before the divorce was finalized. The Court found that the deceased wife's interest in the equitable apportionment of marital property was vested at the time the litigation was commenced, prior to her death.

> During the marriage a spouse shall acquire . . . a *vested* special equity and ownership right in the marital property . . . which equity and ownership right are subject to apportionment between the spouses by the family courts of this State at the time marital litigation is filed or commenced . . .

S.C. Code Ann. § 20-3-610 (2014) (emphasis added).

The Court determined that the vested interest was not abated upon death and distinguished equitable apportionment from divorce by explaining that a divorce proceeding becomes moot upon the death of a spouse, whereas, once filed, an action for equitable apportionment of marital assets concerns a vested right prior to death. The Court ruled that the death did not alter the appropriate jurisdiction and the action remained properly before the family court.

This decision is not controversial, but having to wait for family court litigation can add complexity and time to probate administration. The evidence that is reviewable by the family court is more robust than that of the probate court, which is likely why the husband wanted the matter removed. This seems like a fair result and a correct reading of South Carolina statutes.

VI. Brown v. Sojourner, 846 S.E.2d 342, 346 (S.C. 2020)

This case concerned the estate of James Brown, and the validity of his 2001 marriage. The estate claimed that the marriage was void ab initio because the respondent's first marriage was valid at the time she married Mr. Brown in 2001. The respondent annulled her first marriage to a Pakistani man who she alleged to have 3 wives in Pakistan at the time of her first marriage in 1997. The respondent's first marriage was annulled due to bigamy in 2004. The Court of Appeals found that the 2004 annulment did have retroactive effect and therefore the 2001 marriage was valid.

The issue before the court was whether the 2004 annulment of the first marriage rendered the 2001 marriage to Mr. Brown invalid.

The Court found that the annulment of the first marriage that took place after the second marriage does not retroactively work to validate the second marriage, even if the first marriage was void *ab initio*. The Court cited its own decision in *Lukich v. Lukich*, **379 S.C. 589** , **666 S.E.2d 906** (2008) which looked to SC Code Sec. 20-1-80. [The statute] focuses on the parties' status *at the time a marriage is undertaken*, so an annulment order cannot retroactively validate a bigamous marriage entered into prior to the issuance of the annulment. *Id*.

The Court cited the importance of public records and marriage certificates as a policy consideration for avoiding the retroactive effect of annulment.

If a marriage is void *ab initio*, then it would follow that it does not need retroactive effect; the marriage was never valid. If the 1997 marriage was void *ab initio* due to bigamy, then at the time of the 2001 marriage respondent had never before entered into a valid marriage. This is an interesting decision due to the clear policy concerns of the Court and its hesitancy to grant retroactive effect to an annulment order for fear of creating “chaos.” *Id*.