

Probate Update

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SYNOPSIS OF THE PROPOSED SOUTH CAROLINA TRUST CODE

The Uniform Trust Code (UTC), promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), is the first attempt to comprehensively codify the law of trusts.¹ In that regard, much of the UTC is relatively unremarkable, accumulating in one statutory location a substantial part of existing statutory and common law, without changing either. However, some of the UTC does change existing law generally, and would change existing South Carolina law as well. The South Carolina Trust Code (SCTC) Study Committee (the Committee) – chaired by Jim Hardin, comprised of many of the best and brightest estate planning and probate lawyers from our state, and for which Alan Medlin served as Reporter – decided to recommend some of the UTC provisions that would change existing South Carolina law but to reject some others. Especially in the few areas in which the UTC is provoking some controversy elsewhere, the Committee appeared to be particularly careful to dilute those controversial UTC provisions by rejecting, replacing, or modifying them. All in all, the proposed SCTC would codify or recodify some of the existing South Carolina statutory and common law, clarify some issues not previously dealt with legislatively or judicially in South Carolina, and change some of the existing South Carolina law. This memorandum will discuss some of these issues, with a particular emphasis on proposed changes to existing South Carolina.

Part 1²

¹ The UTC's comprehensive approach, however, is not intended to codify all trust law but instead supplements the common law except when the UTC specifically contradicts it. This is the typical uniform law treatment and is similar to the treatment of the common law under the South Carolina Probate Code.

² The Committee proposes that the SCTC will be codified as 11 Parts of Article 7 of the South Carolina Probate Code (Title 62 of the South Carolina Code of Laws), thus maintaining the current South Carolina Code location for many of the existing trust statutes. However, the UTC is divided into Articles. Consequently, the UTC references to Articles will often, but not always, correlate to the SCTC references to Parts. Although this may create some confusion, this will allow codification at Title 62, Article 7, rather than require the creation of a stand-alone Title in the South Carolina Code. Another caveat about confusion involves the Comments. NCCUSL will not allow any changes to the UTC Comments. Thus, the Committee chose to include the UTC Comments to aid with general explanations, but also to include South Carolina Comments, which refer specifically to South Carolina issues and especially to note differences between the SCTC version and the UTC version discussed in the UTC Comments. Although this methodology creates the potential for some confusion by a reader, the Committee decided that inclusion of the UTC Comments was more helpful by way of adding to the overall explanation of the statutory provisions

Part 1 covers general provisions and definitions. The only significant new definition is that of a “qualified beneficiary,” a term that has repercussions elsewhere in the SCTC, especially as to certain rights, including notice. “Qualified beneficiary” translates loosely to “current beneficiary.”

Part 1 includes default rules, some of which may be overridden by the settlor’s intent, and some of which may not. The proposed SCTC eliminates a controversial provision of the UTC default rules, which required certain notices to beneficiaries despite the settlor’s contrary intent; the SCTC does not contain such a mandatory provision.

Part 1 codifies the essence of the South Carolina common law rule allowing a settlor to choose which state law will govern the trust.

Part 1 provides that a beneficiary may issue a request for notice, which is analogous to an interested person’s right to make a demand for notice in the administration of a decedent’s estate under the current South Carolina Probate Code (SCPC).

Part 1 recognizes the ability for interested persons to enter into a binding settlement agreement without court involvement, but only for a few specified matters; the UTC list is broader.

Perhaps Part 1’s most significant addition to existing South Carolina law is the provision applying the rules of will construction to trust construction when “appropriate.” Although at least one South Carolina case applies will construction rules to trust construction, the SCTC would make this treatment broader and more certain.

Part 2

Part 2 covers general issues concerning judicial proceedings, such as jurisdiction and venue. The Committee chose to include a recodification of much of the pertinent existing South Carolina statutory law rather than adopt the UTC version.

Part 3

Part 3 deal with representation by others. As with Part 2, the Committee chose to include a recodification of much of the pertinent existing South Carolina statutory law rather than adopt the UTC version.

Part 4

Part 4 covers the rules regarding the creation of trusts. The Committee’s proposal differs from the UTC version, and perhaps existing South Carolina law, by requiring a writing to create a self-settled trust (settlor is also trustee).

than detrimental as a potential source of confusion.

The proposed SCTC version of Part 4 includes the UTC requirement that a trust purpose be lawful and possible to achieve, but deletes the UTC requirement that the trust purpose not violate public policy, although the general common law rule would probably impose such a requirement.

Part 4 clarifies, and probably broadens, the powers of the state Attorney General with respect to charitable trusts.

Although Part 4 generally adopts the common law requirement of a definite beneficiary to create a valid noncharitable trust, Part 4 codifies a settlor's ability to create a valid noncharitable trust without definite beneficiaries in two instances: to care for animals and to accomplish certain other valid purposes.

Part 4 covers the early termination or other modification of a trust that is otherwise not amendable or revocable. The proposed South Carolina version requires court approval for an early termination or modification. However, Part 4 allows court approval even if all the beneficiaries do not consent, if the interests of a nonconsenting beneficiary would be protected.

Part 4 allows a court to modify the administrative or dispositive provisions of a trust because of a change in circumstance. Part 4 would broaden the common law rule by allowing a court to modify dispositive provisions in the appropriate case.

Part 4 authorizes a trustee to terminate a trust because its value – less than \$100,000 – is insufficient to justify the administrative costs. Although new to South Carolina law, this provision codifies the practice many estate planners to include such a provision in the trust document.

Part 4 allows modification of a trust to accomplish the settlor's tax objectives.

Part 4 allows the combination or division of trusts to facilitate administration, as long as a beneficiary's rights are not adversely affected. This provision would broaden the existing South Carolina statutory provision.

Part 5

Part 5 covers the rights of a beneficiary's creditors to the trust property. The UTC version has generated considerable controversy, especially among proponents of so-called asset-protection trusts. Asset-protection trusts prevent a beneficiary's creditors from reaching the beneficiary's interest in the trust property, and the purposes used in estate planning range from the often-criticized attempt to protect a settlor's property from creditors, as allowed in Alaska and Delaware, to the generally-accepted purposes of protecting a beneficiary with special needs. The Committee eliminated much, if not all, of the controversial UTC provisions, and generally retained, with some refinement, the existing South Carolina law.

The SCTC version of Part 5 does not follow the lead of such states as Alaska and Delaware that allow a settlor to protect trust assets from the settlor's creditors. Rather, the SCTC version clarifies that a settlor's creditor may reach the trust property in a revocable trust and may reach, to the extent distributable to the settlor, the trust property in an irrevocable trust, subject to a statute of limitations running from the settlor's death for revocable trusts.

Part 5 clarifies that a spendthrift provision is valid as to income and principal interests in trust. Existing South Carolina common law arguably recognizes a spendthrift provision as valid only as to income interests. Under Part 5, the only exception to the protection afforded by a spendthrift provision is for child support, and the SCTC version adds language to the UTC version to ensure the continued protection of special needs trusts.

Part 5 of the SCTC retains the protection afforded by a discretionary trust.

Part 5 of the SCTC differs from the UTC version by deleting UTC language that would treat the holder of a power of withdrawal – effectively, a presently-exercisable power of appointment – as the settlor of a revocable trust.

Part 6

Part 6 covers revocable trusts.

Part 6 changes the existing South Carolina rule concerning the presumed revocability of trusts. Under the common law, a trust was presumed to be irrevocable unless the settlor retained the right to revoke or amend. The proposed SCTC reverses that presumption. However, the new treatment under the SCTC is expressly applicable only to trusts created after the SCTC's effective date.

Because a revocable trust is usually used as part of an overall estate plan, Part 6 clarifies the mental capacity necessary to create a revocable trust is the same as that needed to make a valid will.

Part 6 includes a statute of limitations to contest the validity of a revocable trust after the settlor's death or notice of the trust.

Part 7

Part 7 covers the office of trustee, including resignation and removal. Part 7 does not significantly change the existing pertinent South Carolina law.

Part 8

Part 8 covers the duties and powers of trustees and, although the proposed SCTC version differs in some respects from existing South Carolina law, the proposed changes are relatively insubstantial.

The Committee rejected the UTC provisions governing the exercise of powers by co-trustees and retained existing South Carolina law.

Part 8 incorporates the essence of the existing South Carolina version of the Uniform Trustees Powers Act (UTPA), currently found in Title 62, Article 7, Part 7 of the SCPC., by listing specific trustee powers. Part 8 adds a broader trustee power not expressed in the existing South Carolina version of the UTPA: under the proposed SCTC, the trustee also has the general power of a property owner.

Part 8 duplicates many of the provisions of South Carolina's version of the Uniform Prudent Investor Act, enacted in 2000, and currently found at SCPC Section 62-7-302. However, the Uniform Prudent Investor Act covers only the investment and management of property. Previous versions of SCPC Section 62-7-302 provided a standard of care, although arguably applying more broadly to trustees' duties and powers than only investment and management. Consequently, current Section 62-7-302 arguably leaves a statutory gap in coverage by not providing for a statutorily-expressed standard of care for trustee matters other than investment and management, possibly reverting back to the common law for those issues. Part 8 would rectify this omission in the current statutory standard of care.

Part 9

Part 9 covers investing and fiduciary accounting matters. The UTC recommends inclusion of the state's version of the Uniform Prudent Investor Act as Part 9. The Committee retains and incorporates in Part 9 South Carolina's version of the Uniform Prudent Investor Act, currently found at SCPC Section 62-7-302, with a few appropriate deletions to make it consistent with those broader correlative provisions in Part 8. The Committee also moved the provisions of South Carolina's version of the Uniform Principal and Income Act, governing fiduciary accounting principles, to Part 9.

Part 10

Part 10 covers the liability of trustees and the rights of persons dealing with trustees. Although the proposed SCTC version differs in some respect from existing South Carolina law, the differences appear to be insubstantial.

Part 11

Part 11 contains the effective date and applicability provisions. The Committee bolstered the UTC version's provisions prohibiting the affecting of existing rights.

Recent Probate Decisions³

Circumstances Do Not Warrant Extrinsic Evidence

In *Estate of Hyman*, __ S.E.2d __ (S.C. App. 2004, No. 3895), the testator's father, a respected lawyer, devised certain stock to his wife for life, with the remainder to his children. The children's remainder vested immediately at the father's death by the express provisions of his will. Upon diagnosis of a serious illness, the testator executed a will just before undergoing surgery.

His will devised to his children in trust all property that he might receive by inheritance from his mother's estate. He devised the residue of his estate to his wife. The testator died shortly after the surgery, survived by his mother, his sister, his wife, and his children from a prior marriage. Upon the death of the testator's mother, the testator's wife claimed his interest in the remainder interest in the stock. One of the testator's children, a son, contended that the remainder interest in the stock passed in trust to the testator's children pursuant to the specific devise in the testator's will, despite the plain meaning of the will's language. The trial court admitted extrinsic evidence – testimony from the testator's sister that she and the testator considered the remainder interest in the stock to be part of their mother's estate, and hence governed by the testator's specific devise. However, the trial court concluded that the extrinsic evidence had been admitted improperly and held that the remainder interest in the stock passed under the testator's residuary clause because it was not an inheritance from his mother's estate.

On appeal, the testator's son contended that the trial court erred by failing to find an ambiguity in the will, which would allow the use of extrinsic evidence to determine the testator's intent. Although the testator owned a vested remainder interest in the stock at his death, so that it did not pass through his mother's estate, the son argued that the specific devise was ambiguous. The appellate court stated that extrinsic evidence is admissible only when the will contains an ambiguity. It distinguished patent ambiguities, apparent from the face of the will, from latent ambiguities, not apparent from the face of the will. The appellate court found no patent ambiguity in the will.

The son's argument focused on a latent ambiguity. He contended that the will was inconsistent because the children's trust was left unfunded. The son argued for the consideration of circumstances known by the testator at execution. According to the son, the testator knew that his mother was in good health at the time of execution and would probably survive him. In that case, unless the specific devise included the stock remainder interest, the testator knew that his specific devise would create an unfunded trust. However, the appellate court found the specific devise language to be clear and definite, referring only to the condition that he might inherit property from his mother's estate. Although extrinsic evidence is admissible, by definition, to identify a latent

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ambiguity, a latent ambiguity exists only when the will's words are "incapable of application" or "result in an obvious absurdity, repugnancy, or inconsistency with Testator's declared intent." Because the testator's mother at the time of his death had a substantial estate that she could have left to him if she predeceased him, the appellate court found no latent ambiguity. Consequently, extrinsic evidence was not admissible to resolve an ambiguity because none existed.

Comment: *Hyman* demonstrates the modern trend to use extrinsic evidence in will construction as a two-part process for latent ambiguities. First, extrinsic evidence can be admitted to identify the latent ambiguity, which by definition is not apparent from the face of the will. If the court determines that a latent ambiguity exists, then it may use extrinsic evidence to resolve or clarify the latent ambiguity. The *Hyman* court did not reach the second step of the process because, after admitting extrinsic evidence to attempt to identify a latent ambiguity, it found that none existed. Thus, the second step of the process was inappropriate.

The appellate court rejected the son's contention that the construction rule presuming that a testator intended to dispose of all property in the will created an ambiguity because the testator did not dispose of the remainder interest in the stock. The appellate court observed that rule of construction, based on a presumption against intestacy, was inapplicable because an intestacy or partial intestacy did not result: the remainder interest in the stock passed to the residuary devisee. Moreover, the appellate court observed that rules of construction are appropriate only when the will's language is not clear and definite.

In a similar examination of a will to determine whether extrinsic evidence should be admissible, the court in *Estate of Prioleau*, __ S.E.2d __ (S.C. 2004) (2004 Westlaw 2851796), found that the testator's devise to his "then-living grandchildren" was unambiguous because the devise was prefaced by the language "upon my death." Finding no ambiguity, the court refused to admit extrinsic evidence to explain the devise and held that only those grandchildren alive at the testator's death were entitled to a share of the devise.

Subsequent Restrictions on Vesting Must Be Clear

In *McGirt v. Nelson*, 599 S.E.2d 620 (S.C. App. 2004), Item II of the testator's will devised his funeral home business to "my wife and my daughter to share and share alike." Item IV of the testator's will provided that "[i]n the event my wife or my daughter should predecease the other in death, then the survivor shall inherit the whole." The testator died in 1976, and his daughter died in 1996, survived by children who were the devisees of her estate. The wife died in 2001, and her estate and the daughter's children — the grandchildren — disputed ownership of the funeral home. The wife's estate contended that the survivorship language in Item IV of the testator's will created "either a joint tenancy with right of survivorship, a life estate with cross remainder, or a fee simple subject to shifting executory interest" — in any event, leading to the wife's ownership of the entire business because she survived the daughter. The grandchildren contended that the daughter's owned a half-interest in the business that vested on the testator's death.

The court reasoned that the seminal issue involved construction of the will's language as to the timing of vesting, which typically occurs either at the date of execution, the date of the testator's death, or the life tenant's death. The court noted that the will contained words of survivorship in Item IV, but that the will did not indicate at what time these words were to apply — the testator's death or the daughter's death. The court cited the general rule under state law that words of doubtful import cannot cut down an absolute grant earlier in the document. Because the court construed the Item II language to create an absolute grant and the Item IV survivorship language to be uncertain as to time of application, the court refused to allow the Item IV language to cut down the absolute language in Item II. The court ruled that the daughter owned a vested half-interest in the business at the time of her death, which passed to her devisees.

Comment: McGirt follows the general rule of document construction when the will arguably contains contradictory provisions about the vesting of a grant. However, another view might argue that, when contradictory vesting provisions appear in different parts of a will, a valid construction would construe the two provisions as consistent and thus apply the more restrictive vesting provision as well.

The court observed that state law would allow a subsequent provision to cut down an earlier absolute grant, but only if the subsequent provision was clear and certain.

Because the court ruled in favor of the grandchildren, it did not distinguish the different theories advanced by the estate: joint tenancy with right of survivorship, a fee simple subject to an executory interest, or a cross-remainder following a life estate.

Don't Forget to Consider Postmortem Disclaimers

In *Estate of Sims*, 592 S.E.2d 315 (S.C. App. 2003), a daughter died intestate, leaving her mother as her only heir. Approximately seven and one-half months later, the mother died, leaving her other daughter as the only beneficiary of her estate. The daughter served as personal representative of both estates and hired an attorney to represent her in that capacity for both estates. Because the mother's estate included the estate of her predeceased daughter, the tax for her estate was almost \$200,000 more than if she or her estate had disclaimed her inheritance from her daughter's estate. The daughter brought a malpractice action against the attorney for failing to recommend a timely disclaimer. The trial court ruled against the attorney.

The appellate court considered several arguments by the attorney. First, he contended that the daughter failed to establish the standard of care that he owed her because she failed to produce expert testimony. The appellate court observed that, although normally expert testimony is necessary to establish a standard of care for legal malpractice, exceptions arise if "the subject matter is of common knowledge to laypersons" or the attorney "admits the standard of care that is owed to the plaintiff." In an earlier summary judgment motion, the attorney argued in a memorandum that, although an "counsel of record" owed a duty to advise such a client about disclaimers, he was not the counsel of record. After losing the summary judgment motion, the attorney conceded that he

was the personal representative's attorney. Consequently, the appellate court ruled that he admitted the standard of care owed to the daughter.

The attorney also contended that he did not breach any duty to the daughter because he never knew the size of the estates. The appellate court was unimpressed by that position: "[the] duty to advise his client whether disclaimer would be to her advantage cannot be abrogated by mere ignorance of his client's affairs." Because he admitted a duty to advise the daughter about a disclaimer, he should have determined whether a disclaimer was appropriate or at least advise her about disclaimers.

In addition, the attorney claimed that his lack of advice about disclaimers was not the proximate cause of the additional tax because the mother accepted the daughter's property by taking possession and she directed the property to the surviving daughter. Although neither issue was preserved for appeal, the court opined that the attorney was nevertheless wrong on both counts. The attorney based his acceptance argument on the mother's cleaning of her daughter's house and the sale of her furniture. The appellate court observed that the disclaimant's "conduct in toto," rather than some individual act, determines whether the disclaimant has accepted property. "A beneficiary of property in an estate will not be deemed to have accepted the property as long as she leaves the disputed property in the possession of the estate and does not unreasonably disrupt the orderly and timely distribution of estate assets." According to the appellate court, the act of cleaning the house was merely maintenance of the property that, without more, is not acceptance under the applicable Treasury regulations. The attorney based his direction argument on his conversation with the personal representative and her mother, indicating that they wanted the predeceased daughter's property to pass to the surviving daughter. The appellate court considered this testimony to be no more than an inquiry about a disclaimer. The appellate court recast the attorney's contention as asking the court to find that the mother directed the property by indicating that she wanted to disclaim it. Finding that the argument "strained credulity," the appellate court reasoned that, if the attorney's position was correct, "lawyers advising clients on matters of estate administration would be unable to engage their clients in meaningful conversations about their wishes for the distribution of property for fear of forgoing disclaimer and other similar options." The appellate court upheld the trial court.

Comment: Sims serves as a reminder that lack of, or improper, advice about disclaimers can constitute malpractice. See Medlin, *Disclaimer Malpractice Worries*, in the September 1997 issue of the PROBATE PRACTICE REPORTER.

The appellate court tied the attorney's duty to determine the facts pertinent to the disclaimer or at least advise the client generally about disclaimers to his admission from his summary judgment motion that the counsel of record owed a duty to advise the client about the possibility of a disclaimer. Whether a court would reach a similar conclusion without an attorney's admission as to the standard of care is problematic, but likely.

Finally, the Right Law Is Applied

In *Estate of Boynton*, 584 S.E.2d 154 (S.C. App. 2003), the testator devised a life estate in an 860 acre farm to a life tenant, the putative father of an illegitimate daughter, with the remainder to the life tenant's "child or children." The testator died in 1954, and the life tenant died in 1995, survived only by the daughter. The testator's heirs claimed that the term "child or children" did not include illegitimates, so that the devise of the remainder failed. The daughter contended that she qualified as a child of the life tenant and was entitled to the remainder interest. In a related family court action, the daughter successfully established paternity.

Relying on the applicable state probate code statute, the court applied the law in effect at the testator's death to define the term "child or children." According to the court, such a devise in a will effective in 1954 would be construed not to include illegitimate children. The court dismissed the daughter's equal protection argument, finding that equal protection issues applied only when state action was involved, such as in intestacy. The court reasoned that state "law is well settled that a testator may devise his property any way he sees fit, as long as it is not contrary to law or public policy." Thus, the devise of the remainder interest failed.

Comment: *Boynton* illustrates the different treatment of illegitimate rights in intestacy and testacy. A testator may disinherit an illegitimate child, or the illegitimate child of another, but constitutional requirements mandate an opportunity for an illegitimate child to prove paternity and, if successful, inherit from that child's intestate father. See *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459 (1977). The rights of an illegitimate child to take by intestacy have evolved over time.

The *Boynton* court apparently applied the correct law. However, if a court faced with similar facts instead applied current law, the result may well be different. See, for example, Uniform Probate Code section 2-609, providing for resort to intestacy definitions when certain class terms, such as children, are undefined in the will. Generally, state law provides an opportunity for an illegitimate child to prove paternity and thereby take under intestacy.

Joint Survivorship Accounts

In *Kemp v. Rawlings*, 594 S.E.2d 845 (S.C. 2004), the testator and his wife were married later in life. They each had children from prior marriages. In his will, the testator stated that he had made sufficient provision for his wife, "as we *have* a joint or survivorship bank account or joint and survivorship savings account and she is entitled to and I give and bequeath any and all funds in said account . . ." (emphasis added). After executing the will, the bank holding the joint account was acquired by another bank. Afterwards, the testator closed those accounts and eventually opened a joint brokerage account and a joint savings account at another bank. After the testator suffered a heart attack, his wife, on the advice of counsel, withdrew funds from the joint brokerage account and deposited most of the funds into her personal account before commencing conservatorship proceedings in which she was appointed as his conservator. When the testator died, the testator's

children petitioned for the imposition of a constructive trust against his wife for the return of those funds to the estate.

The court determined that the will contained a latent ambiguity: the use of the word “have” could refer to those accounts existing at the time of the will’s execution or could refer to the account held at the time of death. The court allowed extrinsic evidence, specifically the testimony of the drafting attorney who also served as personal representative, to resolve the latent ambiguity, which the court defined as “one in which the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.” Based on the extrinsic evidence and the presumption that the testator’s will speaks at his death, the court determined that the testator intended for his wife to take the joint accounts as they existed at his death.

The children also argued that the testator’s wife wrongfully withdrew the funds from the accounts before his death because, while both were alive, she was entitled by statute to withdraw only her net contribution from the accounts, and the testator was the sole contributor to the accounts. They contended that the withdrawn funds should be assets of the estate. The court reasoned that his wife was not entitled to the withdrawn funds as the survivor because the funds were not in the account at the testator’s death. However, the court reasoned that the testator’s will evidenced his intent for his wife to receive those funds, so she was entitled to them despite having withdrawn them before his death.

Comment: Kemp demonstrates issues that can arise as spouses age. Whether a spouse is concerned about dissipation of the other spouse’s assets due to illness and nursing expenses, or whether a spouse attempts to appropriate the other spouse’s assets in anticipation of claims from the other spouse’s children from a prior marriage, the effect of a spouse’s attempt to convert assets while the other spouse is alive can wreak havoc on an estate plan. This is especially problematic if the other spouse is ill or infirm. In any case, prevention may be difficult. Presumably, once a conservatorship is established, a more regular process for scrutinizing the utilization of the protected person’s assets becomes available.

In determining the testator’s intent, the *Kemp* court did not focus on the difference between checking, savings, and brokerage accounts. However, depending on the jurisdiction, these accounts may be considered to be different and thus be treated differently for ownership and access purposes.

Retirement Benefits Fight

In *Walsh v. Woods*, 594 S.E.2d 548 (S.C. App. 2004), the decedent married his first wife in 1957. Although they separated in 1970, they remained married until their divorce in 1990. In 1989, the decedent retired, designating his wife as the sole beneficiary of his surviving spouse benefits (SSB) plan after his death. The divorce decree incorporated an agreement between the decedent and his wife in which she agreed to sign any documents necessary to relinquish her rights in the SSB. However, the decedent never presented any waiver documents to his wife, nor did either obtain

during the decedent's lifetime a Qualified Domestic Relations Order (QDRO) that reassigned the benefits.

The decedent married his second wife in 1994. Although he twice requested paperwork from his employer to change his SSB beneficiary, he never attempted to make any change. After the decedent's death, the second wife, who was also his personal representative and sole estate beneficiary, sought a federal court order that the employer should pay the SSB to her. The employer obtained a summary judgment because no QDRO existed. The second wife then contacted the attorney who represented the decedent in the divorce and asked him to prepare a QDRO. The first wife protested, but authorized her attorney to sign the QDRO for her because she feared being held in contempt of court. When the decedent's divorce attorney submitted the QDRO to the employer, it responded that the QDRO was unenforceable because it was created after the decedent's death. Moreover, the employer opined that, even if the QDRO was created before the decedent's death, it would be ineffective because ERISA provides that a joint and survivor election, once made, is irrevocable.

The second wife then filed an action against the first wife, claiming unjust enrichment, breach of contract, and conversion, and asking the court to disgorge the first wife of all SSB payments she had received and would receive. The first wife asserted the statute of limitations as a defense. The trial court granted summary judgment to the first wife, citing *Hopkins v. AT&T*, 105 F.3d 153 (4th Cir. 1997) for holding that SSB benefits vest in the spouse on the date of retirement and SSB can not be paid to a spouse married after retirement. The trial court did not rule on any other ground.

The appellate court ruled in favor of the first wife because the statute of limitations had run. The appellate court determined that the applicable statute of limitations ran from the time the second wife knew or should have reasonably known that she had a cause of action. The appellate court reasoned that the second wife should have known she had a cause of action when the federal court granted summary judgment to the employer in 1997. Because the second wife did not file her action against the first wife until more than three years later, the appellate court held that the statute of limitations barred her claim.

 Comment: Walsh demonstrates the complications that can arise with SSBs governed by ERISA, especially when a decedent obtains a divorce. The second wife, frustrated in her attempts to gain relief from the employer, pursued some innovative causes of action against the first wife. Whether she would have succeeded is problematic, but missing the statute of limitations deadline ensured her failure.

All Saints Fight Touches Many Estate Issues

In *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 595 S.E.2d 253 (S.C. App. 2004), land was donated in 1745 by settlers to two trustees to be used in trust for Waccamaw Neck inhabitants for the use of a church "for divine worship of the

Church of England.” The General Assembly established the Waccamaw Neck Parish in 1767. The 1745 trust deed was recorded in 1767. Because of a concern that the Parish’s charter had expired, which vested the property in the South Carolina Diocese, the Parish obtained a quitclaim deed from the Diocese in 1903. After the quitclaim deed was recorded, the Parish leased the property, for purposes that would not have been allowed under the trust, and, claiming ownership of the property, obtained various mortgages. The Parish, the Diocese, and the National Episcopal Church engaged in an ecclesiastical dispute beginning in 2000. The Diocese recorded a notice in the public records indicating that canons of the National Church and the Diocese restricted alienating and encumbering the church property. The Parish sought the removal of the notice and a declaratory judgment that it owned the real and personal property in dispute. The Diocese and National Church contended that the Diocese owned the property subject to the applicable canons. The court appointed a guardian ad litem to represent the unknown successors of the original trustees, who claimed ownership of the property, and were eventually joined by the Parish. The circuit court granted a summary judgment to the trustees on a variety of issues. The Parish did not appeal, but the Diocese and the National Church did.

The appellate court first reversed the circuit court’s ruling that the Diocese and the National Church did not have standing to assert certain claims. The appellate court observed that a party must have a personal interest. The appellate court reasoned that, unless the Diocese and the National Church were able to assert that the Parish owned the property, then they would lose their ability to claim an interest. Consequently, they have an interest in any action that could deprive the Parish of ownership.

The appellate court next considered the circuit court’s ruling that the Statute of Uses did not execute the trust. The appellate court offered the general rationale for the operation of the Statute of Uses: if the trustee has no active duties — if the trust is passive — then the legal title passes to the beneficiary, who becomes the absolute owner. The trustees contended that the trust language established active duties for the trustees, so that the Statute of Uses did not operate to pass legal title to the beneficiaries. The circuit court sided with the trustees, finding that the trust’s express reference to “inhabitants of the Waccamaw Neck” referred to the residents of the region and that the trustees had an affirmative duty to provide a church or chapel for their worship. The appellate court determined that the circuit court ignored the argument by the Diocese and the National Church that “inhabitants of the Waccamaw Neck” meant the Parish, which the settlor intended as the real grantee of the deed but was unable to accomplish his goal until the government recognized the church, a common practice of the time. Thus, according to their argument, the Statute of Uses operated to pass legal title to the beneficiaries at the time the deed was recorded 20 years later, when the government recognized the Parish. The appellate court held that “inhabitants of the Waccamaw Neck” was ambiguous, so that the circuit court should have used extrinsic evidence to consider the alternative meaning posited by the Diocese and the National Church.

In case the Statute of Uses was eventually determined not to pass legal title, the Diocese and the National Church also contended that the trust failed when the Church of England was no longer established, as required by the trust, as part of an overall argument that the Parish took title by

adverse possession. The appellate court reasoned that a latent ambiguity arose when the Church of England ceased to exist in the United States. The appellate court found that the circuit court should have considered extrinsic evidence to resolve the latent ambiguity.

The appellate court next considered the issue of adverse possession, noting the statutory period of 40 years for a party claiming under color of title. Because the Parish possessed the property from the 1903 deed until the lawsuit's commencement in 2000, the appellate court held that the evidence presented a material question of fact whether that possession satisfied the requirements for adverse possession. Moreover, the appellate court found a material question of fact that the Parish satisfied the requirement for hostile possession.

In the event a court eventually determined that the Parish is the trust beneficiary, the Diocese and the National Church also claimed that the circuit court erred by finding that the Parish did not repudiate the trust. The appellate court reasoned that the Parish's leasing of the property for non-authorized trust purposes created a material question of fact whether it repudiated the trust.

The appellate court then examined the circuit court's finding that the trustees were not barred by laches. It cited the failure of the trustees to assert any right for 200 years, especially in light of the Parish's numerous leases and mortgages of the property in contravention of the trust. Consequently, the appellate court found a material question of fact existed. For similar reasons, the appellate court reversed the summary judgment granted by the circuit court to the trustees on the issue of the staleness of their claim.

Finally, the appellate court ruled that the circuit court lacked subject matter jurisdiction to determine that the Diocese and the National Church were incidental beneficiaries of the trust. Citing South Carolina Probate Code section 62-7-201, the appellate court held that the probate court had subject matter jurisdiction to ascertain beneficiaries. Moreover, the appellate court ruled that the probate court did not have subject matter jurisdiction over the personal property because it was never subject to the trust. Consequently, the circuit court should not have refused to address that issue.

No Strawman Needed for JTROS

In *Estate of Sherman*, 597 S.E.2d 850 (S.C. App. 2004), the grantor deeded real property to herself and her husband, using the following language:

“Rosemary C. Sherman . . . do[es] grant, bargain, sell and release unto said Norman E. Sherman and Rosemary C. Sherman for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.”

The grantor predeceased her husband by ten days. Her estate brought an action against his estate to determine the validity of the deed.. Her estate argued that she created only a tenancy in

common because she did not use a strawman and thus did not create the necessary unities of title. The court observed that the common law required joint tenants to have four unities: interest, title, time, and possession. However, the court cited South Carolina Probate Code section 62-2-804, which provides for a statutory method of creating a joint tenancy by using appropriate language and without the use of a strawman. Moreover, the court found no provision in South Carolina Code section 27-7-40 that conflicted with section 62-2-804 or required the use of a strawman. The court buttressed its conclusion by opining that, even if the grantor created a tenancy in common, it was nevertheless subject to a survivorship right because of the express survivorship language in the grant.

Attorney-in Fact Entitled to Fees

In *Gaddy v. Douglas*, 597 S.E.2d 12 (S.C. App. 2004), the principal's friend and neighbor, appointed as her attorney-in-fact under a durable power of attorney in 1988, sought to invalidate the subsequent attempted revocation of that power of attorney and the creation of a new power of attorney in 1999 because she suffered from Alzheimer's at the time and lacked capacity. The testimony, much of it from doctors, established that the principal lacked the capacity to execute the 1999 documents. The court defined capacity to execute a valid durable power of attorney as contractual capacity: "a person's ability to understand in a meaningful way, at the time of the contract, the nature, scope and effect of the contract." The court awarded payment of the 1988 attorney-in-fact's fees from the estate.

Literal Interpretation of Right to Remove

In *Truluck v. Snyder*, __ S.E.2d __ (S.C. App. 2004) (2004 Westlaw 2851476), the appellate court ruled that a probate court order denying a motion to remove to the circuit court was a final order and thus appealable. A respondent who was dismissed in a will contest action and granted leave to intervene as a petitioner was found to have timely filed his removal request because he did so within 10 days of the last responsive pleading, which was an amended answer to his petition. The appellate court also determined that the intervenor had not waived his right to a jury trial.