South Carolina Bar
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2020 SC BAR CONVENTION

Probate, Estate Planning & Trust Section

Friday, January 24

SC Supreme Court Commission on CLE Course No. 200518

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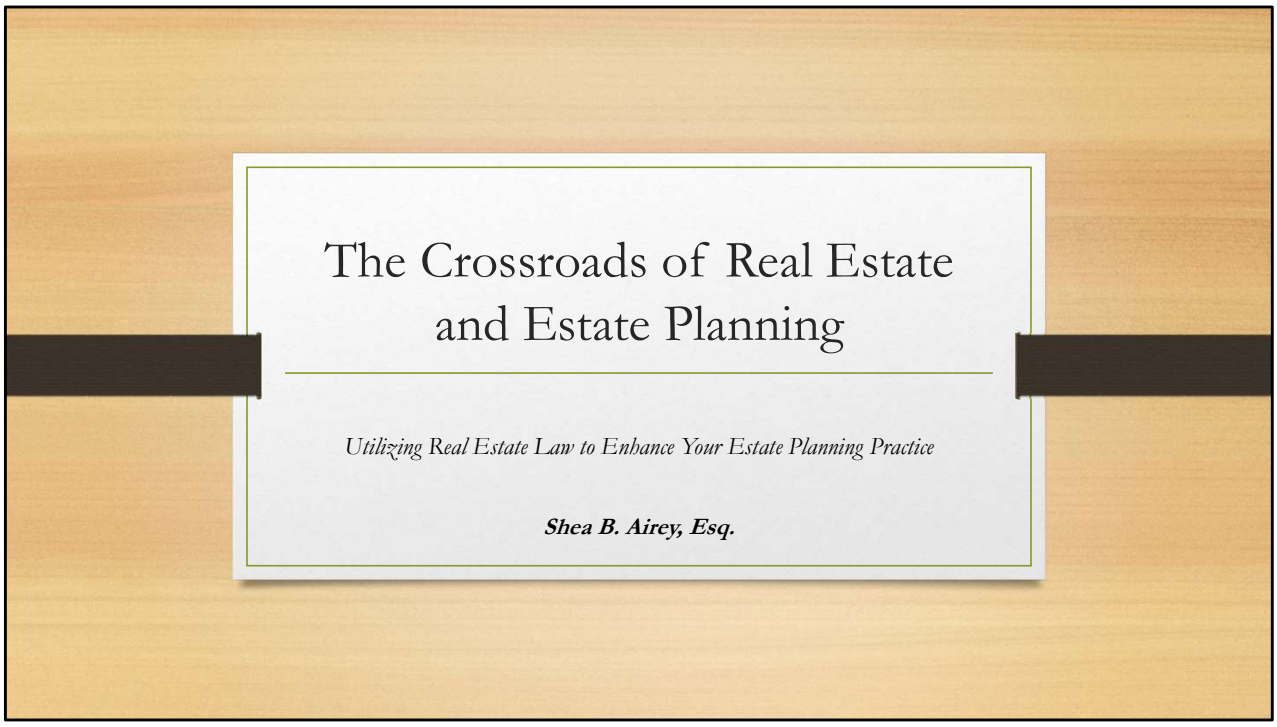
The Crossroads of Real Estate and Estate Planning: Utilizing Real Estate Law to Enhance Your Estate Planning Practice

Shea B. Airey



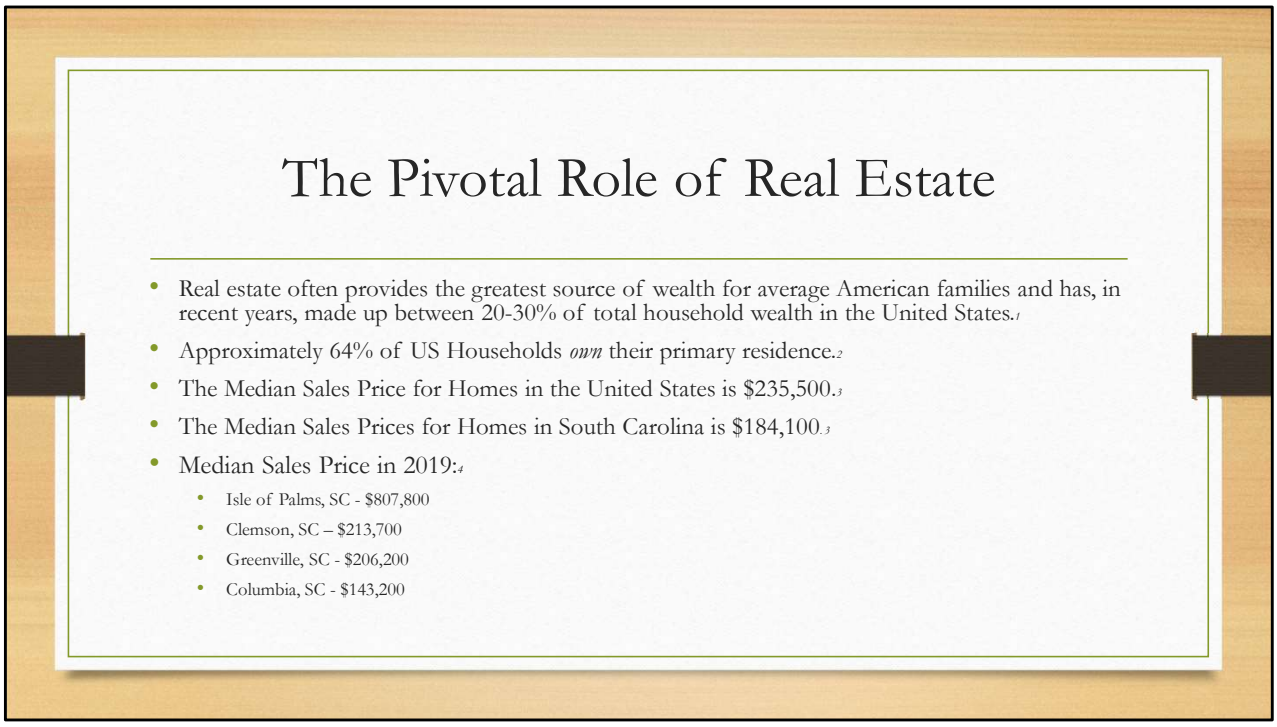
Author and Contact Information:

Shea B. Airey, Esq.

Email: airey@aireylaw.com
Tel: (864) 280-9840
Web: www.aireylaw.com

The Airey Law Firm, Ltd. Co.
1510 Blue Ridge Blvd. Suite 205
Seneca, SC 29672

The Airey Law Firm, PLLC
23 S. Broad Street, Suite 207
Brevard, NC 28712



1 – See UPFINA Report on Housing, 2018 - https://upfina.com/household-wealth-real-estate/; See also National Association of Home Builder's Statistics - https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=215073&subContentID=533787&channelID=311

2 – See United States Census Beareau Report – 2nd Quarter 2019 Report - https://www.census.gov/housing/hvs/files/currenthvspress.pdf

3 – See Zillow Report on National Homes Values (August, 2019) - https://www.zillow.com/home-values/; *See Also Zillow Report on South Carolina Home Values (August, 2019) - https://www.zillow.com/sc/home-values/*

4 – See Zillow Home Values for Isle of Palms, SC; Columbia, SC; Clemson, SC; Greenville, SC & Highlands, NC; https://www.zillow.com/home-values/

The Pivotal Role of Real Estate

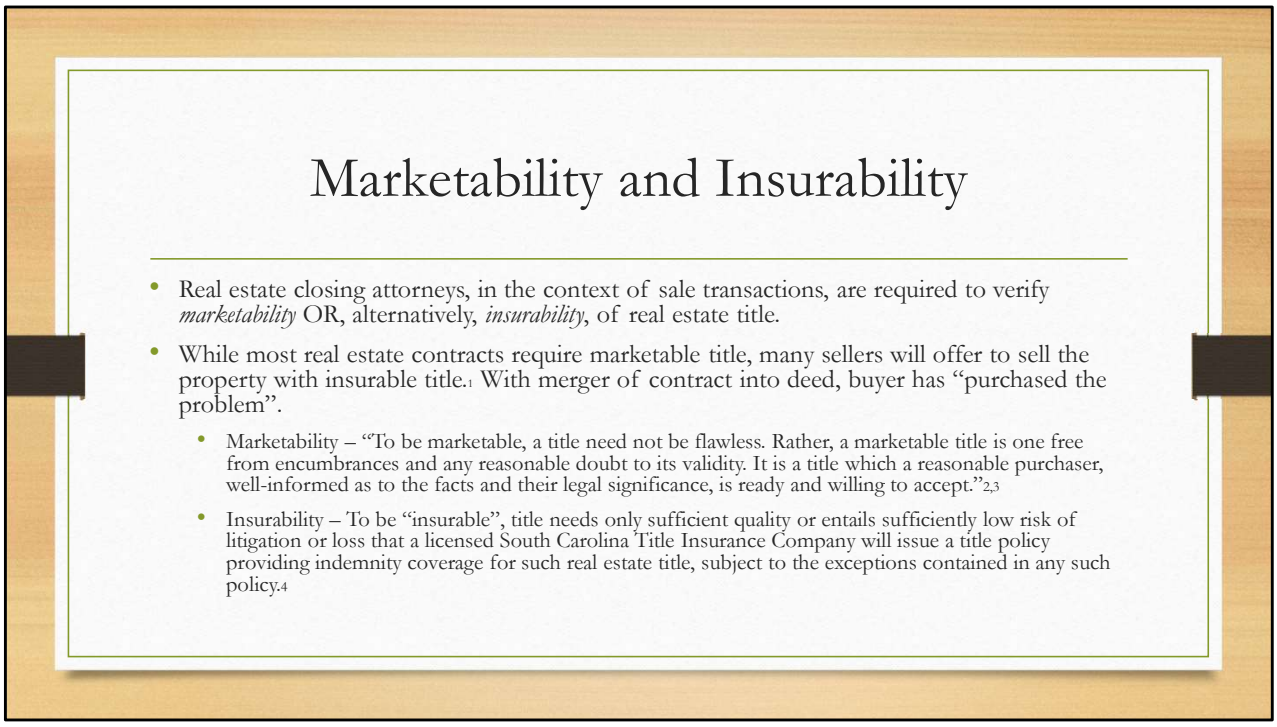
- The central role real estate plays in American life and wealth requires that estate planners understand the legal and practical details of real estate ownership and transactions.

- Adding well founded real estate knowledge and recommendations to your estate planning practice will help add value to the services you provide as an estate planner and ultimately, will produce greater outcomes for your clients.

The Closing Attorney's Perspective

- Real estate closing attorneys who manage residential and commercial real estate sales and transactions are critical focal points and "gatekeepers" of the real estate world.

- It is imperative that estate planning attorneys understand the primary concerns and processes of the real estate closing attorney to ensure the estate planning attorney properly counsels his or her clients.



1. South Carolina Real Estate Contract, Form 300/310, South Carolina Association of Realtors - Reference to the form contracts widely used in South Carolina, as produced by the South Carolina association of realtors, will generally include language similar to the following (emphasis added):

*"Conveyance shall be made subject to all easements as well as covenants of record (**provided they do not make the title unmarketable**) and to all governmental statutes, ordinances, rules and regulations. **Seller agrees to convey by marketable title** and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated."*

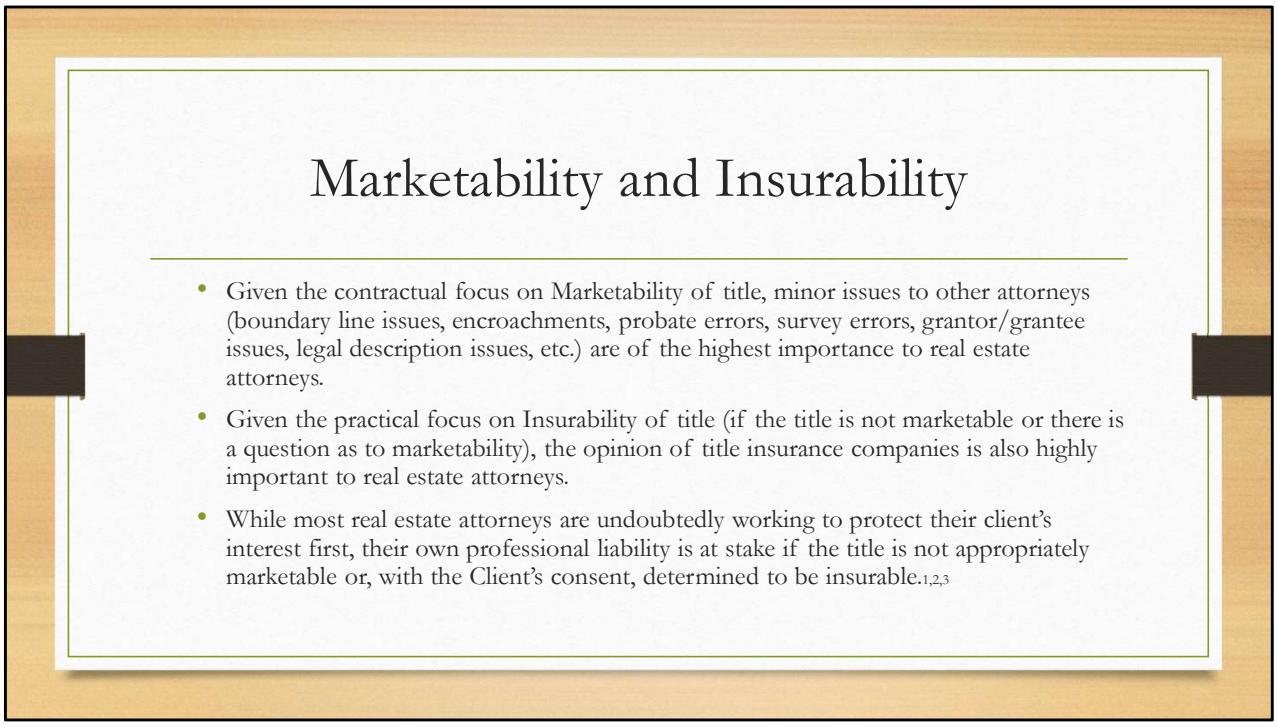
Interestingly and conversely, many standard real estate contracts in the Beaufort County, SC area (specifically, Hilton Head), require only insurable
title in the contract, which changes the nature of real estate legal practice in that corner of the state. This is opposite of the normal default contractual requirement for marketable title in the rest of the State.

2. *Gibbs v. G.K.H., Inc.;* 311 S.C. 103 (S.C. Ct. App. 1993)

3. On Marketability of Title - See also *Sales International Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 242 S.E.2d 432 (1978). In Sales, the purchaser of land sought to recover his

deposit, claiming that the title was unmarketable because there was a latent ambiguity in the chain-of-title in 1935 as to which tract a previous grantor intended to convey and because the habendum clause of a 1931 deed in the chain-of-title included the clause "for the sole use and benefit of a school to be operated at Gable, South Carolina." The SC Supreme Court affirmed the admission of parol evidence to resolve the ambiguity created by the 1935 deed and agreed with the trial judge that the title was not rendered unmarketable by the language of the habendum of the 1931 deed. The SC Supreme Court observed that although "a purchaser cannot be required to take a doubtful title . . . the mere, bare possibility, or remote probabilities that there may be litigation with respect to the title is not sufficient to render it unmarketable. **There must be a reasonable probability of litigation**." (emphasis added)

4. On Insurable Title Exceptions – See *McMaster v. Strickland*, 305 S.C. 527 (S.C. Ct. App. 1991). In *McMaster*, the Court declined to find title was "uninsurable", even though an insurance company would only insure the title with a key exception as to Wetlands on the Property. The exception as to Wetlands may have rendered the property without value to the Purchaser, but this did not mean that the title was not "insurable". The Court's key holding in this specific area noted, "Further, there is no evidence whatsoever that the title to the property was not insurable. The record before us indicates title to the property is in fact insurable, albeit with exception taken to the fact the land has been designated as wetlands. The contract specifically provides that the property is subject to all governmental statutes, ordinances, rules and regulations. This would include wetlands laws and regulations. The fact that exception would have to be taken when insuring the title is irrelevant since such was contemplated by the contract."

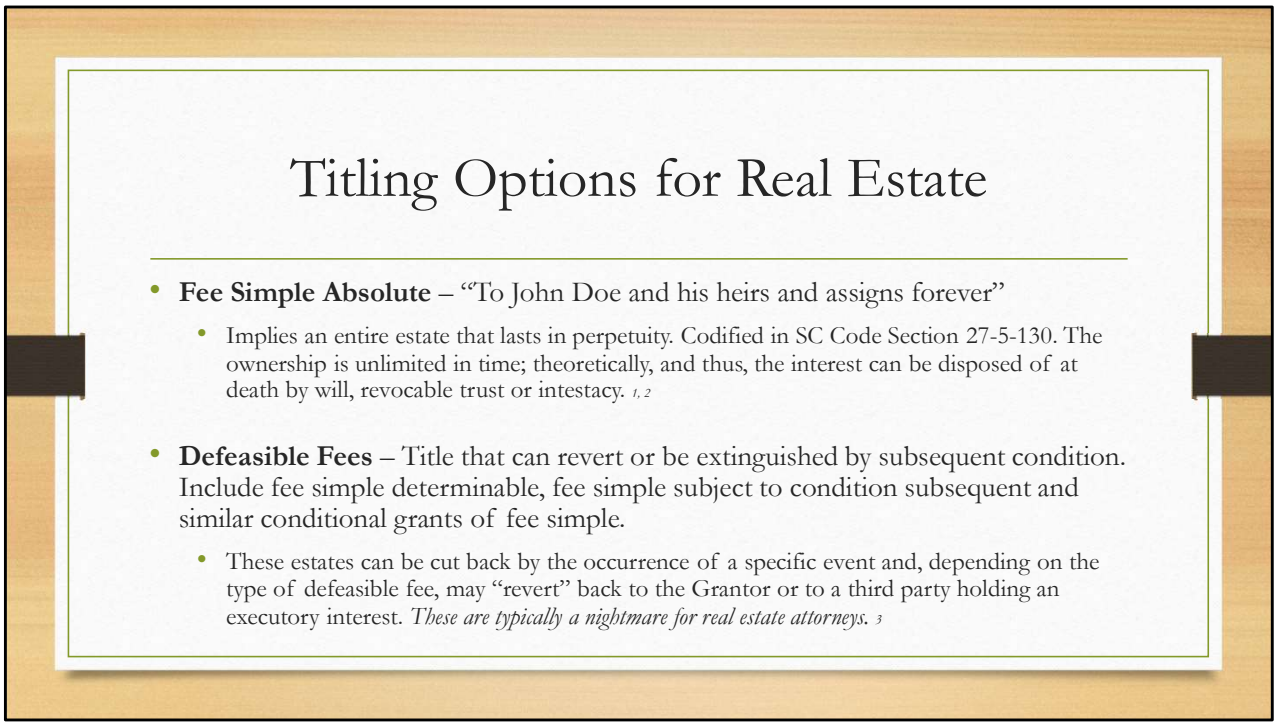


1. South Carolina Courts have held paramount the South Carolina attorney's role in supervising every aspect of a real estate transaction. As such, the SC real estate attorney is the ultimately the responsible party in the event of an undisclosed flaw in title or a problem with marketability, unless the attorney clearly limited the scope of their representation to exclude such matter with the signed and informed consent of the buyer.

2. In *State vs. Buyers Service, Co.* (292 S.C. 426 (1987)), the South Carolina Supreme Court made clear the ultimate responsibility of the South Carolina real estate attorney. Several key passages indicate the South Carolina Court's requirement (and responsibility stemming therefrom) that South Carolina attorney's handle real estate transactions:
    - "The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Often, the line between such activities and permissible business conduct by non-attorneys is unclear. However, courts of other jurisdictions considering the issue of whether preparation of instruments involves the practice of law have held that it does."
    - "The examination of titles required expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney."

- "The State contends instructing clients in the manner in which to execute legal documents is itself practice of law and requires a legal knowledge of statutes and case law. See, e.g., S.C. Code Ann. §§ 27-7-10 and 30-5-30 (1976). We agree."
- "We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern."
- "The circuit court's order permits Buyers Service to continue its practice of mailing or hand-carrying instruments to the courthouse for recording. The State contends this activity is the practice of law. We agree."

3. A more recent case, *Johnson v. Alexander* from July, 2015 (SC Supreme Court Opinion 27553 (2015)), makes clear that SC real estate attorneys remain responsible for the title issues affecting the real estate in their transactions, including proper title examination and review thereof. Further, such duties are "nondelegable" absent a Client's advanced consent. In *Johnson,* the South Carolina Supreme Court held that "…[w]hile an attorney may delegate certain tasks to other attorneys or staff, it does not follow that the attorney's professional decision to do so can change his liability to his client absent that client's clear, counseled consent" and "[f]urthermore, we find the circuit court properly held there was no genuine issue of material fact as to proximate cause. Because of [the real estate Attorney's] failure to discover the tax sale, [the real estate buyer] did not receive marketable title—or any title—to the property she purchased. She was therefore unable to sell or rent the property. [The real estate attorney's] arguments that the property foreclosure was due to [the real estate buyer's] own negligence in failing to pay the mortgage will certainly be considered during the hearing on damages; however, that allegation does not alter the fact that [the real estate buyer's) purchase of the property that had already been sold was a direct result of his failure to ensure she received good title." (context and clarification added by author).



1 – See SC Code Section 27-5-130 (1993) –

"(A) Every deed of real estate executed after December 31, 1993, passes to the grantee the entire interest of the grantor in the property described in the deed, unless provided to the contrary in the deed.

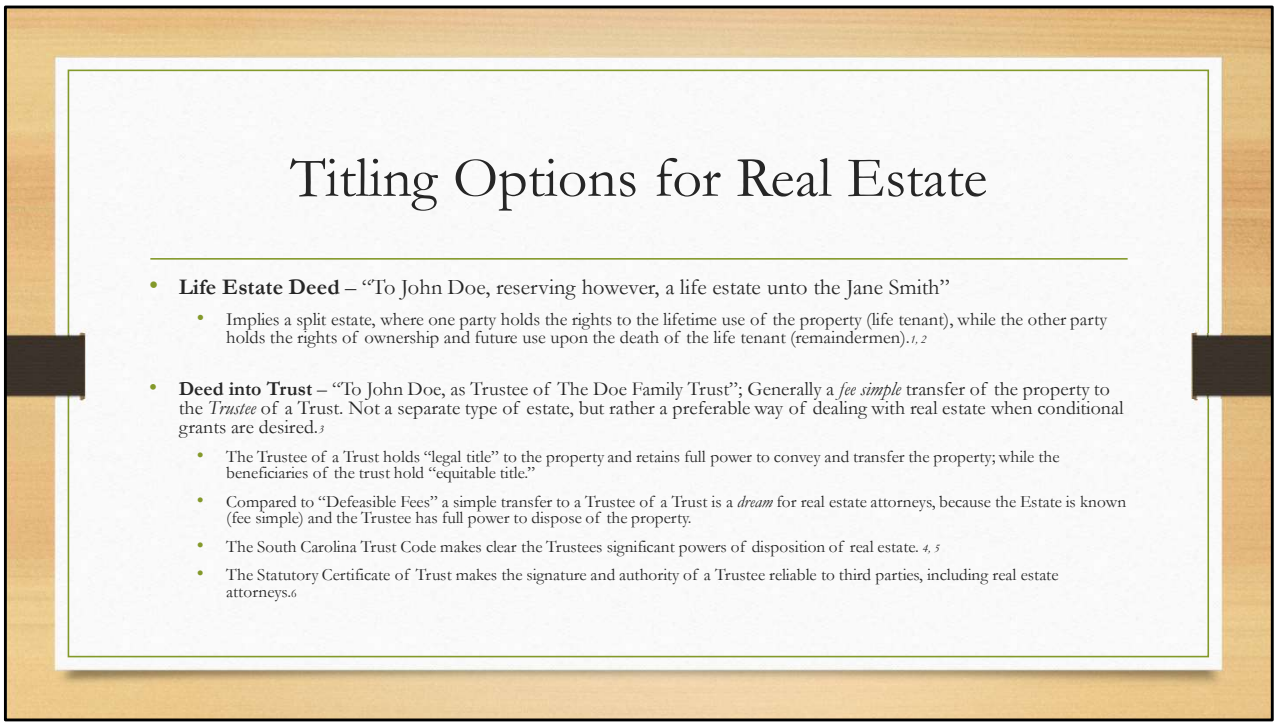
(B) Words of inheritance or succession are unnecessary to convey property in fee simple absolute.

(C) This section modifies the common law and only applies to deeds executed after December 31, 1993.

(D) In the event of a discrepancy between a deed and any addendum or attachment thereto where the words of inheritance or succession are contained in one of the documents, but not in all documents, or where conflicting language exists as to whether or not the grantor intended to convey a fee simple or a life estate interest in the real property, it is presumed rebuttable by clear and convincing evidence that the grantor intended to convey a fee simple absolute interest in the real property if he owned such an interest or his entire interest in the property if he did not own it in fee simple."

2 – The above referenced statute, 27-5-130, modified the existing common law rule to avoid requirement to have words of succession ("to his heirs") added to the granting clause of a deed after December 31, 1993. Thus, deeds directly to "John Doe" without any further modification of the grant will generally be construed as granting a fee simple title.

3 – See *Hunt vs. SC Forestry Commission,* South Carolina Court of Appeals, 2004 – Contain a grant with a defeasible fee granting fee simple title subject to express condition, namely "the said [SCFC] and their successors in office, and assign[ed] forever … upon the express condition that the grantee shall with reasonable dispatch erect and maintain on said lands a suitable fire tower or towers and suitable buildings for the keeper thereof, and use said lands in the furthering the cause of reforestation and forest protection, and should the grantee at any time for a period of two years cease to use the property aforesaid for said purposes the title thereto shall revert to the grantor…". The Court's discussion of defeasible fees in this case is helpful for understanding the nature of such an estate, and also the significant problems in interpreting and enforcing such estates. Further, the Court's discussion (and decision) support the South Carolina rule that a "where the granting clause of a deed purports to convey title in fee simple, the estate may not be cut down by subsequent words in the same instrument" (Citing *Shealy v. South Carolina Elec. & Gas Co.,* 278 S.C. 132, 135, 293 S.E.2d 306, 308 (1982)).



1 – After the enactment of SC 27-5-130, fee simple absolute (rather than a life estate or some lesser estate) is essentially the presumed grant for deeds executed after December 31, 1993. Therefore, when drafting deeds granting a life estate interest clear language must be used. The granting clause should clearly and unequivocally demonstrate that only a life estate has been granted. Examples may include "To John Doe, reserving however, a life estate interest unto Jane Smith" or "while reserving a life estate interest in the property described below, the Grantor conveys, grants and transfers the remainder interest in such property unto John Doe."

2 – Due to the natural expiration of the life tenant interest upon the death of the life tenant, the remaindermen automatically becomes the fee simple owner of the property upon the death of the life tenant and no probate administration is required for SC properties at such time of death. To clarify title in such matters, real estate attorneys often reference the probate file of a deceased life tenant or simply record a death certificate of the life tenant.

3 – *See Broadway National Bank v. Adams*, Supreme Judicial Court of Massachusetts, 1882 for a seminal case on grants to the Trustee of a Trust and the power of real property that such Trustee retains. While the law regarding trusts and trustees has changed considerably since this case, Trustees over Trusts retain great power over real estate and, generally, have

the power to sell, purchase and dispose of real property to the same extent as an individual owner of such real property.

4 – *See* South Carolina Code Section 62-7-815:

"General powers of trustee.

(a) A trustee, without authorization by the court, may exercise:

(1) powers conferred by the terms of the trust; and

(2) except as limited by the terms of the trust:

(A) ***all powers over the trust property which an unmarried competent owner has over individually owned property***;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) any other powers conferred by this part.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this part.

5 - *See* South Carolina Code Section 62-7-816 (selections from statute emphasized by author)

"Without limiting the authority conferred by Section 62-7-815, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) **acquire or sell property, for cash or on credit, at public or private sale**;

(3) exchange, partition, or otherwise change the character of trust property;

…

(5) **borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust**;

…

(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land,

dedicate land to public use or grant public or private easements, including by way of example qualified conservation and façade easements, and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) **grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property**, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

…

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(18) **make loans out of trust property**, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) **pledge trust property to guarantee loans made by others to the beneficiary**;

(22) **on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests**, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
…

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) **sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers**; …"

6 – See selection from SC Code Section 62-7-1013 (Certification of Trust):

"…Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee which may make a reference to the powers set forth in the South Carolina Trust Code;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and

(7) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

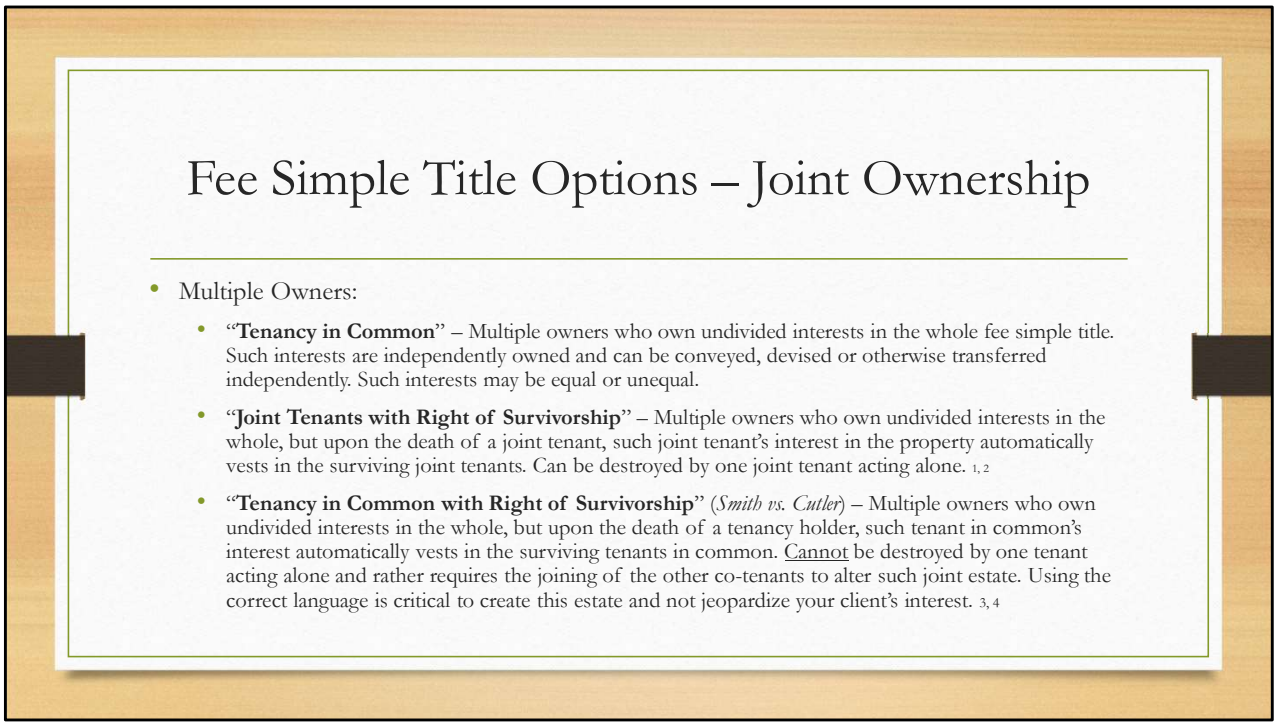
(f) **A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.**

(g) **A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.**

…

(j) **In a transaction involving title to real property, the certificate of trust must be executed and acknowledged in a manner that permits its recordation in the Office of the Register of Deeds or Clerk of Court in the county in which the real property is located."**

(emphasis added)



1 – South Carolina Code § 27-7-40 expressly permits Joint Tenancy ownership in South Carolina and disposes with the "four unities of title" (time, title, interest and possession) which were required at common law. Such code section notes that a proper manner to create such an estate is to convey unto the Grantees as "joint tenants with right of survivorship and not as tenants in common", but later clarifies that such grant language is "[i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law . . . ."

2 - *See* South Carolina Code § 27-7-40 and *Smith vs. Rucker, South Carolina Court of Appeals (1994)* for a discussion of fact that joint tenancies can be destroyed by the act of one joint tenant acting alone.

3 – *See Smith vs. Cutler, SC Supreme Court, Opinion No. 26085 (2005)* – In this seminal case, the SC Courts announced (created?) a new form of tenancy in South Carolina which may be referred to colloquially as "tenants in common with right of survivorship" and, as opposed to "joint tenancy", cannot be destroyed by unilateral act of one of the tenants on the deed. Pursuant to this case, the key language to utilize in such a deed (both in the granting and habendum clause of the deed) is the following: "***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***."

4 – *See Smith vs. Rucker, South Carolina Court of Appeals (1994)* where the Court held very similar language did not create a "tenancy in common with rights of survivorship", but rather a mere joint tenancy. The subject language in that case was "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" and thus, this language should certainly not be used by anyone seeking the "tenancy in common with right of survivorship" as announced in *Smith vs. Cutler.* Since this case predates *Smith vs. Cutler*, it is unclear if the Court would reach the same result again, but caution is certainly warranted. The key point is use the exact language from *Smith vs. Cutler* if you wish to avail your client of the "tenancy in common with right of survivorship" form of ownership.

1 – See *Fernander v. Thigpen, 278 S.C. 140 (1982)* for a discussion of Agency Principals – *"*Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal…The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption."; See also *Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, (Ct.App.1990)* for a more recent discussion of apparent agency principals – "Apparent authority to do a particular act 'is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.'

2 – The South Carolina Limited Liability Company Act, SC Code Section 33-44-301(c), notes importantly regarding LLCs: "(c) Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument."

3 – Part of the South Carolina Uniform Partnership Act, SC Code Section 33-41-310(1) notes, with regard to partnerships in South Carolina, that: “Every partner is an agent of the partnership for the purpose of its business and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.”

4 – See SC Code Section 62-5-420**.** ”Conservators; title by appointment. The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. Neither the appointment of a conservator nor the establishment of a trust in accordance with Title 44, Chapter 6, Article 6, is a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will, or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.”

5 – See also SC Code Section 62-5-421. “Recording of conservator's letters. Letters of conservatorship transfer all assets of a protected person to the conservator. An order terminating a conservatorship transfers all assets of the estate from the conservator to the protected person or his successors. Letters of conservatorship, and orders terminating conservatorships, shall be filed and recorded in the office where conveyances of real estate are recorded for the county in which the protected person resides and in the other counties where the protected person owns real estate.”

6 – While the Internal Revenue Code does not state what an IRA can invest in, it does specifically prohibit certain items and transactions from IRA investment in IRC Section 408 and 4975. The bulk of these restrictions deal with prohibiting IRA investments where the taxpayer is individually interested and involved (e.g., “self-dealing” transactions) and the express prohibition of IRA funds in life insurance and in certain collectibles including artwork, rugs, antiques, metals (except for certain kinds of bullion), gems, stamps, coins (except for certain coins minted by the U.S. Treasury), alcoholic beverages, and certain other examples of tangible personal property.

7 – Due to the growth of SDIRA investments among taxpayers, misleading marketing and widely inappropriate techniques being used (e.g., taxpayers engaging in “self-dealing” transactions), the SEC has issued a fraud alert (https://www.sec.gov/investor/alerts/sdira.html) regarding SDIRA investments and a taxpayer considering such investment must tread carefully and prudently.

Be Kind to Real Estate Attorneys!

Poor Real Estate Drafting (or, the weeping real estate attorney)

- Real estate attorneys see a multitude of drafting mistakes that expose real estate owners to lost sales and confidence in their attorneys. Examples abound:
  - Transfers directly to Trust (rather than a Trustee) - South Carolina law vests authority in the *Trustee* and transfers directly to a Trust are invalid.
  - Deeds which create a Trust with no terms or successor Trustee – If and when the original Trustee dies, you'll be in Court to establish succession and authority.
  - Deeds transferring assets to a non-existent entity – A transfer to "Shea B. Airey LLC" is void if the entity does not exist, even if "Shea B. Airey Inc." does exist.

Poor Real Estate Drafting (or, the weeping real estate attorney)

- Testamentary Devises to Open Classes:
  - "I give my farm to my son and his wife for their lifetimes, but upon their death, then instead unto my issue."
  - How do we establish the vesting of the interest of the issue?
  - When do we measure the issue of the Testator?
  - What happens if some or all of the issue are deceased?
- Life Estate Deeds - Open Classes or Large Groups of Remaindermen:
  - "…unto my spouse, Elizabeth Airey, for the term of her natural life, and upon her death unto my grandchildren"
  - "…unto my spouse, Elizabeth Airey, for the term of her natural life, and upon her death unto James, Jon, Jim, Jill and Johnny"
  - Vesting is easier to determine here (at the time of the grant), but the class may be huge or the earlier deaths of certain members of the remaindermen can create tremendous headaches.

Poor Real Estate Drafting (or, the weeping real estate attorney)

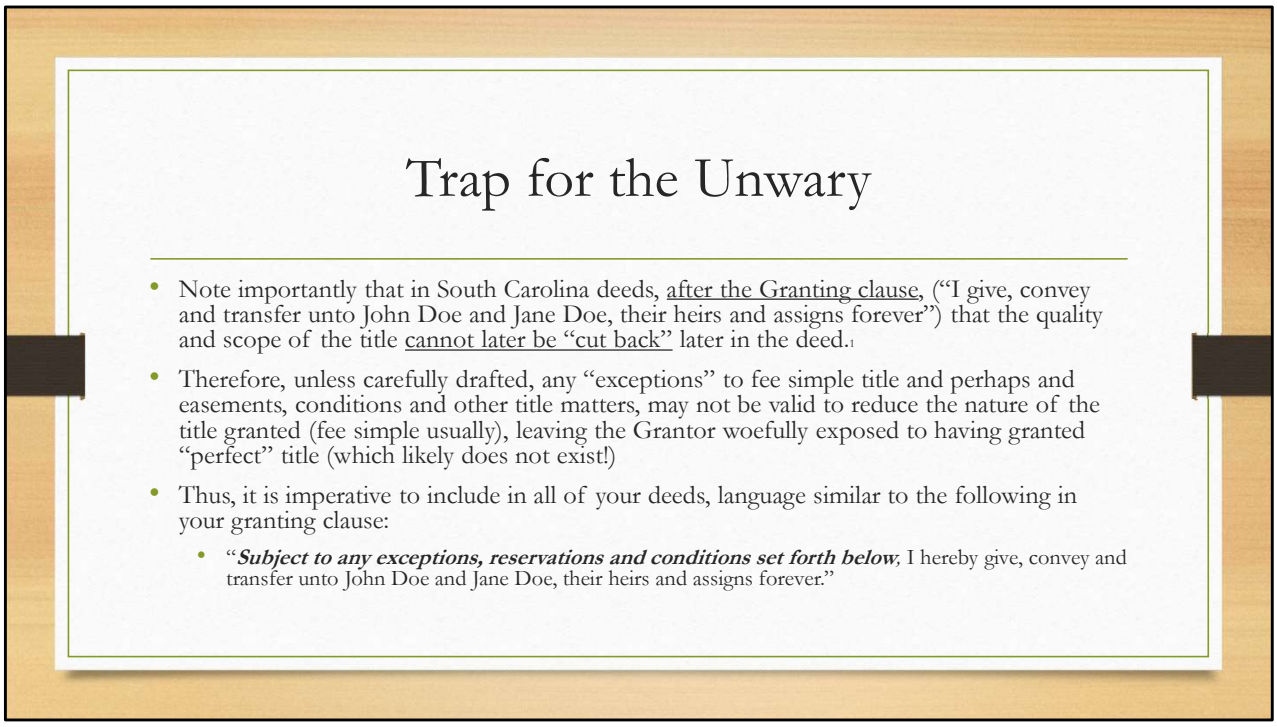
- Conditional/Determinable Deeds:
  - "…I give my farm unto Church, so long as Church hosts a revival on my farm annually, but, if it does not, then instead unto my issue."
    - How would a real estate attorney ever confirm this?
    - How (when) do we measure issue? Presumably at the time of death, but several issues remain.
- Testamentary requirements which imply *deed* transfers, rather than transfers into *trust*:
  - "…I give a life estate unto my spouse, Jane Eyre, and upon her death unto my issue" – *Not good, likely requires deed. No contingencies addressed and much can go wrong.*
  - "…my Trustee shall hold such property in trust for my spouse's lifetime use, and upon her death, my Trustee shall convey such interest free of trust unto my issue then living." – *Much better, establishes trust relationship. Terms can be included to establish contingencies and procedures.*

Poor Real Estate Drafting (or, the weeping real estate attorney)

- Tread carefully when granting "lesser" interests to a party in an estate planning document, as they may (without care) pass to the beneficiary and *their heirs and assigns forever*:
  - "Upon my death, I give my last residence to Mickey Mouse, *but Minnie Mouse shall have a right of first refusal in said property* if Mickey Mouse shall ever sell or convey the property."
  - What if Minnie dies intestate and has 14 children? Do they all share in the right of first refusal?
  - Same issues arise with easements and other "lesser" rights routine given in estate planning documents. Use specific language to restrict the right appropriately to only the person(s) you wish to hold such right for an appropriate time period.

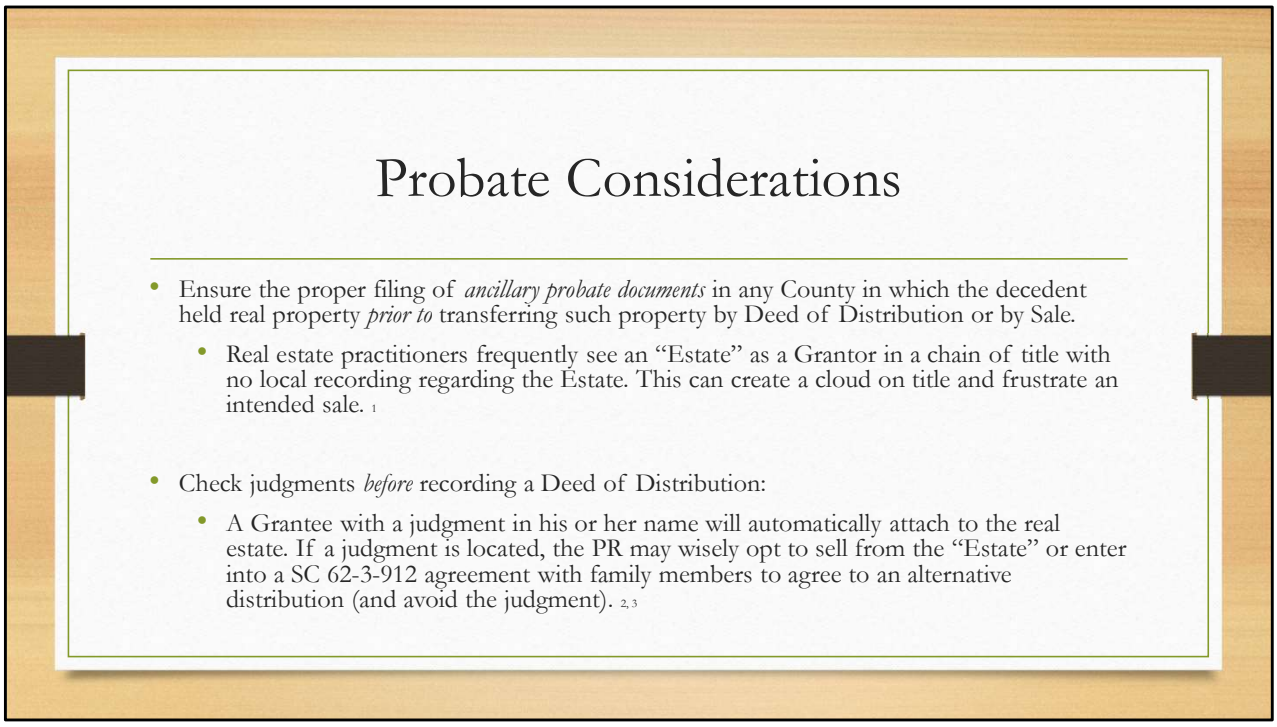
Poor Real Estate Drafting (or, the weeping real estate attorney)

- In drafting gifts of real estate in your estate planning documents, take special care to consider what *appurtenant* rights should accompany such gift. Detail matters and can avoid problems in the future:
  - Poor example: "I give unto Daisy Duck five acres from the old Duck farmstead acreage."
    - Where exactly? Access? For what use?
  - Improved Drafting: I give unto Daisy Duck five acres from the old Duck farmstead acreage, *being that parcel identified in Deed Book 123, Page 456*, records of Beaufort County, South Carolina, in fee simple, *together with an easement providing ingress and egress access for residential use and the installation and maintenance of utilities to serve such parcel, which easement shall run with the land.*
  - Other potential rights that should be considered include rights to: access and use a well, a pond or waterway, use of the property for a commercial, timber or other specific purposes, rights (or prohibition) of subdivision or intensive development of the parcel.
  - If the parcel is not surveyed at the time of drafting the will or revocable trust, consider adding a testamentary requirement for a new survey: "Prior to such devise, my Personal Representative shall secure a plat of such five acre parcel and appropriate easement which shall be recorded along with the conveyance unto Daisy Duck, the cost of which plat shall be paid as an expense of my estate."



1 –For the cases which confirm this trap involving "subject to" language in SC deeds, please refer to *Hunt vs. SC Forestry Commission,* 358 S.C. 564, 595 S.E. 2nd 846 (Ct. App. 2004), which restated the original rule set forth in *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968). The *Hunt* court specifically holds:

"Respondents assert that the language following the physical description of the property in the deed "cuts down" the fee simple conveyance of the granting clause to a fee simple determinable with a possibility of reverter. While this is certainly a sensible interpretation of this deed when read in its entirety, this construction is nevertheless legally incorrect. **It is a well established rule of law that where the granting clause of a deed purports to convey title in fee simple, the estate may not be cut down by subsequent words in the same instrument**." (emphasis added).



1 – South Carolina Code Section 62-4-204 allows, in the absence of local administration (e.g., local probate in South Carolina), the filing of "authenticated copies" of the Personal Representative or Executor's appoint to proceed with the dispensation of South Carolina property. Typically, this means the filing of "Certified copies" (if the Probate County is located elsewhere in South Carolina) or "Exemplified copies" (if the Probate County is located out-of-state) in the SC County in which the property is located. The author recommends ensuring that such copies include, wherever possible, an inventory describing the SC property which the Personal Representative desires to transfer in such SC County. Such a filing will generally avoid the title headache noted above and will make the closing attorney down right giddy. See the South Carolina Statute on this point below:

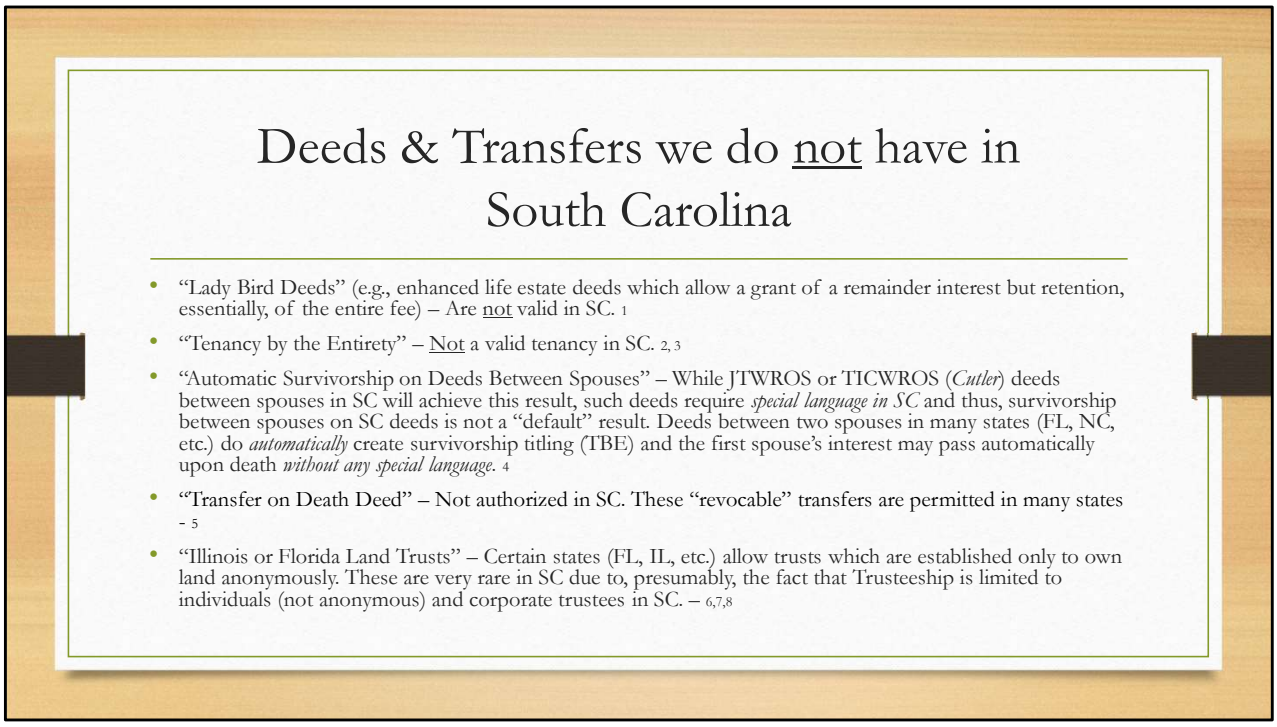
"SECTION 62-4-204. Proof of authority; bond. If no local administration or application or petition therefor is pending in this State, a domiciliary foreign personal representative may file with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of the will, if any. The filing of a bond shall not be required unless the court in its discretion orders it."

2 – As noted in further detail in the Asset Protection section of this presentation, South Carolina judgment liens automatically attach to real property owned by the judgment debtor (e.g., if the title to the property is held in the same name as the judgment debtor)

so long as the final court order or decree is recorded in the County in which the real estate is located. See South Carolina Code Section15-35-810 for the key law on this point.

3 – South Carolina Code Section 62-3-912 allows benefiairies or heirs succeeding to a Decedent's Estate through probate administration to unanimously agree to a distribution different from otherwise proscribed in the wil of the decedent or applicable intestate statute. See key language from the statute below:

"SC Code Section 62-3-912 - Private agreements among successors to decedent binding on personal representative. Subject to the rights of creditors and taxing authorities, **competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions**. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts."



1 – See https://www.statewidetitle.com/newsletterarticle.asp?Article=367 for a great discussion of the definition, use and validity of Ladybird Deeds in North Carolina (again, such deeds are not recognized in South Carolina). A selection from the newsletter available at the link above provides the following regarding such deeds:

""Ladybird" or "Enhanced Life Estate" deeds as they are commonly referred to in their most frequently used form should more properly be termed a reservation of a life estate coupled with a reserved power of appointment. Such a power may take several forms; a "nongeneral power of appointment" (N.C.G.S. Section 31D-1-102(10)) commonly referred to as a special power of appointment that limits how it can be exercised such as by deed, will or deed of trust or to whom it may be exercised in favor of the donor's heirs. The first example is a special power of appointment in gross and the second is a beneficial power of appointment. Another form is the general power of appointment that neither limits how, nor to whom, the property may be appointed; see: N.C.G.S. Section 31D-1-102(6) and Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, (1966).”; and further,

“There does not appear to be clear modern authority addressing the validity of these instruments that is "on all fours" with the issue of the validity of a deed of real property reserving into the grantor a life estate coupled with the reservation of a power of appointment. However, the common law of North Carolina clearly holds that a life estate

can be granted coupled with a power of appointment without merging the two into a fee simple absolute and there is no case suggesting that such reservations are not valid as effective conveyances for the purposes intended. The better question seems to be one of how they will be construed by the courts when questions arise as to how the interests vest under unanticipated circumstances and the rights of creditors seeking recovery of debts and obligations. Fortunately, recent legislation in the form of the North Carolina Uniform Powers of Appointment Act seems to unequivocally authorize such reservations and at the same time provides a framework for interpretation and reasonable amount of certainty."

2 – *See* Tenancy by the Entirety in North Carolina by Robert E. Lee (1962) for a good definition of such Estate as valid in other jurisdictions:

"Where real property is conveyed by deed or by will to two persons who are at the time husband and wife, a "tenancy by the entirety" is created. Sometimes it is referred to as an "estate by the entirety. The husband and wife take the whole estate as one person. Each has the whole; neither has a separate estate or interest; but the survivor, whether husband or wife, is entitled to the entire estate, and the right of the survivor cannot be defeated by the other's conveyance of the property by deed or will to a stranger."

3 – *See* North Carolina General Statute § 39-13.3(b) for statutory authority of such conveyances in NC. You will find no similar authority or recognition in SC, although, perhaps, the *Smith vs. Cutler* "TICWROS" deed referenced above in this outline is similar:

NCGS § 39-13.3. Conveyances between husband and wife…

(b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

4 – See Florida Statute implying the right of survivorship provided by the "tenancy by the entireties" permitted in that State:

Florida Statute 689.15

Estates by survivorship. —The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, ***except in cases of estates by entirety***, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants, upon dissolution of marriage, shall become tenants in common.…

5 – Many states do permit "transfer on death" deeds at this time including, but not limited to, California, Colorado, Kansas and about 20 others! Virginia, which permits such deeds by statute, provides the following statutory form which is interesting to review (but not valid in

SC!):

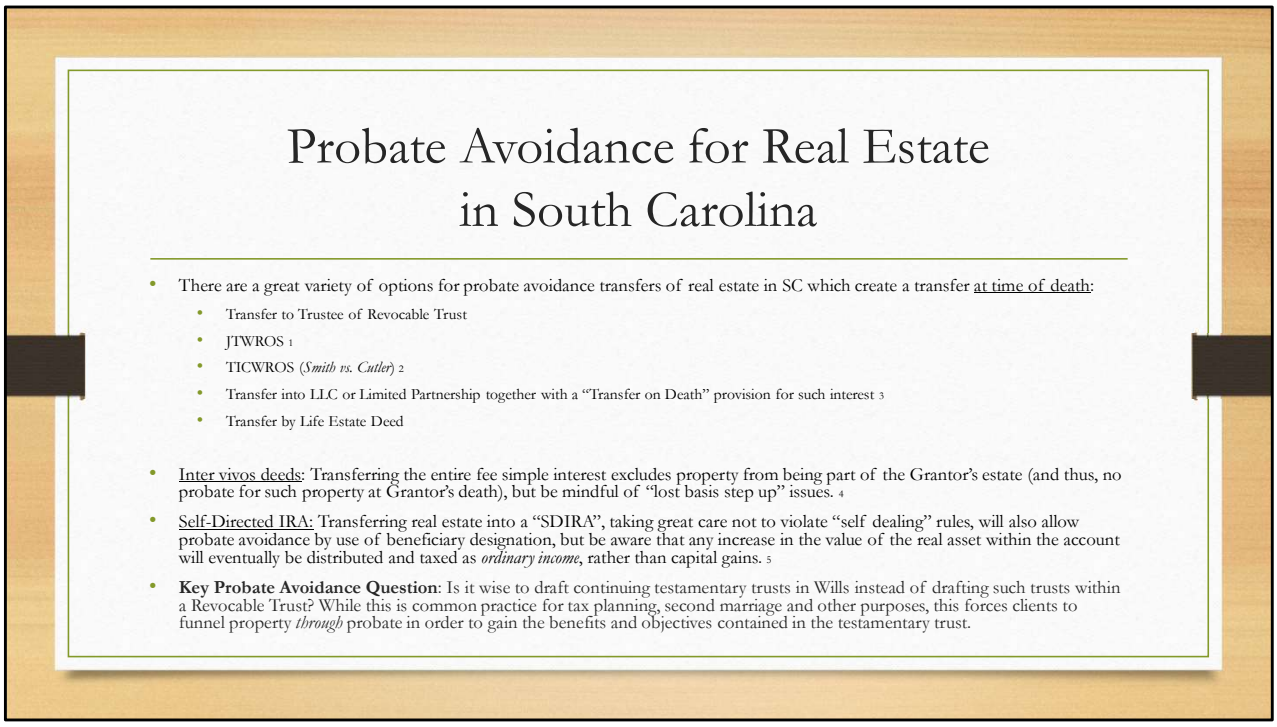
For further reading on transfer on death for real estate in other jurisdictions, please see, for example, Virginia Code Section § 64.2-635, which contains an optional form deed for transfer on death conveyances in that State.

6 – *See* The Florida Land Trust Act at Florida Statute 689.071 (https://m.flsenate.gov/Statutes/689.071) for a review of the legislation permitting "land trusts" in Florida.

7 – https://www.alperlaw.com/asset-protection/florida-land-trust/ - Florida land trusts are defined by the referenced Florida based law firm as the following, which appears similar to many Florida practitioners definition of such instruments:

"A Florida land trust is a private agreement among different people to operate, manage, and hold legal title to Florida real property. A land trust is a written legal agreement under which you, as the trustmaker, appoints someone else as trustee to hold legal title to a parcel of real estate property for your benefit. You also are a land trust beneficiary, and as such you control the use and sale of the property. You receive all the tax benefits and property appreciation. However, public records show only the trustee and trust as the owner of the property—trust beneficiaries are not disclosed. Your name is not made public."

8 – It is important to be aware that South Carolina (and nearly every state) does see the term "Land Trust" in the *land conservation* context, especially when dealing with conservation easements. Such "land trusts" for conservation purposes are defined as follows "A land trust is a charitable organization that acquires land or conservation easements, or that stewards land or easements, to achieve one or more conservation purposes" (https://conservationtools.org/guides/150-what-is-a-land-trust) and are critical to the long term preservation of conservation land in South Carolina and the country. They are charitable organizations, however and are not a form of "land ownership" in South Carolina.



1 –*See* South Carolina Code § 27-7-40

2 - *See* Smith vs. Cutler, SC Supreme Court, Opinion No. 26085 (2005) and prior notes in this presentation for further discussion

3 – The South Carolina Uniform Transfer on Death Security Registration Act (SCUTODSA), found at Title 5, Chapter 36 of the South Carolina Code of Laws, contains important authorization for owners of certain accounts and securities to transfer such securities by reason of a "transfer on death" type registration which would allow the relevant account or security to pass directly to named beneficiaries without passing through probate. Relevant code sections below, while ambiguous in certain respects, appear to imply that LLC interests and limited partnership interests may fall under the scope of the Act.

For starters, let's look at the definitions to see what type of accounts or securities may benefit from such "transfer on death" treatment. Section 35-6-10 contains the definitions for the Act, and includes the following excerpts (including the Author's emphasized portions):

SECTION 35-6-10. Short title; definitions.

(A) This chapter may be cited as the Uniform Transfer on Death Security Registration Act.

(B) As used in this chapter:…

(8) "Security" means and is defined as provided in Section 35-1-102(29) and as a security account.

(9) "Security account" means:

(a) a reinvestment account associated with a security; a securities account with a broker; a cash balance in a brokerage account, cash, interest earnings, or dividends earned or declared on a security in an account; a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; or

(b) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

…
The above statute references the definition of "Security" as contained in South Carolina Code Section 35-1-102(29), which expressly includes the term "investment contract" and later defines that to include, among other things, an interest in a limited partnership or limited liability company. Excerpts from SC Code Section 35-1-102(29) follow:

(29) **"Security" means any** note; **stock**; treasury stock; security future; bond; debenture; evidence of indebtedness; **certificate of interest** or **participation in a profit-sharing agreement**; collateral trust certificate; preorganization certificate or subscription; **transferable share**; **investment contract**; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:

….

(D) **includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors**; and

(E) **"Investment contract" may include, among other contracts, an interest in a limited**

partnership and a limited liability company and shall include an investment in a viatical settlement or similar agreement.

Based on the foregoing sections, it is quite likely that the South Carolina Uniform Transfer on Death Security Registration Act (SCUTODSA) applies to interests in limited partnerships and limited liability companies. The Act continues to describe what individuals may transfer such interests through a non-testamentary (e.g., non-probate) "transfer on death" designation:

"SC CODE SECTION 35-6-20. Individuals eligible to obtain registration in beneficiary form; multiple owners of security.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, and not as tenants in common."

Finally, the following section of the Act makes clear that such transfers are "non-testamentary" or, in other words, pass without the need for probate administration (emphasis added):

"South Carolina Code Section 35-6-90. Effectiveness of transfer on death by reason of contract; effect of chapter on rights of creditors of security owners against beneficiaries and transferees.

(A) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and **is not testamentary**."

4 – Under Internal Revenue Code (IRC) Section 1015, inter vivos transfers of property result in a basis acquired by the Grantee being the same as that held by the Grantor. Thus, no "step up" in basis results, even if the gift is made just prior to death:

"Internal Revenue Code Section 1015:

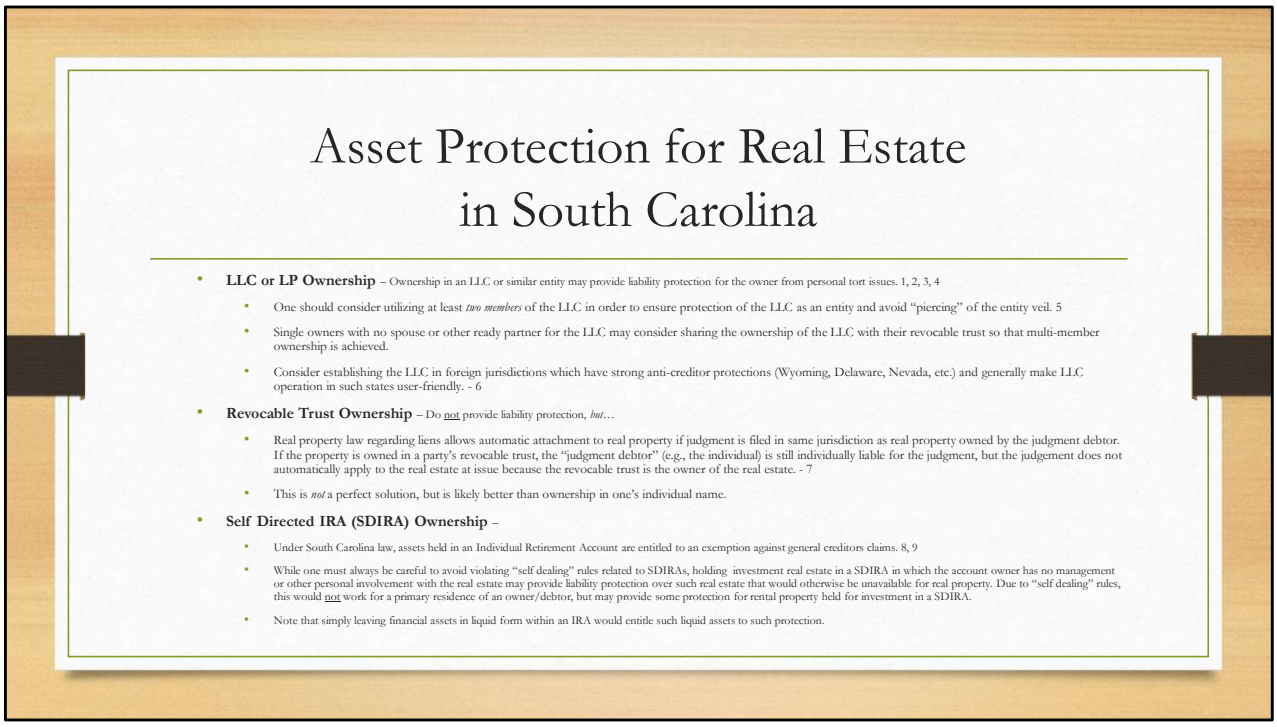
(a) Gifts after December 31, 1920: If the property was acquired by gift after December 31, 1920, **the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift**, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Secretary shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Secretary finds it

impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Secretary as of the date or approximate date at which, according to the best information that the Secretary is able to obtain, such property was acquired by such donor or last preceding owner…" (remainder of statute omitted)

5 – See "Real Estate and the Self Directed IRA" by Michael Held, available at https://www.harrisonheld.com/sites/default/files/Heldlayout.pdf (June, 2013), which discusses, among other things, that purchasing real estate within a SDIRA forgoes "non-cash" deductible items normally associated with real estate (e.g., depreciation, etc.), but that any income or growth within the SDIRA is not taxed at the time of earning, but rather deferred until distribution. Unfortunately, all gains in the account, whether normally associated with income (e.g., rents, etc.) or capital gains (e.g., increase in value of the property), will eventually be distributed and taxed as "ordinary income" under applicable Internal Revenue Code rules.

Asset Protection for Real Estate in South Carolina

- With the elevated estate tax exemptions in place, asset protection has become a major priority of many estate planning attorneys.
- When dealing with real property, there are several specific strategies that the estate planner may recommend to enhance the possibility of asset protection for one's clients.
- Given real property's place as not only an investment, but also a "near and dear" or "essential" part of a family's life (e.g., their home or the family farm that has been in the family for generations), the protection of a family's real property assets may be of special importance to clients.



1 – A limited liability company is a distinct legal entity separate and apart from its individual owners under South Carolina law:

"South Carolina Code Section 33-44-201. Limited liability company as legal entity.

Except as provided in Section 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members."

The above statute may prove quite helpful if an individual is exposed to liability personally, as the limited liability company is considered "distinct" from its individual members and the assets of such limited liability company would generally not be subject to the claims of an individual's creditors, although the individual's membership interest may be vulnerable to creditor's claims.

2 – Under South Carolina law, members or managers of a limited liability company are generally not liable for the torts or other legal liabilities of the limited liability company. While there are some important exceptions to this general rule, this may be of special value to those owning rental real estate through an LLC where much liability can arise and were the individual's personal assets should be protected to the extent possible:

“South Carolina Code Section 33-44-303. Liability of members and managers.

(a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.”

3 – South Carolina law provides limited legal remedies for Creditors seeking judgment against an LLC member for their personal liability. Generally speaking, the Creditor may proceed to obtain a lien against the individual members interest in the LLC (known as a “Charging Order”) and may even foreclose on such lien, but in any event, would only succeed to the “distributions” to which the individual Member would have been entitled (which may be little or nothing depending on LLC activities and governance). Emphasis added in key sections of the following statutes:

“South Carolina Code Section 33-44-501. Member's distributional interest.

(a) A member is not a co-owner of, and has no transferable interest in, property of a limited liability company.

(b) A distributional interest in a limited liability company is personal property and, subject to Sections 33-44-502 and 33-44-503, may be transferred in whole or in part.

(c) An operating agreement may provide that a distributional interest may be evidenced by a certificate of the interest issued by the limited liability company and, subject to Section 33-44-503, may also provide for the transfer of any interest represented by the certificate.”

“South Carolina Code Section 33-44-502. Transfer of distributional interest.

A transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member. **A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled**."

SECTION 33-44-503. Rights of transferee.

(a) A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent.

(b) A transferee who has become a member, to the extent transferred, has the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement of a limited liability company and this chapter. A transferee who becomes a member also is liable for the transferor member's obligations to make contributions under Section 33-44-402 and for obligations under Section 33-44-407 to return unlawful distributions, but the transferee is not obligated for the transferor member's liabilities unknown to the transferee at the time the transferee becomes a member.

(c) Whether or not a transferee of a distributional interest becomes a member under subsection (a), the transferor is not released from liability to the limited liability company under the operating agreement or this chapter.

(d) A transferee who does not become a member is not entitled to participate in the management or conduct of the limited liability company's business, require access to information concerning the company's transactions, or inspect or copy any of the company's records.

(e) A transferee who does not become a member shall:

(1) receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

(2) receive, upon dissolution, and winding up of the limited liability company's business:

(i) in accordance with the transfer, the net amount otherwise distributable to the transferor;

(ii) a statement of account only from the date of the latest statement of account agreed to by all the members;

(3) seek under Section 33-44-801(5) a judicial determination that it is equitable to dissolve and wind up the company's business.

(f) A limited liability company need not give effect to a transfer until it has notice of the

transfer.

“SECTION 33-44-504. Rights of creditor.

(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. **A purchaser at the foreclosure sale has the rights of a transferee.**

(c) At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than the company's property, by one or more of the other members; or

(3) with the company's property, but only if permitted by the operating agreement.

(d) This chapter does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.”

4 – Similarly, limited partners of South Carolina limited partnerships have statutory protections, unless he or she “takes part in the control” the business, as specified in the statute below (emphasis added):

“South Carolina Code Section 33-42-430. Liabilities to third parties.

(a) Except as provided in subsection (d), **a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business**. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his

participation in control.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation;

(2) consulting with and advising a general partner with respect to the business of the limited partnership;

(3) acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership;

(4) taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership;

(5) requesting or attending a meeting of partners;

(6) proposing, approving, or disapproving, by voting or otherwise, one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership;

(iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;

(iv) a change in the nature of the business;

(v) the admission or removal of a general partner;

(vi) the admission or removal of a limited partner;

(vii) a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;

(viii) an amendment to the partnership agreement or certificate of limited partnership;

(7) winding up the limited partnership pursuant to Section 33-42-1430; or

(8) exercising any right or power permitted to limited partners under this chapter and not

specifically enumerated in this subsection (b).

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the control of the business of the limited partnership.

(d) A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by Section 33-42-30(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner."

5 – In certain states single member limited liability companies have come under specific attack and have seen their liability protections weakened through Court and legislative action. In 2010, the Supreme Court of Florida, in *Olmstead v. FTC*, Fla. Sup. Ct. No. SC08-1009 (2010), held that a judgment creditor of the sole member of a single member limited liability company created under Florida law could execute (e.g., become the owner of) the debtor members' complete right, title and interest in the limited liability company to satisfy the outstanding judgment. This stood in contrast to the general interpretation of the FL statute (similar to the South Carolina statute), which would have otherwise only permitted a charging order (e.g., a lient) against the debtor member's interest.

In the wake of *Olmstead*, Florida's legislature went one step further and enshrined this "weakened" protection for single member liability companies in law, while clarifying that "charging orders" truly are the exclusive remedy against members of multi-member limited liability companies. See below for excerpts of the Florida statute on point:

"Section 608.433 of Florida Statutes Right of assignee to become member.—

(1) Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

…

(4)(a) On application to a court of competent jurisdiction by any judgment creditor of a member or a member's assignee, the court may enter a charging order against the limited liability company interest of the judgment debtor or assignee rights for the unsatisfied amount of the judgment plus interest.

(b) A charging order constitutes a lien on the judgment debtor's limited liability company interest or assignee rights. Under a charging order, the judgment creditor has only the rights of an assignee of a limited liability company interest to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled from the limited liability company, to the extent of the judgment, including interest.

(c) This chapter does not deprive any member or member's assignee of the benefit of any exemption law applicable to the member's limited liability company interest or the assignee's rights to distributions from the limited liability company.

(5) **Except as provided in subsections (6) and (7), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's assignee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.**

(6) In the case of a limited liability company having only one member, if a judgment creditor of a member or member's assignee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the assignee of the sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

(7) In the case of a limited liability company having only one member, if the court orders foreclosure sale of a judgment debtor's interest in the limited liability company or of a charging order lien against the sole member of the limited liability company pursuant to subsection (6):

(a) The purchaser at the court-ordered foreclosure sale obtains the member's entire limited liability company interest, not merely the rights of an assignee;
(b) The purchaser at the sale becomes the member of the limited liability company; and
(c) The person whose limited liability company interest is sold pursuant to the foreclosure sale or is the subject of the foreclosed charging order ceases to be a member of the limited liability company…."

6 – Certain jurisdictions have established themselves as "asset protection havens" by virtue of laws established to help safeguard limited liability companies and the members thereof from liability. Take for instance Wyoming, which in 2015 established a limited liability act making absolutely clear that a charging order is the exclusive remedy for any individual member's debts, even in single member limited liability companies, and that Court orders which would otherwise attack the debtor member's interest (e.g., foreclosure of a charging order, accountings, etc.) are prohibited. See the Wyoming Statue below for the key language (emphasis added):

"Wyoming Statute 17-29-503 (2015). Charging order.

(a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.

…

(d) The member or transferee whose transferable interest is subject to a charging order under subsection (a) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) A limited liability company or one (1) or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) This article does not deprive any member or transferee of the benefit of any exemption laws applicable to the member's or transferee's transferable interest.

(g) **This section provides the exclusive remedy by which a person seeking to enforce a judgment against a judgment debtor, including any judgment debtor who may be the sole member, dissociated member or transferee**, may, in the capacity of the judgment creditor, satisfy the judgment from the judgment debtor's transferable interest or from the assets of the limited liability company. **Other remedies, including foreclosure on the judgment debtor's limited liability interest and a court order for directions, accounts and inquiries that the judgment debtor might have made are not available to the judgment creditor attempting to satisfy a judgment out of the judgment debtor's interest in the limited liability company and may not be ordered by the court**."

7 – South Carolina judgment liens automatically attach to real property owned by the judgment debtor so long as the final court order or decree is recorded in the County in which the real estate is located. See the applicable statute below (emphasis added):

"South Carolina Code Section15-35-810 - Judgments lien on real estate continue for ten years

Final judgments and decrees entered in any court of record in this State subsequent to November 25, 1873, or in any circuit or district court of the United States within this State or of any other Federal court the final judgments and decrees of which, by act of Congress, **shall be declared to create a lien, shall constitute a lien upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript**

thereof is entered upon the book of abstracts of judgments and duly indexed, the lien to begin from the time of such entry on the book of abstracts and indices and to continue for a period of ten years from the date of such final judgment or decree."

8 – See South Carolina Code Section 15-41-30, which sets forth the exemptions for Creditors Claims under South Carolina law. Worth noting is South Carolina's exemption for a primary residence (SC 15-41-30(A)(1)) and for "individual retirement accounts" (SC CODE 15-41-30(A)(13)), which presumably includes so called "Self Directed" Individual Retirement Accounts which may hold real property, as such Self Directed Individual Retirement Accounts appear to be included under the references to the Internal Revenue Code section provided in this South Carolina Statute:

SC Code Section 15-41-30 (emphasis added):

(A) The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:
(1) **The debtor's aggregate interest, not to exceed fifty thousand dollars in value, in real property** or personal property **that the debtor or a dependent of the debtor uses as a residence**, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor, except that the aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed one hundred thousand dollars. If there are multiple owners of such a living unit exempt as a homestead, the value of the exemption of each individual owner may not exceed his fractional portion of one hundred thousand dollars.
(2) The debtor's interest, not to exceed five thousand dollars in value, in one motor vehicle.
(3) The debtor's interest, not to exceed four thousand dollars in aggregate value in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.
(4) The debtor's aggregate interest, not to exceed one thousand dollars in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.
(5) The debtor's aggregate interest in cash and other liquid assets to the extent of a value not exceeding five thousand dollars, except that this exemption is available only to an individual who does not claim a homestead exemption. The term "liquid assets" includes deposits, securities, notes, drafts, unpaid earnings not otherwise exempt, accrued vacation pay, refunds, prepayments, and other receivables.
(6) The debtor's aggregate interest, not to exceed one thousand five hundred dollars in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.
(7) The debtor's aggregate interest in any property, not to exceed five thousand

dollars in value of an unused exemption amount to which the debtor is entitled pursuant to subsection (A), items (1) through (6).
(8) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.
(9) The debtor's aggregate interest, not to exceed in value four thousand dollars less any amount of property of the estate transferred in the manner specified in Section 542(d) of the Bankruptcy Code of 1978, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.
(10) Professionally prescribed health aids for the debtor or a dependent of the debtor.
(11) The debtor's right to receive or property that is traceable to:
(a) a social security benefit, unemployment compensation, or a local public assistance benefit;
(b) a veteran's benefit;
(c) a disability benefit, except as provided in Section 15-41-33, or an illness or unemployment benefit;
(d) alimony, support, or separate maintenance; or
(e) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, unless:
(i) the plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose;
(ii) the payment is on account of age or length of service; and
(iii) the plan or contract does not qualify under Sections 401(a), 403(a), 403(b), or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), or 409).
(12) The debtor's right to receive or property that is traceable to:
(a) an award under a crime victim's reparation law;
(b) a payment on account of the bodily injury of the debtor or of the wrongful death or bodily injury of another individual of whom the debtor was or is a dependent; or
(c) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of that individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
(13) The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-6-40(A). **The interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law** and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate

payee, or otherwise.
(14) The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.
(B) Beginning on July 1, 2008, and each even-numbered year thereafter, each dollar amount in subsection (A), items (1) through (14), immediately before July first, must be adjusted to reflect the change in the Southeastern Consumer Price Index, All Urban Consumers, as published by the Department of Labor, Bureau of Labor Statistics, for the most recent year ending immediately before January first preceding July first, and to round to the nearest twenty-five dollars, the dollar amount that represents this change. No later than March first of each even-numbered year, the Economic Research Section of the Office of Research and Statistics of the State Budget and Control Board shall publish in the State Register the dollar amounts that will become effective on July first of each even-numbered year.

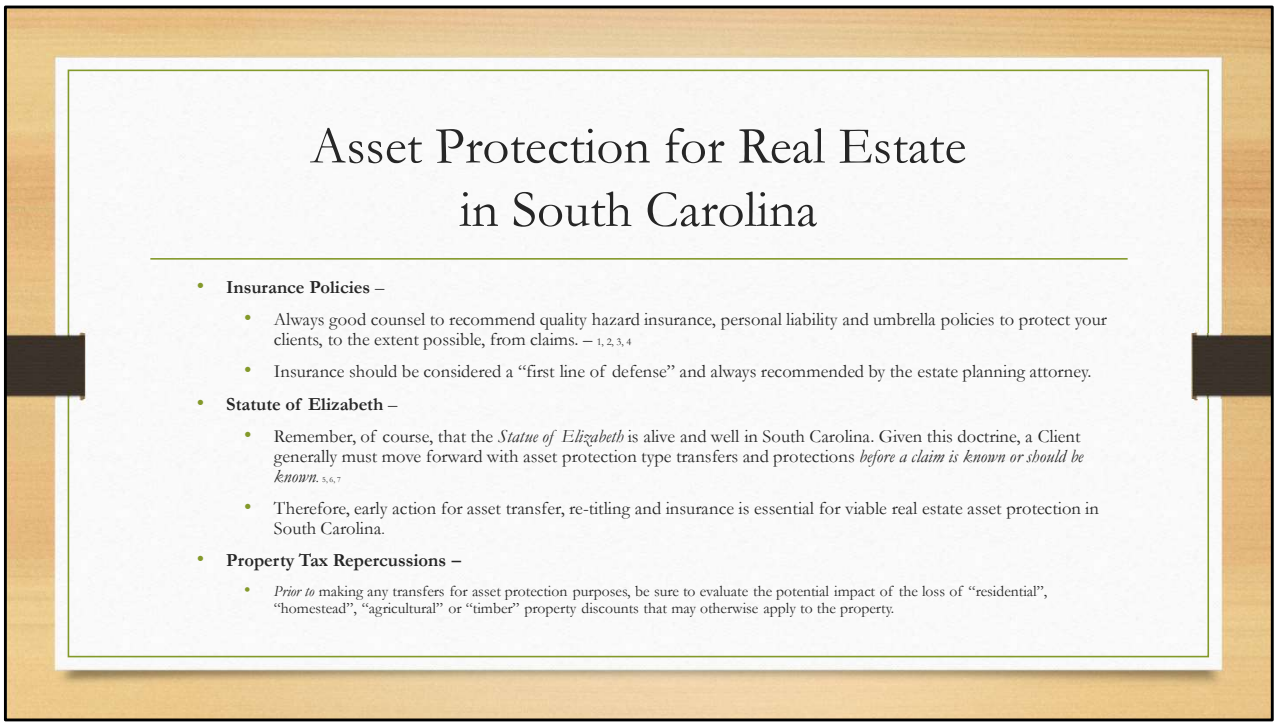
9 – South Carolina Code Section SC Code Section 15-41-30(13), regarding the South Carolina exemption for Individual Retirement Claims from certain creditors claims notes that "**[t]he interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law**", which reference to the federal bankruptcy law is provided below:

11 US CODE 522(d) (emphasis added, selection of statute by author) –

(d)The following property may be exempted under subsection (b)(2) of this section:

…

(12) **Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.**



1 – *See* www.kiplinger.com/article/insurance/T028-C000-S002-how-much-umbrella-insurance-do-you-need.html (visited November 1st, 2019):

According to Kiplinger.com, Umbrella insurance is "…generally sold in increments of $1 million. It costs roughly $150 to $350 a year for the first $1 million of coverage and about $100 per million of coverage above that" and, importantly, "[m]ost insurers will sell you an umbrella policy only if you buy your homeowners or auto policy from them and carry a minimum amount of liability coverage."

2 – *See https://www.kiplinger.com/tool/insurance/T028-S002-how-much-umbrella-insurance-do-i-need/index.php (*visited November 1, 2019) for a **handy calculator which helps estimate the proper amount of umbrella liability insurance coverage.** While not perfect, this is a good start for a client to get a good idea on a rough amount of coverage they should anticipate.

3 – Several commenters believe that Umbrella Insurance Policies should always be at least in the amount of $2 million dollars or more, as a significant personal injury suit (e.g., car accident, premises liability, dog bite, etc.) could all easily exceed the coverage of a $1 million dollar umbrella policy. *See*, for example, https://figuide.com/how-much-umbrella-insurance-do-i-need.html (visited November 1, 2019).

4 – While typical umbrella liability policies are *personal* in nature and therefore do not cover business related liabilities, “commercial”, “small business” and “business owner” umbrella policies do exist and may be explored for potential coverage in excess of what a business owner/operator may otherwise have in place.

5 – *See* South Carolina Code Section 27-23-10(A), which describes South Carolina’s *Statute of Elizabeth* which serves to void fraudulent conveyances and conveyances designed to avoid creditors (emphasis added):

(A) Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution **which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors** and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

6 – The above referenced *Statute of Elizabeth* is qualified, however, by South Carolina Code Section 27-23-40, which would indicates that bonafide transfers for value are not void per the *Statute of Elizabeth* under South Carolina law. This would serve to ensure “valid” transfers for value are upheld, but in such instances, the debtor has merely replaced “one type” of property (e.g., real estate) for “another type” of property (e.g., cash received upon sale of the real estate) and the Creditor may thereafter pursue such funds or other property so received:

SC CODE SECTION 27-23-40

“Nothing contained in § 27-23-10 to 27-23-30 shall extend or be construed to impeach, defeat, make void or frustrate any [transfer]
made upon or for good consideration and bona fide to any person or body politic or corporate.”

The above statute notwithstanding, South Carolina courts can and do still void transfers when the *intent to defraud* a third party is found and such intent can be imputed to a third party acquirer of such property, even when valuable consideration was paid by a third party, as further shown by the South Carolina case described below.

7 – *See Mathis vs. Burton,* 460 S.E.2d 406 (1995), South Carolina Court of Appeals, for an

excellent discussion regarding the application of the *Statute of Elizabeth* both when valuable consideration is paid during the transfer and when it is not (emphasis added):

"**First, where the challenged transfer was made for a valuable consideration**, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. **Second, where the transfer was not made on a valuable consideration**, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in fullnot merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt."

Final Take Aways

- Considering the Real Estate Attorney's perspective is key for estate planning attorneys.
- Understand titling options available in South Carolina and be ready to deploy them appropriately.
- Consider asset protection in the Real Estate context.
- If in doubt, know and reach out to a dedicated "dirt" lawyer for counsel prior to proceeding.

Thank you

Shea B. Airey, Esq.

The Airey Law Firm, Ltd. Co.

1510 Blue Ridge Blvd. Suite 205

Seneca, SC 29672

www.aireylaw.com

airey@aireylaw.com

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Probate, Estate Planning & Trust Section

Friday, January 24

Effective Use of Transfer on Death (TOD) and Payable on Death (POD)

David H. Kunes
Marshall T. Minton
Anne Kelley Russell

Effective Use of Transfer on Death (TOD) and Payable on Death (POD) Designations

Anne Kelley Russell, Esquire
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401

Marshall Minton, Esquire
South State Bank
700 Gervais Street, 2nd Floor
Columbia, SC 29202

David H. Kunes, Esquire
Evans, Carter, Kunes & Bennett, P.A.
115 Church Street
Charleston, SC 29401

I. **Introduction**. In many situations, the use of "Transfer on Death" or "Payable on Death" designations in financial accounts can simplify the estate planning process and achieve an individual's testamentary intent without having to engage a lawyer to prepare a Last Will and Testament. Or, more often, the fear of having your assets locked up in the purgatory known as "probate administration" motivates individuals to avoid the probate process at all costs.

TOD and POD designations are simple documents implemented by financial institutions in which an owner can designate a beneficiary to receive such financial accounts upon the owner's death. For example, husband may designate wife as the TOD beneficiary on the brokerage and checking accounts and name the two children, as the contingent beneficiaries if wife does not survive husband.

Although these designations can "simplify" the process for many individuals, there are many perils and pitfalls surrounding these types of designations. Questions arise as to who can change the beneficiary designation? Is it just the owner of the account or can an agent under a power of attorney make such a change? If an owner becomes subject to a conservatorship, how does the conservatorship affect such beneficiary designation? This presentation will explore some of these questions and provide a review of the statutory framework for TOD and POD designations.

II. **Uniform Transfer on Death Security Registration Act – Section 35-6-10 et seq.**

A. Key Terms

i. **Security.** "Security" means any note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

ii. **Security Account.** "Security account" means: (a) a reinvestment account associated with a security; a securities account with a broker; a cash balance in a brokerage account, cash, interest earnings, or dividends earned or declared on a security in an account; a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; or (b) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

iii. **Beneficiary Form**. "Beneficiary form" means a registration of a security which indicates the present owner of the security and the **intention** of the owner regarding the person who will become the owner of the security upon the **death of the owner**.

B. Ownership and Beneficiaries

i. **Sole owner or multiple owners**. Section 35-6-20 provides that "only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, and not as tenants in common"

ii. **Registration**. Section 35-6-40: Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, and not as tenants in common.

iii. **Magic words**. Registration in beneficiary form may be shown by the words, "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner and before the name of a beneficiary.

C. Death of Owner. On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

D. Protections Afforded Registering Entity. A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with Section 35-6-70 and does so in good faith reliance (1) on the registration, (2) on this chapter, and (3) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity.

i. The protections of this chapter do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form.

III. South Carolina Multiple Party Accounts. Section 62-6-101 et seq.

A. Key Terms

i. **Account.** "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangements.

ii. **Beneficiary.** A Beneficiary is a person named as one to whom sums on deposit in an account are payable on request after the death of all parties or for whom a party is named as the trustee

iii. **Multiple-Party Accounts** (5) "Multiple Party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned including, but not limited to, joint accounts or POD accounts

iv. **Net Contribution of a Party.** The “net contribution of a party” is the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

v. **P.O.D. Designation.** means the designation of: (i) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

B. Ownership During Lifetime

i. During the lifetime of all parties, an account belongs to the parties in proportion to the **net contribution** of each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

ii. A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

C. Right of Survivorship

i. Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was **beneficially entitled under Section 62-6-201** belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 62-6-201, and the right of survivorship continues between the surviving parties.

ii. In an account with a POD designation: (1) on death of one of two or more parties, the rights in sums on deposit are governed by subsection Section 62-6-202(a); (2) on death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. **If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter**. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

iii. Sums on deposit in a single party account without a POD designation, or in a multiple party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 is transferred as part of the decedent's estate. **A POD designation in a multiple party account without right of survivorship is ineffective**. For purposes

of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

iv. The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

D. Rights of parties and beneficiaries.

i. Rights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective the notice must be received by the financial institution during the party's lifetime.

ii. A right of survivorship arising from the express terms of the account under Section 62-6-202 may be altered by clear and convincing evidence, including but not limited to express provisions in a will.

iii. A multiple party account of husband and wife is presumed to be joint with right of survivorship unless clear and convincing evidence shows survivorship was not the intent of the party.

IV. <u>Case Studies</u>.

A. Charlie and the Conservatorship.

i. <u>Fact pattern</u>: Charlie has always had a close relationship with his Uncle Andy. Uncle Andy has no spouse or children, but has a total of 5 nieces and nephews, including Charlie. Throughout his life, Andy would open accounts at different banks with $25,000 naming one of his nieces or nephews as the beneficiary. He considered this his estate plan – each niece and nephew would get one approximately equal account at his death and he would avoid probate. After Uncle Andy has a stroke, Charlie moves in with him to help. Uncle Andy quickly declines after his stroke and is no longer able to handle his financial affairs. The hospital tells Charlie that he needs to petition the court to be the guardian and conservator for Uncle Andy in order to make life easier. Charlie successfully petitions the court and is appointed guardian and conservator. As conservator, Charlie prepares and signs an inventory and appraisement, which reports the values of the accounts but not the designated beneficiary of any of the accounts. There is a restricted account agreement in place but no bond because this particular probate court does not require bond. For the next year Charlie uses the assets of three of the accounts, but does not touch the two accounts which name Andy and his brother as beneficiaries. When Charlie dies, there are only two

accounts remaining – the ones for Andy and his brother. There are no other probate assets.

ii. Questions:

1. What steps can Andy's nieces and nephews whose accounts were spent recover from Andy's estate?
2. As conservator, what were Charlie's responsibilities to Andy and his nieces and nephews?
3. Whose responsibility is it to verify the accuracy of the conservatorship inventory?
4. What liability does the Bank that held these accounts have, if any?

B. The Unsuspecting Financial Advisor.

i. Fact Pattern: John, an 85 year old, updates his estate plan every five years. John never married and did not have any children. John has approximately $1,000,000 in brokerage accounts and $2,000,000 in IRAs. Five years earlier, John revised his estate planning documents to leave small cash gifts to friends and family ($50,000 total) and left the balance of his estate to the local community foundation. For tax reasons, John's lawyer advised John to designate the local community foundation as the beneficiary of his significant Individual Retirement Accounts (IRAs) and advised John to leave the cash gifts to friends/family as bequests in his Last Will and Testament. John's lawyer and financial advisor worked to update the beneficiary designations on his IRAs. John developed cancer and two of his neighbors came to his support, assisting him on a daily basis. At John's next five year estate planning update, John informed his lawyer that he wanted to keep the cash gifts to the friends/family, he wanted to reduce the amount he was leaving to charity to $100,000, and he wanted to leave the balance of his estate to his two neighbors. Once again, the lawyer and financial advisor work to update the IRA beneficiary designations to leave a pecuniary amount to the charity and then the balance to the two neighbors. Lawyer prepares a spreadsheet of John's assets to show John how the brokerage accounts are disposed of under his Last Will and how the IRAs flow pursuant to beneficiary designation. John reviews the spreadsheet and confirms his testamentary intent to his lawyer. John dies two months later, and during the estate administration it is discovered that John's $1,000,000 of brokerage accounts have "Transfer on Death" provisions that designate the local community foundation as the sole beneficiary. As a result, there are no probate assets in John's estate and all of John's assets passed by beneficiary or transfer on death designations.

ii. Questions:

1. At John's death, who is entitled to John's brokerage accounts?
2. Does the financial advisor have any liability? See Section 35-6-80.
3. What actions can the Personal Representative take to carry out the decedent's testament intent as set forth in his Last Will?

C. The Accommodating Joint Tenant

i. Fact Pattern: Martin Crane, a retired police officer, opens an account at First Seattle Bank at a branch located in South Carolina. When opening the account, he tells the bank employee that he has two sons (Niles and Frazier). The bank employee asks Martin if he wants to add beneficiaries to the account. Martin says yes and adds both sons. His son Frazier leaves Boston to move in with Martin. Martin begins to have trouble getting around and decides it would just be easier to add Frazier to his account so that Frazier can help take care of some of the bills. Martin and Frazier visit the bank branch where they add Frazier as a joint owner on the account (with survivorship). They did not change the POD designation on the account. A couple of months later, Frazier gets in a fight with Niles. He goes down to the bank. As joint owner of the account, he changes the beneficiary designation to his friend Roz. A year later, Niles and Frazier make up. However, Frazier gets very sick and dies. Martin doesn't make any additional changes to bank account.

ii. Questions:

1. At Martin's death, who is entitled to the funds in the bank account?
2. What are some things Martin should have done to make sure his sons inherit?
3. What if after Frazier's death, Martin executes a Will that states his bank account at First Seattle Bank is to go to Niles?

D. Others?

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Probate, Estate Planning & Trust Section

Friday, January 24

Legislative Update - Pending Matters Impacting PE&T Law

Representative Russell W. Fry

No Materials Available

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Probate, Estate Planning & Trust Section

Friday, January 24

Probate Update

Professor S. Alan Medlin

Probate Update*

Presented by
Professor S. Alan Medlin
University of South Carolina School of Law

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- **James Brown Decision Parses SCPC Settlement Provisions**

James Brown, the internationally famous entertainer, died on December 25, 2006. Since then, "his Estate has been ensnared in relentless litigation." James Brown executed will and trust documents in 2000. The will named six children to receive certain personal property, with the residue of his estate passing to the 2000 trust, which apparently benefitted poor and needy children by providing scholarships. The will and trust were contested in several ways: the six children filed a contest, his widow (who married him after 2000) filed a contest and also asserted her statutory elective and surviving spouse's share, and his son (who was born after 2000) filed an omitted child's share.

In 2009, the children, the widow, and the state Attorney General — acting on behalf of the charitable trust — entered into a settlement agreement. The settlement changed the 2000 documents by providing that the charitable trust would receive 50 percent of a pot containing the probate assets and proceeds from federal termination copyrights — which are nonprobate assets that by federal law pass to the writer's intestate heirs regardless of the writer's attempts to provide otherwise — contributed by the widow and children. Without the settlement agreement, the charitable trust would not otherwise receive any benefit from these termination rights, which are believed to be worth tens of millions of dollars. The settlement agreement provided for the widow to receive 25 percent of the pot and the children to receive 25 percent. However, in 2013, the South Carolina Supreme Court reversed the trial court's approval of the settlement agreement, stating that the record contained insufficient evidence, despite numerous days of hearings and thousands of pages of documents in the record. *Wilson v. Dallas*, 743 S.E.2d 746 (S.C. 2013).

Thus, in 2013 the various contests resumed. James Brown's widow separately settled with the Estate, which received 65 percent of any proceeds she may accrue from her copyright termination rights. In 2015, four of the six children named in the will also separately settled with the Estate ("children's settlement"). However, that settlement did not involve any contribution of copyright termination proceeds from the children, which means the Estate will not receive millions of dollars it otherwise would have under the 2009 settlement agreement.

Although not a party to the settlement, Terry Brown, one of the six named children, contested the children's settlement with the Estate, along with Daryl Brown, another of the six named children. Terry Brown appealed the trial court's rejection of their contest of the children's settlement. (The widow's separate settlement was not appealed.) In a recent case, a South Carolina appellate court ruled that the children's settlement was valid. In that opinion, the appellate court provided a thorough and cogent discussion of several issues that could impact settlements in states with some version of the Uniform Probate Code. *In re Estate of James Brown*, 828 S.E.2d 789 (S.C. App. 2019).

The Children's Settlement

In their settlement with the Estate, the settling children agreed to dismiss their will contest for payment of $37,500 each, while retaining the right to receive their aliquot share of

certain personal property devised to them. Pursuant to the state version of Uniform Probate Code section 3-105, the Estate sought confirmation from the trial court that it had the authority to enter into the settlement agreement. Having been through the state supreme court's rejection of the previous global settlement agreement, the Estate did not ask for the trial court's confirmation of the settlement itself.

Terry Brown argued several issues on appeal: (1) that one of only two permissible ways to settle a will contest was pursuant to the state version of SCPC section 62-3-912, without court approval; (2) that the other permissible way to settle a will contest was pursuant to the state version of UPC sections 3-1101 and 3-1102, with court approval; (3) that the children's settlement failed to comply with the requirements of a settlement under UPC section 3-912 or sections 3-1101 and 3-1102; and (4) that the Estate fiduciaries breached their duty by agreeing to the settlement and failing to enforce the no-contest clause in the will.

SCPC Section 62-3-105

SCPC section 62-3-105 is a broad provision that allows an interested person, including a fiduciary, to seek court determination of some matter involving a decedent's estate. The Estate sought confirmation that the fiduciaries had the authority to enter into a settlement agreement, but did not seek approval of the agreement itself — as noted above, presumably because the state supreme court had rejected the 2009 settlement including the Estate when the parties had sought court approval under the state version of SPC sections 62-3-1101 and 62-3-1102. The trial court concluded that the fiduciaries had the authority to bind the Estate in the settlement and also added that probable cause existed for the will contests and that the settlement was just and reasonable. The appellate court declined to address the latter two issues as "not relevant to the issues on appeal."

SCPC Section 62-3-912

Terry Brown argued that section 3-912 required the consent of all beneficiaries under a will. The appellate court quoted the pertinent language: "successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will . . .in any way that they provide in a written contract executed by all who were affected by its provisions." The opinion observed that the Reporter's Comment stated that the successors need not seek court approval.

Because the appellate court reasoned that the settlement agreement did not alter the beneficiaries' interests under the will, section 3-912 did not apply: that section applied only when the successors agreed to vary their interests under the will. "The settlements do not disturb Brown's Will or Estate plan; they preserve it." Moreover, the appellate court concluded that section 3-912 did not apply to a settlement among successors and estate fiduciaries — third parties — because that section limits its application only to successors who agree "among themselves."

Terry Brown argued that the settlements did alter the beneficial interests because the court should enforce the will's no contest provisions to disinherit the settling children, who had contested the will. However, the appellate court refused to presuppose whether the no-contest clause applied, saving that issue for possibly another day.

SCPC Sections 62-3-1101 and 62-3-1102

Terry Brown also argued that the trial court was required to approve the settlement under the state versions of SCPC sections 62-3-1101 and 62-3-1102. He contended that those sections mandated that "all competent persons . . . having beneficial interests or having claims which will or may be affected by the compromise" had to execute the settlement agreement, which he had not done.

The appellate court disagreed with his position. Citing the Reporter's Comment, the appellate court construed those statutes to apply only when settling parties intend to make the settlement binding on "all parties." In this case, the settlement did not bind Terry Brown or any other person not a party to the settlement. Importantly, the settling children and the Estate did not seek court approval — as discussed above, presumably because of the previous experience with the state supreme court's rejection of the 2009 global settlement when the parties did seek court approval under sections 3-1101 and 3-1102.

The appellate court cited the intended purpose of sections 3-1101 and 3-1102: "when the settlement (1) will impact persons holding beneficial interests in the estate and (2) is sought to be binding on non-parties." The opinion observed that, while the state version of the Uniform Trust Code defined "beneficiary," the SCPC did not. Nevertheless, determining that the individual parties were beneficiaries was apparent. However, the appellate court reasoned that those sections required more than merely having a settlement involve beneficiaries: the beneficiary's interest "must also be 'affected by the compromise.'" The opinion cited the applicable language. "The agreement must be signed by all persons having a beneficial interest in or claim against the estate, *whose interest or claim is affected by the agreement*" (emphasis in original). Thus, the appellate court read the emphasized language to exclude from the reach of those sections a beneficiary whose interest is not affected by the agreement. Again, the appellate court noted that Terry Brown's interest was not affected by the agreement. The appellate court dismissed Terry Brown's no-contest argument for the same reason it rejected his argument as to section 3-912. While application of the no-contest provision would increase his share of the Estate, sections 3-1101 and 3-1102 "appl[y] only to impacts the *settlement* has on beneficial interests in the Estate" (emphasis in original), not the impact a speculative enforcement of the no-contest clause might have. In other words, those sections look "to the effect the settlement has on beneficial interests, not the effect the underlying litigation might have had (or future litigation may have) upon them."

The appellate court buttressed its reasoning by looking to the language in those sections defining their scope — "once approved, 'all further disposition of the estate is in accordance with the terms of the agreement.'" Thus, the appellate court concluded that the mission of those

sections is to allow parties to change the distribution of an estate in a manner that binds all fiduciaries and all beneficiaries, including certain non-party beneficiaries in specified situations.

The appellate court cited that fiduciaries are not required signatories under those sections. Rather, as noted by the Reporter's Comment, the lack of any requirement that fiduciaries join in is to prevent them from prolonging litigation needlessly with the ulterior motive of enhancing their fees to the detriment of an estate. Thus, fiduciaries do not have a veto power under those sections.

As the appellate court saw it, Terry Brown was similarly asking the court to allow a "non-settling" successor to veto the settlement even when his interest was not affected by the agreement. In other words, the statute did not allow him as a holdout successor to force the Estate into wasteful litigation that would dissipate the Estate's assets. The opinion noted that millions had already been spent litigating issues involving the Estate. Not only did the settling parties not ask the trial court to approve the terms of the settlement agreement, they did not seek to make the settlement binding on others.

Common Law Authority to Settle

Having concluded that section 3-912 and sections 3-1101 and 3-1102 were inapplicable, the appellate court then examined whether the Estate through its fiduciaries had the authority to enter into the settlement. Thus, the remaining issue was whether a will contest could be settled by those who contested the will without the consent of those who had not contested the will.

To begin its analysis, the appellate court noted that it considered the matter to be a formal probate proceeding. The appellate court found no provision in the state version of the UPC conditioning the settlement of a will contest upon the consent of all the successors. Citing SCPC section 62-1-103, allowing resort to the common law when the statutory language does not displace it, the appellate court observed that case precedent recognized the ability of some parties to settle a will contest, without binding others. Moreover, because the state version of the UPC had no procedural rule governing settlements, the trial court appropriately looked to the applicable state civil procedure rule for settlements, "which the skilled circuit judge properly relied upon." The appellate court opined that the Estate's use of section 3-105 to confirm the authority to settle was "prudent."

Miscellaneous Points

The appellate court stated that Terry Brown had not contested the will. That may not be technically correct. Terry Brown had entered into the 2009 settlement agreement, which effectively re-fashioned the 2000 will. Thus, by agreeing to the 2009 settlement, he had in effect contested the will. Although that argument was not necessary to the appellate court's rationale, it would constitute an additional reason to rule as the appellate court did.

The appellate court noted that, in rejecting the 2009 settlement agreement, the state supreme court had determined that the state version of sections 3-1101 and 3-1102 did not

require that fiduciaries sign the agreement. Section 3-1102 empowers a court accepting a settlement to require the fiduciaries to execute the agreement. The trial court order approving the 2009 settlement agreement required the co-fiduciaries to sign the agreement, but they refused and appealed the validity of the settlement, which also removed them from their fiduciary positions. Even though the state supreme court rejected the 2009 settlement, the co-fiduciaries were nevertheless removed.

- **Trustee Acting in Good Faith Can Be Liable**

In *Dereede Living Trust*, 851 S.E.2d 435 (S.C. App. 2019), the settlor created a revocable living trust, which contained only her home. The settlor initially served as trustee, and her daughter succeeded her when she died. The trust directed the trustee to sell the house "as soon as practicable" after the settlor's death and to pay a debt owed to a company owned by the settlor's husband, who was the stepfather of her daughter, the trustee. That provision further directed to pay half of the remaining net sales proceeds to the husband, with the remainder then passing via the trust's residuary provisions. The trustee sold the house and netted approximately $350,000. After the closing, the husband demanded immediate payment of the debt to his company and the remaining half to himself. The trustee resisted, contending that she needed to wait until the estate's assets and claims were finally determined. The husband sought a declaratory judgment in the probate court. The trustee then claimed that he had violated the no-contest clause and that he and his company thereby forfeited any claim against the trust. In that event, the proceeds would pass to the trustee and her siblings under the trust residue.

After ten months of litigation, the trustee and the husband consented to appoint a well-respected attorney as the trust protector, who under the trust had certain powers. The trust protector filed a report justifying the trustee's delay but proposing that the no-contest issue be decided by the court.

The trial court ruled that the trustee breached her fiduciary duty; the husband had probable cause to bring the action, so that he did not trigger the no-contest clause; the no-contest clause was not applicable to the husband's company, which was a creditor; and the trustee was liable for fees and costs.

The appellate court determined that, although an action involving a trust is usually equitable, an action to require a trustee to make an unconditional payment was legal. Thus, the applicable standard of review was whether the lower court judge's decision was supported by any evidence. The appellate court noted that an argument could be made that the matter was equitable, so that the standard of review would be de novo, but opined that the result would be the same regardless of that expanded scope of review.

The appellate court reasoned that the trustee's duty to distribute was mandatory and not discretionary. Even though the appellate court recognized that a personal representative of a probate estate could typically delay distribution until confirming the liquidity of the estate, it observed that "the rules are different for trust administration." Although the South Carolina Trust Code section 62-7-505 subjects revocable trusts to creditors of a decedent's estate if

probate assets are insufficient, the appellate court reasoned that the trustee risked no personal liability for following the trust's distribution directions because SCTC section 62-7-604(b) insulated her and required creditors to "follow the money and recover against the distributee." Moreover, SCPC section 62-3-808 and SCTC sections 62-7-1010(b) and 62-7-1002 make a trustee liable to non-beneficiaries only if they are personally at fault.

The appellate court rejected the trustee's argument that the settlor could have changed the terms of the trust in a will without the trustee's knowledge, which might be subsequently probated. However, the trust expressly exonerated the trustee for distributions if she did not learn of any subsequent will within six months — which had long transpired.

Although the appellate court concluded that the trustee did not act in bad faith, it cited authority for the proposition that a trustee acting in good faith can be liable for a breach of trust.

The appellate court also agreed that the husband had probable cause to bring the action, so that the no-contest clause was not triggered. Although the fact that he prevailed on the underlying action would obviously satisfy the probable cause standard, the appellate court also relied on the testimony of the husband's expert witness and the settlor's intent expressed in the trust to find that, at the time he brought the action, "there was a high probability he would prevail."

The trustee contended that the husband's company could not be both a creditor and a beneficiary, but the appellate court concluded that, even if true, this was a distinction without a difference. If the company were a creditor, the no-contest clause could not bind it. However, if the company were a beneficiary, the company would have the same justification as the husband in satisfying the probable cause requirement.

The trustee also argued that she was not liable personally. Citing SCTC section 62-7-1002 and Restatement (Third) of Trusts section 100 comment a, the appellate court disagreed. The appellate court also rejected the trustee's reliance on SCTC section 62-7-1010, which it concluded protected her from third parties but not beneficiaries.

Another issue examined by the appellate court was the award of attorney's fees. Citing SCTC section 62-7-1004, the appellate court noted that the trial court was empowered to assess fees.

Finally, the trustee argued that the trust language gave exclusive jurisdiction to the trust protector and not the courts. Noting the lack of any state precedent on that question, the appellate court recognized that the trust granted the trust protector binding authority to resolve disputes, but in this case the trust protector was not even appointed until after litigation commenced and she declined to resolve the dispute but instead encouraged the trustee to seek judicial resolution. Thus, the appellate court concluded that the courts were not stripped of subject matter jurisdiction.

Comment: The trustee dealt with a complicated issue in good faith, although the decision concluded that she breached her duty. This is just another example of how serving as trustee can lead to liability, even if acting in good faith. Clients should understand the possible consequences of accepting fiduciary responsibilities before doing so.

- **Fiduciary Relationship Creates Undue Influence Presumption**

In *Swiger v. Smith*, 827 S.E.2d 200 (S.C. App. 2019), the decedent moved to a nursing facility. During his stay there, his family sought to prevent his former caregiver from visiting him. His niece testified that the family was concerned about abuse while he was at home. A doctor located an abdominal aneurism and noted that the decedent was oriented as to time, place, and person. According to the niece, the decedent sought to make a new will the same day of the aneurism diagnosis. He asked the niece to act as a scrivener and write out his new will, which he dictated to her in the presence of two witnesses, who confirmed the niece's testimony. A few weeks later, the decedent returned home and executed a durable health care power of attorney naming his niece as agent. Upon the decedent's death, the probate court granted the niece's petition for probate and appointment of personal representatives. The will named 12 of the decedent's nieces and nephews as devisees. Another niece and two other nephews were not named as devisees.

The decedent's sister sought to set aside the will and appointment. She contended that the niece and a nephew serving as personal representatives had unduly influenced the decedent. The personal representatives asserted that the sister did not have standing.

During the pendency of the probate litigation, the sister's attorney-in-fact was substituted for the sister because of her mental incapacity. The probate court granted the personal representative's motion for partial summary judgment, and the sister, through her attorney-in-fact, appealed. The personal representatives sought to dismiss the appeal because the attorney-in-fact was engaged in the unauthorized practice of law by filing an appeal. The appellate court ordered the attorney-in-fact to retain counsel.

The personal representatives then sought to dismiss the appeal, arguing that the attorney-in-fact's status terminated when the sister died and that there was nothing in the record to indicate that the sister's estate had been opened. The appellate court dismissed the motion but allowed the issue to be raised during briefing.

The appellate court eventually granted standing to the attorney-in-fact — not in that capacity but rather as an interested person under the state probate code because the attorney-in-fact was also a niece of the decedent. The personal representatives had even listed her as a successor-in -interest in their probate petition.

The appellate court then underwent the usual analysis of undue influence, noting that a fiduciary relationship with a decedent raises a presumption of undue influence. Once that presumption arises, the will's proponents must then rebut the evidence. The requirement of

rebuttal does not, however, change the ultimate burden of proof, which still rests with the contestants.

After a review of the relevant facts, the court concluded that the contestants did not satisfy their burden of proof, and the will was valid.

Comment: The testator's mental capacity was not really an issue, and in fact the probate court's determination of capacity was not appealed. Of course, even a competent testator can be unduly influenced, and factors such as weakened mental or physical condition can add to a testator's susceptibility to possible undue influence.

The niece was held to be in a confidential relationship even though the health care power of attorney was executed after the will. Although an agent under a power of attorney is in a position of confidence and trust, a confidential relationship can arise even without one. In *Swiger*, for example, the niece was trusted by the decedent to serve as a scrivener for his will and to be nominated as a co-personal representative.

- **Disciplinary Complaint Does Not Trigger No-Contest Clause**

In *In re Lenahan Trust,* ___ S.E.2d __ (S.C. App. 2019) (Opinion No. 5689), the settlor created a revocable trust in 2001 and served as the original trustee. Upon the settlor's death, the trust provided cash distributions to her surviving children, with the remainder to be divided equally among them. After the settlor's death, two of her daughters succeeded her as trustees. Two of the settlor's other daughters (the beneficiaries) began objecting to the trustees' actions. The parties resolved their dispute in a private settlement agreement.

The trust contained a no-contest clause, providing, inter alia, for the forfeiture of the share of a beneficiary who directly or indirectly objected to any action proposed in good faith by the trustees. In the private settlement agreement, the beneficiaries agreed to indemnify the trustees if the trustees were made a party to any claim, action, or proceeding.

Soon after the settlement agreement was executed, the beneficiaries sent letters to the Office of Disciplinary Counsel (ODC) accusing the trustees' counsel of misconduct. The trustees brought an action for declaratory judgment that the ODC complaint violated the trust's nocontest clause and triggered the settlement agreement's indemnification provision. The trial court held for the beneficiaries, finding that the ODC complaint did not trigger the trust's nocontest provision, that probable cause existed if the ODC action were a contest, and that the beneficiaries were not obligated to indemnify the trustees for costs.

The Court of Appeals had little regard for the trustees' attempt to parse the ODC complaint by contending that they were not claiming that the complaint itself triggered the nocontest clause but rather that the allegations in the complaint violated the no-contest provision. The court found this distinction "artificial." The Court of Appeals noted that ODC complaints were not only "absolutely privileged" but the applicable rule provided that "no civil lawsuit predicated thereon may be instituted against any complainant or witness." The appellate court

reasoned that it was impractical to attempt to separate allegations about the lawyer's conduct from the trustees' conduct.

The trustees attempted to "sidestep the privilege" by pointing to a pretrial order that the complaint would not be shielded from discovery once the ODC proceeding ended. Because that order was unappealed, the trustees argued that it was the law of the case and therefore that the complain must be disclosed. The appellate court concluded that the trustees' argument "misfired," stating that merely because evidence is discoverable does not mean it is admissible. If the pretrial order was the law of the case, which the appellate court did not decide, it would not matter because that order did not rule on the admissibility of the ODC material.

Even if the letters alleged misconduct against the trustees, the appellate court concluded that the letters did not affect the administration of the trust or the trustees. The appellate court noted that the state legislature followed the prevailing view by confirming that no-contest clauses are not enforceable if the action is brought with probable cause. Because the ODC complaint letters contents were privileged, "the only way to equate the filing with an objection is by speculating as to its content." The applicable rule required that the complaint is absolutely privileged, and the appellate court saw nothing in the record demonstrating otherwise. The appellate court dismissed the argument that affidavits referring to the contents of the complaint created a factual dispute because the complaint was privileged. "[O]nly admissible evidence counts in the summary judgment calculus."

The Court of Appeals next examined the issue of the enforceability of no-contest clauses. Recognizing that South Carolina has enforced a no-contest clause, the appellate court observed that such clauses must be strictly construed because equity abhors a forfeiture. The appellate court noted the expanding number of no-contest clauses and related litigation, especially over trusts that can last for decades. The appellate court reasoned that the issue of whether the enforceability of no-contest clauses actually deters estate disputes and preserves family harmony was not before it. The issue was the construction of the actual no-contest clause: whether the complaint constituted a "direct or indirect" objection "in any manner" to the trustees' actions. The appellate court reasoned that, construed literally, that language would "apply to a beneficiary who uses an intemperate tone, questions, or even flashes a disapproving eye-roll to a Trustee."

Viewing the no-contest clause as a whole, the appellate court was convinced that the settlor intended to disinherit only those who interfered with the administration of the trust. The court found no evidence that the complaint caused any interference.

The Court of Appeals also rejected the trustees' contention that the ODC investigation triggered the indemnification provision of the settlement agreement because the trustees were not a "party" to the ODC proceedings, as required by the settlement agreement. Moreover, "no rational reading of the hold harmless and indemnity clause would result in the idea that the Trustees could sue the Beneficiaries, claim as damages the costs of bringing the lawsuit, and then seek to have the Beneficiaries foot the bill for being sued." The Court of Appeals consequently upheld the trial court.

Comment: Having ruled in favor of the beneficiaries, the appellate court did not address the issues of probable cause for bringing an action or the public policy issues.

- **Explanation of Patent Versus Latent Ambiguities**

In *Harbin Living Trust,* __ S.E.2d __ (S.C. App. 2019) (2019 Westlaw 6884669), a married couple created a joint revocable inter vivos trust in 2000, which they funded with a farm and their home. The trust named the couple as settlors and as trustees. According to the trust document, upon the death or incapacity of either, the other settlor would serve as the sole trustee. The trust further provided that either settlor could "withdraw" property while both were alive. Upon the death of the survivor, the remaining trust property would divide equally among their children.

A couple of months after creating and funding the trust, the couple transferred the farm from the trust to a son. The husband died a few months later. In 2005, the surviving settlor, acting as trustee, conveyed the home to herself for life, with the remainder to a daughter. In 2008, the surviving settlor and the daughter mortgaged the property. The surviving settlor died in 2011.

Another son was appointed as special fiduciary and brought an action to declare that the home was still part of the trust. He contended that the trust required both settlors to be alive to withdraw property from the trust. The daughter demanded a jury trial, and the special fiduciary consented.

The daughter argued that the trust was ambiguous. The trial court found that the trust was not ambiguous but, even if it were, the ambiguity would be patent "and no extrinsic evidence would be allowed." The trial court recognized that the trust document "was subject to different interpretations as to [the surviving settlor's] authority to transfer the home property [but] it was not the same thing as ambiguity." Thus, the issue of the surviving settlor's authority was a question of fact for the jury. Even though the special fiduciary argued that, in light of the court's determination that no ambiguity existed, no jury trial was needed, the trial court proceeded with the jury trial.

At trial, an attorney who had represented the settlors testified that he reviewed the trust in 2000 and learned that the daughter and her husband were living in the home with the settlors and taking care of them. He also testified that he had met with the couple and the daughter about the home, but the deed transferring the home was not executed until 2005, after the deceased settlor's death.

The special fiduciary moved for a directed verdict as a matter of law. The trial court disagreed, observing that the trust did create an issue of fact. The trial court then charged the jury with the instruction that the sole issue was whether the surviving settlor had the power to transfer the home. The jury found that she did.

On appeal, the special fiduciary contended that the trial court erred by denying the directed verdict motion because the trust unambiguously limited the power to withdraw property only while both settlors were living — in effect, making the trust irrevocable upon the death of the first settlor to die. The appellate court disagreed.

The appellate court focused on the authority of the surviving settlor as trustee, not as settlor. Although the trust document did not specifically grant a power to the trustee to "withdraw" trust property, the document generally empowered the trustee by referring to the provisions of the state version of the Uniform Trustees Powers Act. The appellate court noted that "[a]lthough the trust court stated the Trust was unambiguous, it also found the trust was subject to different interpretations." The appellate court agreed with the latter statement and concluded that a trust subject to different interpretations is "inherently ambiguous." Consequently, the trial court properly denied the motion for directed verdict.

The appellate court next addressed the special fiduciary's argument that the trial court should not have sent the issue to a jury because the document was either unambiguous or only patently ambiguous — either of which would present a question of law for the trial court to decide.

Having already determined that the trust was ambiguous, the appellate court examined whether the trial court erred by submitting a patently ambiguous document to the jury. The appellate court agreed with the special fiduciary that state law had long distinguished between patent and latent ambiguities, both as to the admissibility of extrinsic evidence and whether the issue was a question of law for the court or of fact for the jury. According to the appellate court, state courts historically admitted extrinsic evidence and submitted issues of fact to the jury only when a latent ambiguity existed. However, the appellate court noted that the state supreme court had more recently discarded the distinction between patent and latent ambiguities with respect to whether a document's interpretation is for the court or a jury. The more recent decisions left construction of only unambiguous documents to the court, while ambiguous documents were jury issues with the admission of extrinsic evidence as appropriate.

Because the appellate court had concluded that the document was ambiguous, it ruled that the submission ot the jury for interpretation as a question of fact was proper.