PROBATE CODE BILL SUMMARY 2012

This summary focuses on the changes to the existing probate code. The sections that are not amended will be noted, but not summarized in detail.

<u>ARTICLE I.</u> GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Sections 62-1-100 through 62-1-111

Most of the provisions in Part 1 would not be changed. The amendment to § 62-1-106, concerning the effect of fraud and evasion, would clarify that a person injured by the effects of fraud could obtain relief against the perpetrator of the fraud and anyone benefitting from the fraud, and would not have to choose between the two, as existing law might be read. The amendment to § 62-1-107 would rename this provision "Applicability of Rules of Evidence" and would clarify that the SC Rules of Evidence that apply in circuit court would apply in a probate court, unless specifically excluded by a provision in the SC Probate Code. The provisions related to evidence as to the status of death would be deleted and the other provisions would be incorporated into the amended Article 1, Part 5, dealing with Uniform Simultaneous Death provisions. A new provision, § 62-1-111, would be added to clarify a probate court's authority to award attorneys' fees and costs and to conform to the provisions of the SC Trust Code in § 62-7-1004, which provides similarly.

PART 2. DEFINITIONS

Section 62-1-201

Most of the definitions in Part 2 would not be changed. The amendment would change the definitions of "Person" and "State" to conform to the language that currently exists elsewhere in the Probate Code in § 62-5-702. The Terms "Fair Market Value" and "Probate Estate" would be added and defined. The changes to the term "Guardian" would be technical corrections to the language of the definitions. The term "Stepchild" would be deleted because the intestacy statutes would no longer list stepchildren as heirs.

PART 3. SCOPE, JURISDICTION, AND COURTS

Sections 62-1-301 through 62-1-309

Several provisions in Part 3 would be amended by this bill. Cross-references to other Code Sections would be added to several provisions where these references would provide additional information related to that provision. Section 62-1-302, relating to subject matter jurisdiction and concurrent jurisdiction with the Family Court, would be amended to clarify that the probate court has jurisdiction over property in which a decedent's estate or a protected person has an interest, would amend the provision to conform to the new provisions of Article 5, Part 7, dealing with Adult Guardianship, would amend the removal language to clarify the specific types

of actions that could be removed to circuit court, and would clarify that the Probate Court does not have jurisdiction over the care, custody, or control of minors. Section 62-1-308, dealing with appeals, would clarify and provide more detail for the appeals process from the probate court, which is generally to the circuit court first. The procedural rules for appeals from the circuit court would be in accordance with the usual rules for appeals to the appellate courts.

PART 4. NOTICE, PARTIES, AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

Sections 62-1-401 through 62-1-403

These provisions, relating to notice and representations in litigation were substantially amended in 2010, when the General Assembly enacted changes on what types of probate proceedings were classified as "formal" and which ones were classified as "informal." Part 4 is not amended in 2012.

PART 5. UNIFORM SIMULTANEOUS DEATH ACT

Sections 62-1-500 through 62-1-508

The provisions of Part 5 would be substantially amended by this bill. Definitions for "coowners with rights of survivorship", "governing instrument", and "payor" would be added. There would now be a 120-hour survival requirement to clarify an individual's survivorship with relation to a testate and intestate decedent, unless the individuals fell within the exceptions listed in § 62-1-506, making the current intestacy rule consistent with other transfers at death. The exceptions would include circumstances where imposing the 120-hour survival requirement would contradict the terms of a will or trust, would deprive the decedent's estate or beneficiary of tax exemptions, would invalidate property interests, or would result in an escheat. Another exception would be included in § 62-1-505, where a decedent would be deemed to have survived the death of the decedent's killer, unless the killer survives for more than 120 hours by clear and convincing evidence; this provision is intended to be consistent with 62-2-801, currently dealing with a murder-suicide. Part 5 would also include provisions concerning evidence of death. Part 5 would also include new provisions concerning obligations and protection of payors and bonafide purchasers who operate in good faith without notice that an individual was not entitled to receive the benefit, and also for the liability of the payor who has received notice of lack of entitlement of an individual. The provisions would also provide for an individual's liability when he is not entitled to receive benefits.

ARTICLE II. INTESTATE SUCCESSION AND WILLS

PART 1. INTESTATE ESTATE.

Sections 62-2-100 through 62-2-114

Most of the provisions in Part 1 would not be changed. The amendment to § 62-2-103 would eliminate step-children as intestate heirs. Section 62-2-104 would be amended to clarify the 120 hour survival requirement for intestate succession, homestead allowance, and exempt property: The section currently requires an intestate heir to survive the decedent by 120 hours.

The amendment would clarify the intestacy 120-hour survivorship rule to include anyone in gestation at the time of decedent's death: that person would qualify as an heir if he or she survived 120 hours after that person's birth. Section 62-2-114 would be amended to require the parent or interested party, in an action to deny or limit a parent's intestate share, to serve Summons, Petition and Notice rather than just making a motion. It would also stipulate that the Disqualified Parent's share shall pass as though the parent had predeceased the decedent.

PART 2. ELECTIVE SHARE.

62-2-201 through 62-2-207

Section 62-2-205 would change the time limit for presenting a petition for an elective share to include the case when a different will was later probated – e.g., surviving spouse might be satisfied with an informally probated will but not with a will later probated formally, after the current time period to present an elective share claim has expired. (This issue came up in a recent Laurens County case.)

Significant revisions to section 62-2-207 would offset the elective share amount by probate and nonprobate transfers to the surviving spouse (currently only probate assets offset the elective share amount), confirm that the value of an illusory revocable trust may still be subject to the elective share (as per the Seifert case and current Section 62-7-401(c) (also covered at 62-2-202), and give the surviving spouse the right to require the trustee to convert a trust in which he/she has only a life estate/income interest to a unitrust (with an annual payout of 3 to 5% of the trust value). This would provide further protection for the surviving spouse in the current economy when fixed-rate investments produce little income. Also, 62-2-207 would clarify that the elective share is a pecuniary, rather than a fractional, amount, which impacts the rights of the surviving spouse to income and appreciation during the administration of the estate.

PART 3. OMITTED SPOUSE AND CHILD.

62-2-301 through 62-2-302

The only change to this part would be in § 62-2-302. Here, the amendment would delete the provision under current law that provides an intestate share to a child born after the execution of the will if a husband and wife had no children at the time of execution, even though the testator devised substantially all of his/her estate to the surviving spouse. The amendment would not provide an omitted child's share to any child born after the execution of the will if the will devises substantially all of the deceased spouse's estate to the surviving spouse.

PART 4. EXEMPT PROPERTY.

62-2-401 through 62-2-403

Section 62-2-401 would be amended to increase the maximum value of exempt property from five thousand dollars to twenty-five thousand dollars. Section 62-2-403 would be amended to allow veteran's benefit payments to be exempted for deceased veterans of any period of war as defined by Federal Law. Previously this section only covered specific wars up to WWII.

PART 5. WILLS.

62-2-501 through 62-2-512

The amendment to § 62-2-501 would change "person" to "individual" to make it clear that only individuals may create wills. "Person" is defined in the code as "an individual, a corporation, an organization, or other legal entity." Section 62-2-502 would also be amended to change "person" to "individual." The section would also be amended to change the style of the section, attempting to make it clearer. The self-proving affidavit example in § 62-2-503 would be amended without changing substance, other than clarifying when individuals under the age of eighteen may sign the document. Section 62-2-504 would be amended to define an interested witness to include a beneficiary's issue in addition to the beneficiary's spouse, who is already included under current law. Section 62-2-504 purges an interested witness's profit under the will so that the witness can serve as a credible witness to validate the will. The other changes would merely be stylistic. The amendments to § 62-2-505 would merely be stylistic.

Section 62-2-506 would be amended stylistically and to handle subsequent wills that do not expressly revoke a previous will. Under this amendment, the subsequent will would completely revoke the previous will by inconsistency, if the testator intended the subsequent will to revoke the prior will. There would be two possible presumptions that could only be rebutted by clear and convincing evidence: a presumption that the subsequent will revoked the prior will or a presumption that the subsequent will was intended to supplement the prior will. The presumption of revocation of the prior will would occur if the subsequent will made complete disposition of the testator's estate. The presumption of supplementation would occur if the subsequent will did not make a complete disposition of the testator's estate. In that case, any inconsistencies between the two wills would be governed by the subsequent will.

The amendment to § 62-2-507 would define "disposition or appointment of property," "divorce or annulment," divorced individual," "governing instrument," and "revocable." The significant substantive change would be to expand the scope of this section to cover life insurance and retirement plan beneficiary designations, transfer on death accounts, and other revocable dispositions to the former spouse established before the divorce or annulment. Section 62-2-508 would be amended to clarify its current effect. The amendment to § 62-2-510 would clarify the section.

PART 6. CONSTRUCTION.

62-2-601 through 62-2-611

Sections not specifically discussed were not substantively changed. Section § 62-2-601 would be amended to give probate judges express authority to reform the terms of a will if the testator's actual intention is proved by clear and convincing evidence. This would prevent injustice in situations where a mistake has been made because the judge will no longer be bound by the terms of the will. This codifies a general common law view. Section § 62-2-602 would be amended to make it clear that property acquired by the testator's estate, after the testator's death, passes under the will, not by intestacy; this clarifies an issue not clearly covered under the common law. Section § 62-2-603 would be amended to make it clear that words of survivorship are sufficient to create a presumption that this section does not apply. Section 62-2-606 would be amended stylistically for clarity and to clarify that its coverage with respect to conservators

applies similarly to agents under a durable power of attorney. Section 62-2-610 would be amended to clarify its operation.

PART 7. CONTRACTUAL ARRANGEMENTS RELATING TO DEATH.

62-2-701

This section was not changed. The three methods to contract to make a will, revoke a will, not revoke a will, or to die intestate would remain the same as the current version.

PART 8. GENERAL PROVISIONS.

62-2-801 through 62-2-806

Section 62-2-801 would be substantially reformatted, but the substance would remain the same with a few changes. The amendment's main change would be to enhance clarity and readability. The section would define "disclaimer," "disclaiment," "disclaimed," and "fiduciary." It would also expressly state that disclaimers under the Internal Revenue Code are valid under this section and that disclaimers under this section can be valid for state law purposes even if the Internal Revenue Code requirements are not met. The section would further explain when fiduciaries, trustees, and parents may disclaim property. Lastly, the amendment would provide the methods to deliver disclaimers for interests in intestate succession, testamentary trusts, inter vivos trusts, beneficiary designations, property jointly held, and other disclaimers by fiduciaries, individuals with power of appointment, and agents. Section 62-2-802 would be amended to change "person" to "individual," to provide that an individual is a surviving spouse even if the individual was a party to a decree ending the divorce or confirming equitable distribution, if the parties are living together as husband and wife at the time of the decedent's death.

Section 62-2-803 would be amended mostly for clarification of the existing statute. The amendment would clarify that the decedent's killer is not entitled to any benefit from the decedent by including retirement plans, annuities, elective shares, etc. The amendment would also revoke any nomination of the killer as a fiduciary or representative. Section 62-2-806 would be added to allow the modification of a will to achieve the testator's tax objectives provided that it is not contrary to the testator's probable intent. This would allow a court to effectively change the will for tax purposes and is analogous to Section 62-7-416 of the South Carolina Trust Code.

PART 9. DELIVERY AND SUPPRESSION OF WILLS.

62-2-901

This section would be amended to require the individual in custody of the will to deliver it directly to a judge, as provided under current law, or allow the individual to deliver the will to a named Personal Representative who would in turn have a duty to deliver the will to a judge. The duty to deliver the will to a judge would only occur after actual notice rather than just notice. Further, there would be no criminal penalty unless an individual intentionally or fraudulently suppresses, conceals, or fails to deliver the will to a judge. The existing code provides criminal punishment for mere failure to deliver the will. The criminal penalty would also be changed from a misdemeanor to contempt of court. Lastly, rather than a monetary fine of no more than

five hundred dollars, the intentional or fraudulent actor would be liable for any person's damaged caused by the action or inaction.

ARTICLE III. PROBATE OF WILLS AND ADMINISTRATION

PART 1. GENERAL PROVISIONS

62-3-102 through 62-3-108

Section 62-3-102 would be amended to clarify the existing law that a will found valid in another state would be valid to transfer property in South Carolina. Section 62-3-104 would be amended to clarify that a claim cannot being filed against an estate before a personal representative is appointed. Lastly, § 62-3-108 would be amended stylistically to make it read more clearly.

PART 2. VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

Section 62-3-203 would mainly be amended for clarity and stylistic changes. However, § 62-3-203(e)(4) would be amended to allow probate judges to act as personal representatives of a family member's estate, if the proceedings occur in a different county than the one in which the judge sits. Section 62-3-204 would be amended to make a demandant's demand expire after one year. It would also require a Personal Representative to give the demandant a copy of the filing and require compliance with § 62-1-401 only if the demand is for a hearing.

PART 3. INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS **62-3-301 through 62-3-310**

Section 62-3-303 would be amended to allow a copy of an unprobated will of a nonresident decedent to be informally probated in certain cases. Section 62-3-310 would be amended to provide that applicants seeking to be appointed informally would only be required to give notice to individuals with equal right to appointment. This means individuals with prior right and those who demand it under § 62-3-204 would not be entitled to notice.

PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS **62-3-402 through 62-3-414**

Section 62-3-406 would be edited substantively and stylistically. The amendment would provide that wills that are notarized, but not self-proved, are presumed to satisfy the execution requirements. Also, an attesting witness would only be required if the will is not notarized or self proved. Section 62-3-408 could require courts in this state to recognize final orders of another state's court to be determinative with regard to construction of a will, in addition to testacy and validity. Section 62-3-409 would be amended to provide that wills from a place that does not provide probate may only be probated if they are not ineligible for probate in that place. This would be a change from requiring that they be effective in that other place. Section 63-3-410 would be amended to provide that the deadline of after-discovered wills is subject to the provisions for modification in addition to the provisions for vacation of the wills.

The comments to sections 62-3-412 through 62-3-414 would be amended stylistically and to bring them in line with proposed amendments to other sections.

PART 5. ADMINISTRATION UNDER PART 5

62-3-501 through 62-3-505

The amendment would make only technical changes to this Part which would not substantively change it. The provisions governing the ability to secure complete administration and settlement of a decedent's estate in a single in rem proceeding would remain the same.

PART 6. PERSONAL REPRESENTATIVE, APPOINTMENT, CONTROL, AND TERMINATION OF AUTHORITY

62-3-601 through 62-3-621

Section 6-3-604 would be amended to clarify that a court can dispense with bond in its discretion. Section 62-3-605 would raise the value of a putative interest of an interested person to demand a bond from \$1,000 to \$5,000. Also, it would prevent the delay in providing a bond from being cause for removal of a personal representative if good cause is shown for the delay. Section 62-3-610 would provide that an order closing the estate and resignation of the personal representative relieve the personal representative's attorney of any further duties to the court. Section 62-3-611 would provide that the termination of a personal representative for cause relieves the personal representative's attorney from further duties to the court.

Section 62-3-614 would be amended to substantially broaden the circumstances that allow a special administrator to be appointed informally. Currently there are only two specific circumstances when this is allowed, but the amendment would allow the appointment in order to take appropriate actions regarding estate assets. Section 62-3-619, dealing with executors in their own wrong (those who improperly have property belonging to the estate) would be amended to make the section much easier to read and understand without changing the substance. Section 62-3-620 would be amended to make the section more readable and to allow the court to assess attorney's fees against the executor de son tort. Section 62-3-621 would be amended to make the section more readable and clear.

PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES **62-3-701 through 62-3-721**

Section 62-3-701 would be amended to allow a named personal representative to protect the decedent's estate before the personal representative is appointed. Section 62-3-703 would clarify the reference to the trustee's standard of care. The amendment would also give a personal representative the authority to distribute intestate property after the relevant claim period provided that the personal representative has not received actual notice of an action to probate a will. The current version does not require the personal representative to wait until after the relevant claim period and allows distribution if the personal representative is not "aware" of a claim.

Section 62-3-704 would be amended to remove specific penalties for failure of a personal representative or trustee to comply with § 62-3-706 and instead subject the person to the contempt power of the court. The court then would have complete discretion over the consequences. The section would also be amended to be consistent with changes to Part 8, requiring a personal representative to allow or disallow claims within a certain time.

Section 62-3-706 would be amended stylistically and substantively. It would require the personal representative to prepare an inventory of only probate property, rather than all property and require a copy of the appraisement and inventory be delivered only to people who have filed

a proper demand notice. However, if a proper demand is made, within 90 days, the personal representative must deliver a list of the non-probate property, and at the personal representative's discretion, its value and the decedent's interest in it; mail a copy of the information to the demanding person; and provide proof of such mailing to the court.

Section 62-3-708 would be amended to require the personal representative to file the supplementary inventory and appraisement but would not require the supplements be delivered to interested persons unless they have requested it. Otherwise, the changes would be to clarify the section.

Section 62-3-711 would allow personal representatives without the power of sale under the will to sell real property in the estate in a few additional situations described in 62-3-911 and 62-3-1301 et. seq. It would also allow the personal representative without the power of sale under a will to sell personal property without an order from the court if the aggregate value is ten thousand dollars or less. This would double the current maximum. Further, the amendment would allow issuance of a court order of the sale of personal property upon application with notice or consent as the court sees fit.

Section 62-3-715 would be amended to allow personal representatives to access the decedent's electronic files, user names, and passwords. Section 62-3-717 would be amended to require that, when a co-representative who has been delegated the authority to act, written notice, signed by the other co-representatives, must be filed with the court.

PART 8. CREDITORS' CLAIMS

62-3-801 through 62-3-807

Several changes would result from the amendments to this Part. Section 62-3-801 would make it clear that a personal representative need not publish or deliver notice if the decedent has been dead for a year. Section 62-3-804 would make the filing of the claim in court be the only act that stops the running of the period to present a claim. Section 62-3-806 would require the personal representative to act to allow or disallow claims within the later of 60 days from the claim or 14 months after the decedent's death and clarify that allowance of a claim does not necessarily mean that the estate has assets to pay it, Section 62—3-805 would move federal claims up in the order of payment priority and clarify that one who pays a claim on behalf of the estate is subrogated to that claimant's priority.

PART 9. SPECIAL PROVISIONS RELATING TO DISTRIBUTION **62-3-901 through 62-3-916**

Section 62-3-901 would be amended to clarify that successors take title subject to the elective share, in addition to the currently available rights of others. Section 62-3-902 would be amended to clarify the elective share provisions as an exception to the abatement rules. Section 62-3-906 would be amended to require any notice that the personal representative gives to interested persons regarding the proposed distribution to inform the interested persons of their right to object. Section 62-3-907 would be amended to clarify that a deed of distribution is required for distributions of real estate and that an appropriate instrument of conveyance is required for other types of property. Section 62-3-910 would be amended to update the reference to documentary or deed stamps as evidence of value to the current appropriate terminology: deed recording fee pursuant to Chapter 24, Title 12.

Section 62-3-911 would be amended to update the method for partitioning property to a process more akin to partition in the circuit court pursuant to section 15-61-25: First, the court

should attempt to fairly and equitably partition the property, but if that is impossible, the court should proceed to sell the property. Non-petitioning, interested heirs and devisees have the first opportunity to purchase the property. If an agreement as to price cannot be reached, the court shall approve and appoint at least one appraiser who shall have 30 days to submit a written report. If an interested heir or devisee objects to the valuation, then the court shall conduct a hearing to determine the value of the property. The interested heir or devisee may then purchase the property within 45 days. If the heir or devisee fails to pay, then the court shall follow the traditional practices of circuit courts in partition sales.

Section 62-3-914 would be changed to allow an unclaimed devise or intestate share of less than five thousand dollars to be transferred to the State Treasurer. Currently the property must be worth less than one hundred dollars

Section 62-3-916 would be substantively amended to make the section comparable to the new UPC. Subsection (b) would be changed to have three sub-subsections. The first would provide that an express and unambiguous tax apportionment in a will must be followed. The second would provide that if sub-subsection (1) does not apply, then the taxes must be apportioned in accordance with a revocable trust created by the decedent. If neither (1) or (2) apply, the taxes would be apportioned based on each person's proportion of the estate, just like the current version. Thus, the amendment effectively recognizes the current use of revocable trusts in estate planning, which often contain language regarding tax apportionment, and provides specific language coordinating tax apportionment language in wills and trusts.

PART 10. CLOSING ESTATES

62-3-1001 through 62-3-1008

Section 62-3-1001 would be amended to allow the personal representative to avoid the requirements of this section if all interest parties waive the filings under this section. The comments from § 62-3-1003 would be deleted because they are not applicable to the version of this section adopted by South Carolina. Section 62-3-1005 would be amended to change the title of the section and to require the successors and creditors proceedings be filed within six months after the filing of the application for settlement of the estate under 62-3-1001. Currently several items must be filed to start the clock, but the amendment would reduce it to one application, conforming this section to the amendments to Section 62-3-1001.

PART 11. COMPROMISE OF CONTROVERSIES

62-3-1101 through 62-3-1102

The sections governing the effect of court approval of a compromise and the procedure to get court approval would not be changed.

PART 12. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

62-3-1201 through 62-3-1204

Section 62-3-1201 would be amended to allow use of this section if the value of the estate is less than twenty-five thousand dollars. Currently the statute requires it be less than ten thousand. The amendment would also expressly include a person who remitted payment for reasonable funeral expenses as a claiming successor. Lastly, rather than requiring a signature from a judge in the decedent's resident county, the judge must be in the county of the decedent's domicile. Section 62-3-1202 would be amended to place a duty on the person receiving the

affidavit to comply with the affidavit, provided that the affidavit specifically state that no person acting in reliance of the affidavit incurs liability to the estate for doing so.

Section 12-3-1203 would be amended to raise the maximum value of the probate estate from ten thousand dollars to twenty-five thousand dollars to qualify for small estate administration. Additionally, the amendment, under both subsections, would clarify that, after publishing notice to creditors, the personal representative of an independent estate administration need not give creditors any additional notice before distributing the estate. Also, under subsection (b) the personal representative may be the sole devisee individually or in the capacity of a fiduciary, such as a trustee, to qualify for independent administration.

Section 12-3-1204 would be amended to clarify that the personal representative must file an inventory with the court and pay court fees before closing a small estate. The amendment to this section recognizes the amendment to Section 62-3-1203, by which the maximum value of a small estate would be raised from ten thousand dollars to twenty-five thousand dollars.

PART 13. SALE OF REAL ESTATE BY PROBATE COURT **62-3-1302 through 62-3-1310**

Part 13 would be amended to clarify the process for obtaining court approval for estate sales of real estate. Section 62-3-1302 would be amended to change "real estate" to "real property." Section 62-3-1303 would be amended to change the wording of the statute and to add the following to the list of people to whom a summons shall be issued: the heirs at law of the decedent, the devisees under the decedent's will, any person who has properly presented a claim against the estate which remains unresolved, any interested person effected by the proceeding. Section 62-3-1305 would be amended to add the same people as those added in section 62-3-1303 to the list of who must be summoned. It would also be amended to clarify the procedure regarding guardians ad litem.

Section 62-3-1309 would be amended to make the procedures for sale of real property proceed in the same manner as a normal civil lawsuit. The current time to respond to the summons and petition of at least thirty days would be changed to be the same as normal civil suits. Similarly, the court would be given authority to hear motions and accept pleadings as in normal civil suits. Also, the amendment would require notice of hearings be provided according to Section 62-1-401. Section 62-3-1310 would be amended to give the court discretion as to whether a bond is required, rather than requiring the bond in all cases.

ARTICLE IV. ANCILLARY ADMINISTRATION

PART 1. DEFINITIONS

62-4-101

The definitions for this Article would not be changed.

PART 2. POWERS OF FOREIGN PERSONAL REPRESENTATIVES **62-4-201 through 62-4-207**

Section 62-4-204 would be amended to remove bond from the title and to state that a bond is not required unless the court orders it. Section 62-4-207 would be amended to provide that a proceeding under Article 3 is an alternative to the procedures under Sections 62-4-201 through 62-4-206.

PART 3. JURISDICTION OVER FOREIGN PERSONAL REPRESENTATIVES **62-4-301 through 62-4-303**

The sections governing when courts have jurisdiction over foreign personal representatives and the methods of service would not be changed.

PART 4. JUDGMENTS AND PERSONAL REPRESENTATIVES 62-4-401

The section stating that judgments in favor of or against personal representatives is binding on the local representative would not be changed.

ARTICLE V. PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

Article 5 has been substantially amended with regard to guardians, conservators, and protective orders.

PART 1. GENERAL PROVISIONS

62-5-101 through 62-5-104

Section 62-5-101 would be significantly amended. The amendment would basically rewrite the entire section with new defined terms and redefine existing terms. The defined terms would include: Adult, Conservator, Court, Emergency, Guardian, Guardian Without Limitation, Guardian With Limitation, Guardian ad litem, Guardianship order, Home state, incapacitated person, Incapacity, Party, Person, Primary respondent, Protected person, Protective order, Protective proceeding, Record, Significant-connection state, State, Visitor, and Ward.

Section 62-5-102 would be amended to remove subsection (a) that states that the probate court has jurisdiction over protective proceedings and guardianship proceedings; the statement of this jurisdiction is covered elsewhere. Section 62-5-103 would be amended to clarify that the maximum amount of money that may be distributed to a minor or incapacitated person, rather than requiring the appointment of a conservator, is an aggregate amount of ten thousand dollars a year. The amendment would also state that the individual receiving money or property for the minor or incapacitated person is subject to fiduciary duties. The amendment would state that an employer may deliver any amount owed to the minor or incapacitated person to an account under that person's name. Lastly, the amendment would make stylistic changes to the current version.

The current Section 62-5-104 would be deleted and Section 62-5-105 would be renumbered as Section 62-5-104. This re-numbering ripples throughout Article 5. Section 62-5-104 would clarify that the Director of Mental Health may only accept a patient's assets for the patient's use if the value does not exceed ten thousand dollars per year. Previously the applicable section stated "a sum of money" rather than assets. The amendment would also require the Director of Mental Health to notify the probate court of the patient's death within thirty days of the patient's death. The Director must also turn over all assets to the conservator when one is appointed and provide the conservator an accounting of the assets. Section 62-5-106 would also be deleted. Currently it states that guardianships, conservatorships, nor protective orders terminate merely because the ward reached the age of majority or other benchmark age. This issue is covered elsewhere in the amended Article 5.

PART 2. JURISDICTION **62-5-201**

This section would be amended to clarify that probate courts have jurisdiction as set forth in Sections 62-1-301 and 62-5-701. The amendment would confirm that the probate court has jurisdiction over guardian appointment, protective orders, and the property of minors. It would clarify that the probate court does not have jurisdiction over the person of a minor.

PART 3. GUARDIANS OF INCAPACITATED PERSONS **62-5-301 through 62-5-313**

Sections 62-5-301 and 62-5-302 would be swapped so that 62-5-302 would be first and 62-5-301 would be next. Governing the testamentary appointment of guardians by a parent, Section 62-5-302 would make numerous stylistic changes for clarity. The amendment would also require notice to people required under Section 62-5-303, who would have the right to object. It would also state that an appointment under this section is not an adjudication of incapacity and that once an appointment is effective, the guardian is deemed to have been court appointed. Section 62-5-301 would be amended to clarify that venue is subject to the provisions of Section 62-5-701 et. seq. regarding the appointment of a guardian for an adult

Section 62-5-303 would be amended to allow a person interested in the welfare of the respondent to file a petition with the court for a finding of incapacity, guardian with limitation, or guardian without limitation. It would also provide that the proceeding would commence after the filing and verification of service of the people listed in 62-5-303. The petition to the court would be required to set forth particular information and a visitor would not be required at this stage. The court would be required to appoint a guardian ad litem after the filing and verification of summons, but the amendment would state that the appointment would not raise a presumption of incapacity. The amendment would allow the respondent to proceed pro se, but require the court to appoint counsel for the respondent if the respondent, guardian ad litem, or any party requests that the respondent be appointed counsel. The court may also appoint counsel on its own motion. Further, the amendment would require the court to appoint a physician to examine the respondent and allow the court to appoint other examiners who do not have to be physicians. However, the court would be required to state its reasons for appointing the other examiners. Each examiner would have to submit a report more than forty-eight hours prior to the hearing, unless an exception applies. The amendment would also set out the items required to be in each examiner's report. It would require the court to hold a hearing as soon as justice would allow and require the respondent to attend the hearing. The amendment would allow any interested person to file a demand for notice and require that that person be notified for matters concerning that demand. After the hearing or with the consent of all parties, the court would be required to appoint a guardian, if the basis for appointment has been established.

Section 62-5-304 would be amended to require clear and convincing evidence to find the respondent incapacitated and allow the court to use less restrictive means than guardianship to meet the respondent's needs. The court would be required to provide a copy of its orders to all parties.

Section 62-5-311 would be renamed 62-5-305. The section would have the priority for appointment as guardian listed from highest to lowest as follows: current non-temporary guardian, a person nominated by the respondent prior to incapacity, an attorney appointed by the respondent under Section 62-5-501, the respondent's spouse or person nominated by the spouse's will, an adult child of the respondent, a parent of the respondent or person nominated by the parent's will, another relative of the respondent, a person who is caring for the respondent or

paying benefits to him. If persons would have equal priority, the court would have discretion to choose whom to appoint.

A new section, labeled 62-5-306, would be added to address the rights of a ward and the ward's testamentary capacity. The amendment would guarantee the ward the following rights, unless otherwise ordered by a court: the right to a guardian who acts in the ward's best interest; the right to a guardian who is reasonably accessible; the right to have the ward's property utilized to provide the ward with education, heath, and welfare; the right to communicate freely and privately with people other than the guardian; the right to an accessible telephone or similar communication device; the right to notify the court that the ward is being denied a right and any person who interferes with this transmission is guilty of contempt; the right to request readjudication of incapacity; and the right to the least restrictive form of guardianship taking into account the ward's needs. The amendment would also expressly provide that the finding of incapacity is not a determination that the ward lacks testamentary capacity or the capacity to create, amend, or revoke a revocable trust.

A new section, labeled 62-5-307, would be added to address rights removed from a ward upon adjudication of incapacity with the appointment of a guardian without limitation. The following rights would be expressly removed unless the court orders otherwise: the right to marry; the right to reside where the ward chooses; the right to travel without the guardian's consent; except as allowed by section 62-5-306, the right to bring an action in law or equity, the power to make, modify, or terminate contracts; and the power to refuse or consent to medical treatment. The amendment would require a court to specify in an order which rights are retained and removed in this section if a guardian with limitation is appointed. Lastly, the amendment would state that appointment of a guardian suspends the authority of an agent of the ward unless the court orders otherwise.

Section 62-5-305 would be relabeled 62-5-308. The amendment would move the notice proceedings formerly found here, to section 62-5-305. Additionally it would state that all formal proceeds under this section are governed by the rules of civil procedure, court rules, and other rules under this title.

A new section, labeled 62-5-309, would be added to address compensation and expenses for guardians ad litem, attorneys, examiners, visitors and guardians appointed. It would provide that these people are entitled to reasonable compensation as determined by the court. The amendment would also give the court discretion to award attorneys' fees to be paid from the ward's estate in proceedings resulting in adjudication of incapacity, appointment of a guardian, or a protective order.

Section 62-5-306 would be relabeled 62-5-310. The amendment would require the guardian to file a certified copy of the ward's death certificate within sixty days of the ward's death. The court may then require the guardian, provide an accounting of the ward's assets and then the court must terminate the appointment.

Section 62-5-307 would be relabeled 62-5-311. The amendment would revise the section for clarity. Additionally it would provide the procedures for co-guardian resignation and sole guardian resignation. Lastly, the court may order the termination of the ward's incapacity based solely on the guardian ad litem's report based on the guardian ad litem's visit to the ward's residence and the court may issue an interim order regarding the ward's care.

Section 62-5-310 would be relabeled 62-5-312. There would be three main categories for appointment of a temporary guardian: appointment with notice, appointment for an emergency, and the court exercising the powers of a guardian. For appointment with notice there would be

two subcategories: a person who has no guardian and a person who has had an appointment of a guardian which has not been terminated due to capacity. For both of these subsections, a party must move the court to make the appointment and the court must state certain factors with particularity. The amendment would then require the court to conduct a hearing as soon as practicable and must appoint a temporary guardian if it finds that no guardian has been appointed or the current guardian is not performing his duties; for a respondent whose incapacity has not been adjudicated, a physician must certify that the respondent is incapacitated; and the respondent's welfare requires immediate action. The order would have to set forth a duration not exceeding six months, except for good cause; a statement of the evidence; the findings according to this section; why the guardianship is necessary; and the limitations on the guardianship if any. For the appointment, the court would have to consider the appointment priorities set forth in Section 62-3-305.

The amendment would provide a procedure for the appointment of an Emergency Temporary Guardian. It would allow any person interested in the respondent's welfare to file under this subsection. The court could then issue an order ex parte or after a hearing. The amendment would prevent any order for appointment except as provided in the above subsection for appointment with notice. It would require the order have the date of issuance, be filed in the record, be served on the people required under Section 62-5-303, and state the nature of the emergency. The order could not be longer than thirty days and on two days notice to the party who obtained the order, any party opposed to the order could move for its dissolution or modification. The amendment would provide the temporary guardian with the same powers and duties of a guardian unless limited by the court.

Under the amendment, the court could exercise the powers of a guardian if it finds that no person has the authority to act or the persons authorized cannot agree; the person has been adjudicated as incapacitated or a physician certifies that the person is incapacitated; and an emergency exists.

The amendment would define an emergency to require no person having authority to act, a guardian who is not fulfilling his duties, a person with a durable power of attorney not fulfilling his duties, or multiple persons with authority to act who cannot agree. It would also require a serious threat to the person's life, health, or bodily integrity.

Section 62-5-312 would be relabeled 62-5-313. The amendment would state the duties of the guardian: to make decisions regarding the ward's health, education, and maintenance; to use his authority only as necessary; to consider the desires of the guardian; to act in the ward's best interest; to remain personally acquainted with the ward; to bring proceedings to protect the ward's property if needed; to spend the ward's money only on the ward's needs, to conserve the ward's money; to immediately notify the court of a change in the ward's condition; to inform the court of a change in the ward's address; and to report to the court in writing of the ward's condition at least annually. The amendment would provide that the powers of the guardian are: to make decisions regarding the ward's health, education, and maintenance; to have the same powers as a parent has for its child; to establish the ward's place of residence; to take reasonable care of the ward's personal property; to make decisions regarding the ward's medical care; if no conservator is appointed, to institute proceedings to compel persons to support the ward and to receive any money for the ward up to ten thousand dollars; if reasonable, the guardian may delegate powers to the ward; to delegate his powers to another person for no more than sixty days. The guardian would be entitled to receive reasonable compensation. The amendment

would also provide that if the guardian acted reasonably in choosing a third party to provide a service for the ward, the guardian is not liable for the third party's conduct.

Section 62-5-308 would be relabeled 62-5-314. It would allow a court to appoint a visitor to investigate the condition of the ward and check up on the guardian.

Section 62-5-313 would be relabeled 62-5-315. The amendment would allow for the transfer of venue if in the ward's best interest.

PART 4. PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

62-5-401 through 62-5-435

Section 62-5-401 would consolidate venue issues. Section 62-5-402 would address only protective orders by reason of minority. It would provide that an appointment of a conservator may be made if: a minor owns assets that require management or protection not otherwise available; a minor has or may have business affairs that will be jeopardized; or funds are needed for the minor's education, heath, or maintenance. The amendment would require that the minor and the minor's living parent be served. The court would be allowed to appoint a guardian ad litem if the court determines that the minor is inadequately represented. The amendment would allow the court to limit access to needs-based government benefits and would allow interested persons to file petitions against termination of the conservatorship.

Section 62-5-403 would address only appointment of conservators for reasons other than The appointment may be made if the person is incapacitated for reasons of confinement, detention by a foreign power, or disappearance or if a protective order. The amendment would provide when this appointment may be made when the person has a durable power of attorney and when the person does not have durable power of attorney. Next, the amendment would allow a protective order to be made when a person is disabled in accordance with Social Security Administration guidelines. The amendment would allow the alleged incapacitated person or any other interested person to petition the court for a conservator or a protective order. The petition would be required to set out certain information. After the filing of the petition, the court would be required to appoint a guardian ad litem for the respondent. The respondent may be represented by counsel or proceed pro se, or the court may appoint counsel for the respondent. The attorney's fees for the respondent's counsel would be subject to approval of the court. The court must appoint a physician examiner and may appoint other examiners, but must set out its reasons for appointing other examiners. The examiners' reports would be required to contain certain information. As soon as justice allows, the court would have to hold a hearing on the merits. Any interested person would be able to file a demand for notice and would be entitled to receive notice for matters concerning that demand. Section 62-5-408 would be relabeled 62-5-404 and redrafted. It would allow any person interested in the estate or welfare of the respondent to file a motion for temporary relief with regard to the respondent's assets. The motion would be required to state the relief sought and why the relief is in the best interests of the respondent. The court would be allowed to issue an order ex parte or after a hearing. The amendment would require a hearing unless the specific facts demonstrate the need for the order and there is no time for a hearing. All interested parties would be entitled to notice and entitled to oppose an order made without notice. The amendment would state that all temporary orders would terminate when the court issues a final ruling on the merits. The amendment would grant the court powers over the estate and affairs of a minor if the basis for an

appointment is based solely on minority. It would grant the court power over the person's real and personal property if the appointment is based on reasons other than minority.

Section 62-5-409 and a portion of Section 62-5-408 would be relabeled 62-5-405. A subsection would be added to include the list of powers from the current section 62-5-408 and would provide that these powers could only be exercised under a section 62-5-403 basis. These powers would only be able to be exercised by a conservator or a special conservator. The amendment would also provide service requirements if the power is sought to be exercised concurrently with a petition under 62-5-403 or if the power is sought to be exercised after appointment of a conservator. The amendment would allow the court consider certain factors when considering the exercise of these powers: the financial needs and obligations of the respondent, tax reductions, eligibility for government assistance, the respondent's pattern of support, the respondent's estate plan, and the respondent's life expectancy. The court would be required to set forth its specific findings. A new section, 62-5-406, would be added to address testamentary capacity. It would specifically state that a finding of incapacity or an appointment of a conservator is not a determination that the person lacks testamentary capacity.

A new section, 62-5-407, would be added to address the rights and privileges lost by a person when a conservator is appointed. It would state that the following rights and privileges are lost: the power to buy, sell, or transfer any property; the power to make, modify, or terminate contracts; and the power to bring or defend any action at law or equity. The amendment would make the appointment suspend any agent's power under the financial provisions of a power of attorney.

Section 62-5-410 would be relabeled 62-5-408 and amended. The amendment would change the priority list for conservator to the following, listed from highest priority to lowest: a person previously appointed as conservator or other like fiduciary, a person nominated by the respondent, an attorney in fact appointed by the respondent, the respondent's spouse, an adult child of the respondent, a parent of the respondent, the person nearest in kinship to the respondent, a person with whom the respondent resides, a person nominated by the healthcare facility caring for the respondent.

Section 62-5-411 would be relabeled 62-5-409 and be amended stylistically. It would also be amended to allow the court to permit an unbonded account to be used by the conservator and allow the court to order the creation, change, or termination of an account.

Section 62-5-412 would be relabeled 62-5-410, but would not be substantively changed. Section 62-5-413 would be relabeled 62-5-411 but would not be substantively changed. Section 62-5-414 would be relabeled 62-5-412. The amendment would state that guardians guardians ad litem, attorneys, examiners, conservators, and special conservators appointed are entitled to reasonable compensation from the protected person's estate. It would also give the court discretion to award attorneys' fees from the protected person's estate.

Section 62-5-415 would be relabeled 62-5-613. The section would not be substantively changed except that it would make it clear that the conservator's resignation must be approved by the court before it is effective. Section 62-5-417 would be relabeled 62-5-414. The amendment would enlarge the duties of a conservator. The conservator would only be able to exercise authority necessitated by the protected person's limitations and would have to encourage the person to participate in the decisions. The court would be able to require the conservator to submit a plan for managing the person's assets, but it would not require the court to oversee the decisions of the conservator. The plan would have to include specific statements regarding the management of the assets. The conservator would be required to consider an estate

plan or other appointive instruments of the protected person before making decisions regarding the person's assets.

Section 62-5-418 would be relabeled 62-5-415. Part of current section 62-5-418 would be moved to section 62-5-416 (current section 62-5-419). The only substantive changes would be to give the conservator sixty days rather than thirty to file the accounting and to require a copy of the accounting be sent to the protected person's guardian and any other persons as the court directs.

Section 62-5-419 would be relabeled 62-5-416. The amendment would require the conservator to report to the court regarding the administration of the estate annually, when the conservatorship ends, and whenever the court so requires. The conservator would be allowed to petition for formal proceedings for orders regarding the conservatorship. The reports would be required to contain an accounting, a list of assets, and recommended changes to the plan for conservatorship. The conservator would be required to provide the protected person and his parent or guardian with a copy of the report. The amendment would allow the court to appoint a guardian ad litem for any purpose as the court directs and to order the conservator to submit the assets of the estate for examination.

Section 62-5-420 would be relabeled 62-5-417. The only substantive change to this section would be to remove the sentence that allows a person to make specific provisions by contract relating to the conservator. This right would be covered in section 62-5-407.

Section 62-5-421 would be relabeled 62-5-418. The amendment would provide that letters of conservatorship are only evidence of vesting title in the conservator, whereas the current section says that the letters transfer all assets. The amendment would also allow the conservator to file letters of conservatorship with credit reporting agencies.

Section 62-5-422 would be relabeled 62-5-419. This section would be amended to require the court to follow the procedure set forth in section 62-5-428. Currently the procedure used to approve a transaction with a conflict of interest is left to the court. Section 62-5-423 would be relabeled 62-5-420. No substantive change was made to this section.

A new section, 62-5-421, would be added to address inalienable interests. The section would generally prevent the protected person from being able to transfer property. However, it would allow tangible personal property of the type normally transferred by delivery to be transferred if the person acts in good faith and had no knowledge of the conservatorship. The section would also grant the third party any other protection provided by other law.

Section 62-5-424 would be relabeled 62-5-422. The section would be amended to enlarge the list of powers held by the conservator from eighteen to twenty-one. The new listed powers would be to invest and reinvest funds similar to a trustee and to enter into a lease for a residence for the protected person. The list of powers that the conservator may request from the court would be enlarged to allow the conservator to: pay a reasonable fee to himself for services; adopt a budget for routine expenses; reimburse the conservator for monies paid on behalf of the protected person; to exercise or release the protected person's powers of trustee, personal representative, custodian, conservator, or donee; enter into contracts; and to exercise the protected person's options to purchase property. The conservator would be able to apply to the court for ratification of any action, request instructions regarding his fiduciary responsibility, and make requests for expenditure of funds.

Section 62-5-425 would be relabeled 62-5-423. The amendment would stylistically change various parts of the section and change the wording based on amendments to other sections. It would also allow the conservator to distribute funds to the protected person if it is

reasonably necessary. Additionally, the amendment would provide for termination of a conservator appointed by reason of minority once the protected person reaches eighteen years of age, unless a protective order has been issued due to incapacity or a protective order is pending.

Section 62-5-426 would be relabeled 62-5-424. This section would not be substantively amended, other than to clarify that the failure to endorse any limitation imposed by the court on the conservator's letters of appointment shall not relieve the conservator of those limitations. Section 62-5-427 would be relabeled 62-5-425 and would be amended to change the word "should" or "must." This change would require the court and the conservator to take into account any known estate plan, revocable trust, contract, transfer, or joint ownership arrangement when investing the estate, selecting assets for distribution or utilizing powers of revocation or withdrawal.

Section 62-5-428 would be relabeled 62-5-426 and redrafted The amendment would require the creditors serve the conservator with all pleadings. When the conservator becomes aware of the claims, he would be required to notify the court and could seek instructions from the court.

Section 62-5-429 would be relabeled 62-5-427 but would not be substantively changed. Section 62-5-430 would be relabeled 62-5-428 and would be significantly expanded to cover both termination of the conservatorship and orders subsequent to appointment. The amendment would allow the protected person, conservator, or an interested person to request an order: requiring, adding, or modifying a bond; requiring an accounting; directing distributions; removing the conservator; limiting or expanding the conservatorship; adjudicating liabilities; authorizing a transaction involving a conflict of interest; accepting the resignation of the conservator; terminating a conservatorship; or granting relief. The amendment would then set forth in detail the procedure for obtaining orders subsequent to appointment. At the death of the protected person, the amendment would allow the conservator or the protected person's personal representative to apply to terminate the conservatorship and for approval of the final accounting. The conservator would also be allowed to apply for approval of funeral expenses. The amendment would also allow the protected person or a person interested in the protected person's welfare to petition to adjudicate or readjudicate the person's incapacity. The court would be able to specify a time period in which that petition may not be made Section 62-5-431 would be relabeled 62-5-429, but would not be changed. Section 62-5-432 would be relabeled 62-5-430. This section would be stylistically amended, but the substance would not change except that courts in this state may grant any relief available to enforce a registered order.

A new section, 62-5-431, would be added to address matters involving payment of Veterans' benefits that are currently addressed in Part 6 of Title 62. The section would define VA, estate, income, benefits, Secretary, protected person, and conservator. The amendment would require section 62-5-403 be followed if the VA requires a conservator be appointed, except to the extent this section requires otherwise. It would provide that a petition filed by the Secretary for appointment of a conservator is prima facie evidence of the necessity of the appointment. The amendment would prevent anyone other than a bank or trust company from serving as conservator for five or more people at one time. The conservator would be required to provide the VA with all documents that are required to be filed with the court. The amendment would prevent investment in securities in which the conservator has an interest and specifically allow the conservator to invest in certain securities. It would require the custodial of public records required by the VA to be given at no charge. The Secretary would also be a required party in interest in four specific types of proceedings. However, when the VA's funds are not at

issue, the VA would not be a required party, but would be allowed to be joined as a party. Lastly, the section would prohibit the conservator from being paid more than five percent of the protected person's income, with a limited exception for extraordinary services.

Section 62-5-433 would be relabeled 62-5-432. The amendment would add or change the following definitions: Court, Claim, and conservator. Importantly, the definition of Court would grant the probate and circuit courts concurrent jurisdiction. It would provide that the settlement of any claim of no more than ten thousand dollars may be settled by the conservator, but if no conservator has been appointed then by the parent or guardian or guardian ad litem. If the settlement of any claim involves more than ten thousand dollars, it could only be effected by a conservator. The amendment would then provide a procedure for the conservator to effect a settlement of no more than twenty-five thousand dollars without court approval and a procedure to effect a settlement of greater than twenty-five thousand dollars with court approval.

A new section, 62-5-433, would be added to address the creation of a special needs trust. The section would allow a non-incapacitated, disabled adult to petition the court to establish a special needs trust. The petition would be required to contain a written statement of a physician stating that petitioner is competent to manage his property. The section would also allow the court to create a special needs trust for an incapacitated person pursuant to section 62-5-401 et seq. It would also allow the court to create a special needs trust for a disabled minor even if the terms of the trust extend beyond the age of majority.

PART 5. DURABLE POWER OF ATTORNEY **62-5-501 through 62-5-524**

Section 62-5-501 would remain substantially unchanged, except that a subsection would be added to clarify that a valid power of attorney be executed in another jurisdiction as long as it complies with section 30-5-30. Section 62-5-502 would be amended to clarify that agents with durable power of attorney are fiduciaries according to this title and South Carolina Law. It would also be amended to provide that a photocopy or electronically transmitted copy of an original has the same effect as the original.

Section 62-5-503 would be replaced with a section addressing activation of durable power of attorney. It would clarify that generally a durable power of attorney is effective when executed and also that if it is to be effective at a later date, it may require one or more persons to determine that an event of contingency has occurred.

Sections 62-5-504 through 62-5-523 would be completely new, but section 62-5-524 would be substantially the same as current section 62-5-504. The new sections would include separate provisions formerly contained in one section (Section 62-5-501) as well as selected provisions from the Uniform Power of Attorney Act.

Section 62-5-504 continues to recognize health care powers of attorney, but the specific provisions and the form have been moved to Section 62-5-524. Provided the power was executed properly, it would not matter whether it was executed after May 14, 1990. The amendment would also allow any durable power of attorney properly executed under the current title to be unaffected by these proposed amendments.

Section 62-5-505 would allow the executed instrument to define physical disability or mental incompetence. It would also allow the instrument to authorize one or more persons to determine that the principal is incapacitated and allow that person to obtain access to the principal's health care information. If no one is named to make that determination, then the power of attorney would become effective upon a determination according to the instrument or if

there is no procedure for making that determination in the instrument, then it would become effective when a physician determines that the principal is incapacitated. If no one is able or willing to make the determination, then a person authorized pursuant to Section 44-55-30 would be able to communicate with the healthcare providers. Lastly, the amendment would state that no physician who makes a good faith determination regarding the principal's physical disability or incapacity is subject to liability for that determination.

Section 62-5-506 would allow a power of attorney to provide for successor attorneys and provide conditions for that succession. Section 62-507 would state that an appointment as an agent under a power of attorney is accepted by exercising that authority or performing duties as that agent.

Section 62-5-508 would address an agent's resignation and Principal's removal. The section would provide that the power of attorney may change the resignation and removal methods, but this section would be the default rule. The statute would provide that for an agent to resign, it may give written notice to the principal. However, if the principal is incapacitated, the agent would have to give written notice to the conservator, guardian, or successor agent; if there is not one of those, then to the caregiver, someone reasonably believed to have sufficient interest in the principal's welfare, or a government agency with authority to protect the principal's welfare. The section would allow a principal to remove the agent by giving it written notice. If the power of attorney is recorded, the resignation or removal would have to be recorded in the same manner. If the power of attorney was not recorded, then the resignation or removal could be recorded, but would not be required. The section would terminate the agent's authority upon resignation or removal. It would also terminate the agent's authority when the principal dies or if the person is a spouse, then when the marriage is terminated.

Section 62-5-509 would address the duties of the agent with power of attorney. It would provide limits to the power, regardless of what the power of attorney states. These limits would be: to act in good faith and to act only within the scope of authority granted in the power of attorney. The section would require the agent to act in accordance with the principal's reasonable expectations; act loyally; not create a conflict of interest; act with care, competence, and diligence; keep a record of all receipts, disbursements, and transactions; cooperate with a person that has authority to make health care decisions; and attempt to preserve the principal's estate plan. The section would state that an agent who acts in good faith is not liable to any beneficiary of the estate; the agent is not liable merely because the agent benefits from the act; absent a breach of duty, the agent is not liable for a decrease in value of the estate; and if the agent delegates authority, the agent is not liable for an act if the agent exercises reasonable care, competence, and diligence in selecting that person. If the agent was chosen because of any special skills, the section would require a court consider those skills to determine whether the agent has acted with care, competence, and diligence.

Section 62-5-510 would provide that granting an agent the authority to do all the principal could do gives the agent the powers listed in Sections 62-2-511 – 514 as well as any specific powers set forth in the document. The section would allow general authority to be given to the agent, but that authority would be subject to the provisions of this section. It would also provide that the broadest grant of authority controls in situations where authorities overlap. The section would list certain powers that the agent may perform only if the document expressly grants that power. Lastly, the section would expressly state that the power of attorney controls all of the principal's property whether currently owned or acquired in the future.

Section 62-5-511 would address how authority is granted. The power of attorney could refer to descriptive terms in these sections or refer to whole sections to grant authority. The section would provide that by using a descriptive term or a citation to a section, the entire section is incorporated. However, the section would allow the principal to modify authority that is incorporated.

Section 62-5-512 would give an agent authority to: demand, receive, and bring an action to obtain anything of value; contract in any manner with any person; execute, acknowledge, seal, deliver, file, or record any instrument; initiate or otherwise handle litigation involving the principal; engage, compensate, and discharge an attorney, accountant, investment manager, expert witness, or other advisor; prepare, execute, and file a record etc. to promote the principal's interest under the law; communicate with the government on behalf of the principal; access communications intended for the principal; waive, release, or renounce any fiduciary positions that the principal has been appointed to; deposit and withdraw money in the name of the principal; act in the place of the principal as a shareholder in a business; engage in a specific list of actions with regard to stocks or other securities; pay taxes, and expenses for the principal; prepare tax returns; handle employee benefit plans; expend sums for the principal and its dependents for health, education, maintenance, and support; apply for government benefits; file claims for an elective share; enter into agreements for the care of the principal; and do any other lawful act with respect to the principal and it's property.

Section 62-5-513 would give an agent authority to do the following with regard to real property: demand, buy, lease, etc. an interest; sell, exchange, apply for zoning, develop, grant etc. an interest, mortgage an interest; release, assign, enforce, etc. a claim; manage or conserve an interest; use develop, alter, replace, etc. structures or other improvements; participate in a reorganization of the real property in which the principal owns an interest and receive stocks and bonds which the agent can sell, convert, and exercise voting rights in; change the form of title of an interest; and dedicate an interest to public use.

Section 62-5-514 would give an agent authority to do the following with regard to tangible property: demand, buy, receive, etc.; sell, exchange, convey; grant a security interest in tangible personal property; release, assign, satisfy, enforce by litigation; and manage or conserve in specific ways such as by insuring or moving the personal property.

Section 62-5-515 would provide that the agent's authority under a power of attorney does not terminate or revoke until the agent has actual notice of the principal's death, disability, or incompetence. Any action taken by the agent in good faith would be binding on the principal. An affidavit executed by the agent that he did not have notice would be conclusive proof that he did not have notice.

Section 62-5-516 would provide a provision that, if included in the power of attorney and recorded, would require a third party to honor the agent's authority. This section would also make the third party relying on the third party not liable for acting upon the authority, not inquiring as whether the act is proper, or not ensuring the proper application of the principal's property. If the third party is not presented with a written copy of the power of attorney, the third party would be able to similarly rely on the agent's certification under penalty of perjury, an English translation of the power of attorney, or the opinion of counsel as to the power of attorney. Lastly, this section would provide that an employer acting through its employees does not have actual knowledge of a fact relating to the power of attorney unless the employee does.

Section 62-5-517 would provide an optional form that may be used by an agent to certify facts concerning a power of attorney. Section 62-5-518 would provide that an agent who

violates this Part is liable for restoring the value of the principal's property and reimbursing the principal for reasonable attorney's fees and costs. Section 62-5-519 would require the principal to reimburse the agent for reasonable expenses incurred on the principal's behalf and reasonable compensation. An interested person would be able to petition a court to review the reasonableness of the agent's reimbursement or compensation.

Section 62-5-520 would allow the following persons to petition a court to construe a power of attorney, review the agent's conduct, and grant relief: the principal or agent; a guardian, conservator, or fiduciary; a person authorized to make health-care decisions; the spouse, parent or adult child; an intestate heir; a named beneficiary; a governmental agency; the principal's caregiver; and a person asked to accept the power of attorney. However, on a motion by the principal, the court would be required to dismiss the petition.

Section 62-5-521 would grant the probate court concurrent jurisdiction with the circuit courts over powers of attorney. Section 62-5-522 would allow a court appointed conservator or guardian despite the power of attorney appointment. The court appointed fiduciary would terminate the power of attorney's authority that overlaps with the court appointed fiduciary's authority. Section 62-5-523 would state that powers of attorney are valid if they comply with this Part and also allows previously executed powers of attorney and powers of attorney executed in other states to be valid. The section would also allow a photocopy or electronically transmitted copy of the original power of attorney to have the same effect as the original.

Section 62-5-524 effectively restates current law (under Section 62-5-504) and would address the heath care power of attorney and define the following terms: Agent, Declaration of a desire for a natural death, Health care, Health care power of attorney, Health care provider, Lifesustaining procedure, Permanent unconsciousness, Nursing care provider, Principal, and Separated. The section would provide that a heath care power of attorney is the same as a durable power of attorney except as it is inconsistent with this section. It would also allow a heath care power of attorney to be valid even if it does not comply with this section, but the provisions of this section would not apply. The section would also expressly provide that the Adult Health Care Consent Act applies to this section to the extent it is not inconsistent. It would also provide the methods for determining mental incompetence under this section. The section would provide strict requirements for a valid health care power of attorney: substantial compliance with the form in this section, be dated and signed by the principal, be signed by at least two persons who must meet strict requirements, and state the name and address of the agent who must meet strict requirements.

The heath care agent would have the following default powers: to access the principal's medical information, to contract on the principal's behalf in relation to health care, to hire and fire medical personnel, and to have the same visitation rights as immediate family or spouses. The section would state that the health care agent is not entitled to compensation, but is entitled to reimbursement. It would also prevent the agent from being liable for the services to the principal. The section would prevent the agent from withholding life-sustaining procedures if the principal is pregnant. The section would require health care providers with knowledge of the heath care power of attorney to follow the directives of the agent so long as they are consistent with the health care power and if there is uncertainty with regard to whether the directive is consistent, the health care provider may petition the court to determine the consistency. The section would require the agent to make decisions in accordance with the principal's directives in the health care power. It would also prevent the agent or third parties from being civilly or criminally liable if they act in good faith with regard to the power of attorney.

Next, the section would allow the principal to appoint one or more successor agents, but state that the Adult Health Care Consent Act governs if no agent or successor is available. The section would provide that the statements of intent in a health care power of attorney must be treated as the principal directing the course of his health care. Revocation of the health care power of attorney would be possible by a writing, oral statement, or other act constituting notice to the agent or health care provider; or by subsequent execution of a health care power of attorney if it states an intention to revoke the previous power or is inconsistent with the previous power. The section would state that a health care power of attorney does not constitute suicide. It would expressly prevent execution of a health care power of attorney as a condition for admission to a facility, insurance coverage, or treatment. The section would state that nothing in this section may be construed to approve mercy killing or anything other than the natural process of dying. The section would prevent the absence of a health care power of attorney from giving rise to a presumption for or against death prolonging procedures. The section would make anyone who coerces or fraudulently induces a person to execute a health care power of attorney and that person dies as a result of the health care power of attorney, criminally liable. However, the section would allow good faith counseling to execute a power under this section. The section would also make civilly liable anyone who willfully and wrongfully prevents the implementation of the principal's wishes through a health care power of attorney.

The section would require a physician or nurse who refuses to follow the agent's instructions to make a reasonable effort to find qualified people who will. Lastly, the section would state that a document or writing containing the following items is deemed to comply with this section: the name and address of the agent, the types of decisions to be made, the signature of the principal, the signature of at least two witnesses, and notarization. It would also expressly allow the agent to make seven specific decisions in compliance with this section.

PART 6. UNIFORM VETERAN'S GUARDIANSHIP ACT **62-5-601 through 62-5-624**

This Part would be condensed and moved to section 62-5-431.

PART 7. SOUTH CAROLINA ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

62-5-700 through 62-5-716

This Part was added to the Probate Code in 2010 as S. 1070 and became effective on January 1, 2011. It provides a mechanism for more quickly resolving multi-state jurisdictional disputes that concern adults who need protection. The part also provides procedures for SC probate courts to communicate more easily with a court in another state concerning a guardian or protective order proceeding regarding an adult, so that discussions between courts on the merits of a case would be recorded and parties given an opportunity to participate. Also, it would provide procedures for courts in different states to coordinate schedules, calendars, court records, and other administrative matters concerning adult protective proceedings, without the necessity of a formal hearing. It allows probate courts to authorize in another state, or agree to the same in this state, different types of proceedings that affect adults needing protection, such as evidentiary hearings; orders for assessment or evaluation of the respondent; transfers of copies of transcripts or other records of hearings to courts in other states; and orders authorizing release of medical, financial, criminal, or other relevant information. The part specifies the factors for probate

courts to consider in determining the appropriate forum and allows a probate court in SC to decline jurisdiction or to exercise jurisdiction when it was felt to be necessary.

Unless otherwise stated, the sections in this Part would not be substantively amended. Comments to section 62-5-700 would be added to explain the purpose of this part and state that the Part is a modified version of the Uniform version. The definitions section would be removed and the definitions from section 62-5-101 would be incorporated by reference. Comments to section 62-5-703 would be added to explain the purpose of the section and provide examples as to when a foreign country may be treated as another state of the United States. The comment would state that the court may, but is not required to recognize the foreign order.

Section 62-5-704 would be amended to add comments to provide an example of when courts may communicate and to explain the section. Section 62-5-705 would be amended to add comments which would to stress the importance of court cooperation under this act and state that this section is similar to section 112(a) of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Section 62-7-706 would be amended to add comments to explain the act and to state that it is similar to section 111 of the UCCJEA. Section 62-5-707 would be amended to add comments to state that the similarities and differences to the UCCJEA, to explain the section in greater detail, and to explain its purpose. Section 62-5-708 would be amended change the maximum term for an emergency appointment from ninety days to six months and to add comments to explain the section in detail.

Section 62-5-709 would be amended to add comments to explain the difference between this section and the Uniform version and to explain how this section works in conjunction with sections 62-5-707, 62-5-708, and 62-5-714. Section 62-5-710 would be amended only to reword the section and to add another factor for the court to consider: other information the court deems relevant. Comments would also be added to explain the section in greater detail, to explain how this section works with section 62-5-707, and to state that this section is similar to section 207 of the UCCJEA. Section 62-5-711 would be amended to add comments to explain how it differs from the UCCJEA and to explain the subsections in greater detail.

Section 62-5-712 would be amended to not require the respondent provide notice to people as if the proceeding was brought in this home state if the respondent's home state was South Carolina within six months before the filing of the petition. Comments would also be added to explain the section. Section 62-5-713 would be amended to add comments to explain the differences between it and the UCCJEA and to explain the section. Comments to section 62-5-714 and 62-5-715 would be added to explain the two sections and to explain how they work together. Section 62-5-715 would be amended to allow the court to accept the transfer without a hearing if all parties consent.

Current section 62-5-716(A) would become 62-5-716, 62-5-716(B) would become 62-5-717, and 62-5-716(C) would become 62-5-718. Each of these sections would be slightly modified versions of the current versions. A comment to sections 62-5-716, 62-5-717, and 62-5-718 would be added to explain them and to explain how they work together. For section 62-5-716 and 62-5-717, the amendment would require only one copy be filed in the register of deeds, but there would also have be a clocked copy of the letters of office and a certified copy of the order of appointment filed in the probate court. The amendment to Sections 62-5-716 and 62-5-717 would change the requirements for registration of guardianship orders and protective orders. The amendment would require a guardian or conservator not be appointed in this state and a petition not be pending in this state, for a guardian or conservator appointed in another state to

register the guardianship order. Section 62-5-717 would be amended to be more comparable to 62-5-716. Section 62-5-718 would not be substantively amended from the current version.

PART 7. GUARDIAN AD LITEM UNDER ARTICLE 5 **62-5-810 through 62-5-870**

Section 62-5-810 would give the court discretion to select a guardian ad litem, subject to 62-5-810. The comment to this section would state that this part is based on the guardian ad litem statutes in S.C. Code Ann. Title 63 Chapter 3 Article 7 concerning family court guardian ad litem. Section 62-5-820 would provide the qualifications to be a guardian ad litem: have the requisite knowledge or expertise and complete the required training approved by the probate court. The training requirements for non-lawyers would be: six hours of training and six hours of training every three years. The training requirements for lawyers would be: three hours of training with three hours of training every three years, but the training may be waived for good cause. The training would include review of SC Code Parts 1 – 4 and 8 of Article 5, and issues commonly encountered by guardians ad litem including government resources and probate court procedures. The guardian ad litem would have to certify that he/she has met the requirements when appointed. If a guardian's qualifications lapse, he/she would be required to complete the initial requirements. The section would also allow waiver of these requirements for the first year after its enactment. The comment to the section would state that it is based on 63-3-820(A).

Section 62-5-830 would provide a non-exclusive list of guardian ad litem responsibilities. These would include: acting in the respondent's best interest, conducting an investigation of relevant facts, advocating for the best interests of the respondent, attending all hearings, making recommendations regarding the appropriateness of any appointment, presenting an oral report at the hearing, and if requested, providing written reports to the court and parties. The required investigation would require doing the following: obtaining and reviewing relevant documents, meeting with the respondent at least once, conveying the substance of the petition to the respondent, informing the respondent of his right to retain counsel, interviewing the petitioner and proposed appointee, visiting the respondent's residence, interviewing anyone with knowledge of the case, reviewing the criminal history of any appointee, and considering the respondent's best wishes.

The guardian ad litem's responsibilities would also include submitting reports, recommendations, briefs, etc. and submitting a report to the court containing the following information: the date and place of the meeting with respondent; whether the respondent approved of the appointment and appointee; a description of the respondent; a description of the place of the meeting; the diagnosis of the respondent; any prior action between DSS or the police and the respondent or appointee, a statement of any prior relationship between the guardian ad litem, respondent, and appointee; and the guardian ad litem's signature. The amendment would also allow the court to extend or limit the guardian ad litem's responsibilities and authority with good cause.

Section 62-5-840 would provide compensation for the guardian ad litem. The court would be required to set the rate of compensation at the time of appointment. The section would entitle the guardian at litem to reasonable compensation and reimbursement, subject to court review and approval. In considering the reasonableness of the guardian ad litem's fees and costs, the court would be required to consider: the novelty and difficulty of the issues, the contentiousness of the proceedings, the time expected to be expended, the likelihood that the appointment will preclude other employment, the time limitations, experience, reputation, and

ability, the financial ability of each party to pay, and any other factors. The section would require the guardian ad litem to submit an itemized bill upon request and allow any part to petition the court to review the reasonableness of the guardian ad litem's costs and fees.

Section 62-5-850 would require the guardian ad litem, at the request of the court or any party, to disclose the nature, duration, and extent of any relationship with the guardian ad litem or the guardian ad litem's family, and any interest adverse to any party or party's attorney that may cause the guardian ad litem's impartiality to be challenged. Section 62-5-860 would allow the guardian ad litem to resign or be removed at the discretion of the court and provide that the appointment of the guardian ad litem terminates upon issuance of a guardian or protective order. The section would allow the court to prevent the automatic termination of the guardian ad litem.

Section 62-5-870 would provide immunity for the guardian ad litem if he acts in good faith. However, the section would eliminate the immunity if the guardian ad litem's action is willful, wanton, or if he commits gross negligence.

ARTICLE VI. NONPROBATE TRANSFERS

Article VI, concerned with transfers of a decedent's assets outside of a probate estate, would now be split into 3 separate parts, instead of the currently existing 2 parts. The first part would be concerned with the types of accounts governed by these provisions and the formats of single and multiple party accounts with financial institutions that would involve transfers of assets of a decedent. The second part would repeat some of the existing provisions to address issues that would relate to ownership of these accounts, the rights and limitations on beneficiaries, and how the death of a party would affect the rights of a party, beneficiary, or agent. The third part would be concerned with financial institutions, their authority, and their responsibilities for payments and the protections accorded to them.

PART 1. MULTIPLE PARTY ACCOUNTS Section 62-2-101 through 62-6-106.

Section 62-6-101 (Definitions) would be amended to correspond more with multiple party accounts issues, and so most of the existing definitions would be changed to reflect this change. Section 62-6-102 would limit the scope of the provisions of Article VI, Part 1 so that they would not apply to certain types of business transactions. Section 62-6-103 would explain that an account could be for either single or multiple parties and would establish that the amended Probate Code would allow for accounts to have or not have rights of survivorship, POD designations or agency designations. Section 62-6-104 would provide forms for single and multiple party accounts and would provide that financial institutions would be protected if the language in these statutory forms were essentially the same as those used by the financial institution.

Part 2. OWNERSHIP AS BETWEEN PARTIES AND OTHERS Sections 62-6-201 through 62-6-205.

Section 62-6-201 would establish that beneficiaries and agents would have no rights to an account during the lifetime of a party. Section 62-6-202 would substantially change existing law so that accounts with multiple parties or beneficiaries would automatically contain a right of

survivorship arrangement unless the account specifically provided otherwise, such as the designation of an account as a tenancy in common. Section 62-6-203 would provide what rights exist to parties and beneficiaries at the time of death, what would be necessary from a party or other individual to alter the terms of an account with a financial institution, through notice or express terms in a will, and that the standard of proof would be clear and convincing evidence. This section would also provide that a multiple party account of husband and wife would be presumed to be a joint account with the right of survivorship unless shown otherwise by clear and convincing evidence. Section 62-6-204 would clarify that these accounts would be nontestamentary and therefore could not be determined by provisions of a will. Section 62-6-205 would repeat the provisions of existing law Section 62-6-107, dealing with creditors' rights. As with existing law, this section would provide that a decedent's estate would have limited beneficial ownership to the funds in a multiple party account for the payment of debts, taxes, and estate administration, but only if the decedent's estate was insufficient to meet those requirements. The statute of limitations for creditors would be amended to 1 year following the death of the decedent.

PART 3. FINANCIAL INSTITUTIONS Section 62-6-301 through Section 62-6-307

Part 3 separates the provisions governing financial institutions from the rights of beneficiaries. Section 62-6-301 would provide for the same authority for financial institutions to enter into single or multiple party accounts as now exists in Section 62-6-108, but would include additional references to POD and agency designations. Section 62-6-302 would expand on the existing law of Section 62-6-108 and would authorize payments from multiple party accounts to a party or parties upon request, to a personal representative, or by a court order. Section 62-6-303 would repeat the provisions of current law Section 62-6-110 so that a financial institution would be authorized, within certain restrictions, to pay out funds in an account with a POD designation to one or more of the parties, the beneficiaries, a personal representative, or a court order. Section 62-6-304 would be a new provision to deal with accounts with an "agency" designation. It would be similar to existing Section 62-6-111 dealing with trusts and trustees, but would be much broader in terms. Section 62-6-305 would be a new provision to allow payments by financial institutions directly to minors pursuant to the provisions of Section 62-5-103 or a court order.

Section 62-6-306 would continue to provide protection to financial institutions as exists in current Section 62-6-112, so long as the payments were made pursuant to the terms of an account. The provision would continue to curtail the protection of a financial institution receiving written notice from certain parties that payments should not be made, but would continue to protect the financial institution for refusal to make payments based on the notice received. Section 62-6-307 would continue the provisions of Section 62-6-113, allowing a financial institution to set-off in its own favor an amount from a multiple-party account to cover the indebtedness of the party, but only to the amount to which the party was beneficially entitled.

ARTICLE VII UNIFORM TRUST CODE

General Comments: Comments are substantially changed and updated, removing former incorrect or inaccurate references and discussions about the Uniform Trust Code. Amendments to and reorganization of the comments make comments accurate and clearer.

PART 1. GENERAL PROVISIONS AND DEFINITIONS

Secion 62-7-103. Definitions

This section would remain largely unchanged, but the definition of "Permissible Distributee," "Trust Investment Advisor," and "Trust Protector" would be added.

PART 2. JUDICIAL PROCEEDINGS

Section 62-7-201. Role of court in administration of trust

The only change to this section would be to add a statement to subsection (a) to clarify that the court proceedings must be formal unless it is a consent petition. The section would continue to grant the court exclusive jurisdiction over trusts and allow proceedings to be maintained for various issues in trusts.

PART 3. REPRESENTATION

PART 4. CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS

Section 62-7-402. Requirements for creation; merger of title.

This section would be amended to allow the settler to sign the trust instrument or have someone sign it at by the settlor's direction in the settlor's presence. Otherwise, the section would remain the same and continue to address the requirements for a trust.

PART 5. CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

Section 62-7-505. Creditor's claim against settlor.

This section would be amended stylistically and to state that a contribution to an inter vivos marital deduction trust as described in section 2523(e) of the IRC, after the death of the settlor's spouse, shall be deemed to be a contribution by the spouse rather than the settlor. The section would continue to establish when creditors may reach the trust by actions against the settler.

PART 4. REVOCABLE TRUSTS

Section 62-7-602. Revocation or amendment of revocable trust.

The amendment would delete subsection (e) which states that the settlor's power of attorney may only be exercised by the settlor's agent as expressly stated in the instrument and that the power of attorney does not alter beneficiaries under existing estate plans. See new section 62-7-602.1 for an expanded coverage of this issue. The section would continue to discuss when settlor(s) may amend or terminate a trust.

Section 62-7-602.1. Exercise of settlor's powers with respect to trust by agent

This section would be the former section 62-7-602(e), but it would be expanded. The section would give the agent acting under a power of attorney the following powers, but only to the extent expressly authorized in the trust or power of attorney: revocation of the trust, amendment of the trust, additions to the trust, direction to dispose of the trust, and creation of the trust. The section would give the agent the following powers over an irrevocable trust: additions to the trust and creation of the trust. Lastly, the section would state that the exercise of the agent's powers shall not alter the amount of property that beneficiaries are to receive under the existing will or intestacy. The comment would summarize the changes between 62-7-602(e) and 602.1.

Section 62-7-607. Divorce or annulment as revoking disposition to spouse in revocable trust. This section would be amended to make stylistic changes, but would continue to remove the former spouse from being a beneficiary of a trust unless expressly stated otherwise in the trust.

PART 7. OFFICE OF TRUSTEE

PART 8. DUTIES AND POWERS OF TRUSTEE

Section 62-7-813. Duty to inform and report.

Subsection (a) would be amended to make the duties under this section owed only to the settlor rather than to qualified beneficiaries for revocable trusts. This can be overridden by the terms of the trust. Subsection (b)(1) requires the trustee to notify the qualified beneficiaries of the existence of the trust, the identity of the settlor(s), the trustee's contact information, the right to request a copy of the trust instrument, and the right to request a copy of any trustee's report. Subsection (b)(2) requires the trustee to keep the distributes reasonably informed about the administration of the trust. Subsection (b)(3) requires the trustee to provide a non-qualified beneficiary with a copy of the trust instrument upon the beneficiary's request, redacted to show only that beneficiary's interests, and to respond to the non-qualified beneficiary's request for information about the administration of the trust. Subsection (b)(4) requires the trustee to notify the distributed in advance of any change in method or rate of compensation for the trustee. Subsection (c)(1) requires the trustee to keep distributed and other qualified beneficiaries who request information reasonably informed as to the administration of the trust, send annual written reports, a written report at the termination of the trust. Subsection (c)(2) requires the trustee to send a final report as in (c)(1) if the trustee resigns. Subsection (d) allows the trustee to satisfy (b) and (c) by following the guidelines in 67-7-302 through 67-7-305. Subsection (e) allows distributees to waive their rights to reports under this section. The comments to this section are completely redrafted. The comments state that this section was completely redrafted and provide a brief examination of subsections (b) and (c).

Section 62-7-816A Authority to decant; trustee's special power to appoint to another trust

This section would be added to grant the trustee with discretionary power authority to appoint the trust property in favor of another trust for the benefit of one or more of the beneficiaries – a so-called decanting power. The trustee would be able to create this second trust regardless of any need to distribute principal or income. The second trust could be created under

the same trust instrument as the original or under a new instrument and the trustee may be the same as the original or a new trustee.

The second trust would be subject to the following requirements: the beneficiaries of the second trust must be beneficiaries of the original; future interests in the original cannot be accelerated to present interests; the second trust may not contain any provision that would have disqualified any assets of a tax deduction; if contributions were excluded from the gift tax in the original, then the interest must vest and become distributable on the same date as the original; if a beneficiary has the power of withdraw in the original, the beneficiary must have it in the second or there must remain sufficient property in the original so the beneficiary can withdraw; the second trust must contain the same ascertainable standard as in the original if there was one; and the trustee may confer a power of appointment upon a beneficiary of the original and the beneficiary's permissible appointees do not have to be beneficiaries of the original or second trust. The section would also prevent the trustee from exercising the power to appoint principal or income under (a) if the trustee is a beneficiary of the original trust, but the remaining co-trustee may act for the trust.

The power of appointment would be considered a power to appoint to people other than the trustee, the trustee's creditors, the trustee's estate or creditors of the trustee's estate. The power would not be able to result in the trustee of the original trust being considered the settlor and the power is not prohibited by a spendthrift provision or by the trust instrument prohibiting revocation or amendment of the trust. To exercise the power the section would require a writing signed by the trustee that is recorded with the records of the original trust; the trustee must give written notice to the qualified beneficiaries 90 days prior to the exercise of the power; but if the notice period is waived, the trustee may exercise the power on the date of the waiver. The section would state that this section does not create duty on the trustee to distribute principal or income and that the terms of the trust may modify this section. In addition, a trustee or beneficiary would be able to commence an action to approve or disapprove an exercise of the power of appointment. Lastly, Section 62-7-109 would apply to this section with regard to notices and sending documents.

The comments to this section would state that this section would allow greater flexibility in the case of unforeseen circumstances or drafting error. The section would basically allow modification of irrevocable trusts for the benefit of the beneficiaries. The SC version of this section does not require absolute discretion over distribution in order to maximize flexibility. Lastly, the comments would explain many of the subsections in detail.

Section 62-7-818. Powers and discretions of trust protector

This section would be added to grant the Trust Protector power as set out in the trust instrument. Its decisions are binding on all other persons. These powers would include: modifying the trust instrument for tax benefits; increase or decrease interests of any beneficiaries; modify the terms of any power of appointment; remove or appoint a trustee, advisor, committee member; terminating the trust, vetoing or directing distributions; changing situs or governing law; appointing its successor; interpreting the terms of the trust; advising the trustee; and amending or modifying the trust to take advantage of certain laws.

The comments to this section would state that there is no common law counterpart to this section.

Section 62-7-819. Powers and discretion of trust investment advisor

This section would state that the trustee has no duty to monitor the conduct of the Trust Investment Advisory ("TIA"), advise the TIA, or communicate with the beneficiaries concerning any instance where the trustee would have acted differently than the TIA. The section would also state that actions by the trustee with regard to matters within the TIA's scope of authority are presumed to be administrative only. Lastly, the section would define "investment decision." The Comments would state that there is no common law counterpart to this section.

PART 9. SOUTH CAROLINA UNIFORM PRINCIPAL AND INCOME ACT; SOUTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

A prefatory note would be added to give a brief history of the act and to inform the reader of a few section number changes. When the General Assembly enacted South Carolina's versions of the Uniform Principal and Income Act and the Uniform Prudent Investor Act, both of which were contained in Part 9, no comments were included. The amendments would add appropriate comments throughout.

Section 62-7-903. Fiduciary duties; general principles.

This section would be amended to change every "this part" to "the South Carolina Uniform Principal and Income Act." The section would also be amended to expand subsection (B) to include actions under section 62-7-904(A), a discretionary power under 62-7-904.1 through 62-7-904.15, and discretionary power of administration within the scope of the South Carolina Uniform Principal and Income Act.

Section 62-7-904. Trustee's power to adjust

This section would be amended to recognize the trustee's power to convert the trust into a unitrust according to Sections 62-7-904B through 62-7-904P. The amendment would add another requirement to (C)(1), (4), and (5) to prevent the trustee from making an adjustment that would make an individual the owner of the trust for income and transfer tax purposes, but only if the person was not considered the owner for income and transfer tax purposes prior to the adjustment. Subsection (C)(6) would also be amended to prevent the adjustment only if the estate of the individual would not include the assets if the trustee did not possess the power to adjust. Subsection (C)(8) would be amended to allow the trustee to make an adjustment that benefits a beneficiary even if the trustee earns compensation as a percentage of the trust's income. Subsection (C)(9) would be added to prevent the trustee from exercising the adjustment power if the trust has been converted to a unitrust.

Section 62-7-904A Judicial control of discretionary power

This section would be amended to prevent a court from ordering a fiduciary to change its decision unless the court determines that it was an abuse of discretion. The remaining changes would be to clarify the section

Section 62-7-904B Definitions

This section would be added to provide definitions for sections 62-7-904.A through 62-7-904.P. The section would define the following terms: Code, Disinterested person, Income trust, Interested distribute, Interested trustee, Legal disability, Qualified beneficiary, Related or

subordinate party, Representative, Settlor, Total return unitrust, Treasury regulations, Trustee, and Unitrust amount.

Section 62-7-904C Conversion in trustee's discretion without court approval

This section would be added to allow non-interested trustees to convert without court approval an income trust to a total return unitrust, reconvert a unitrust to an income trust, or to change the percentage used to calculate the unitrust amount or the method used to calculate the fair market value of the trust. However, the trustee could only do either of these if: the trustee adopts a written policy for the trust; the trustee gives written notice to certain persons of its intention to take action; there is at least one qualified beneficiary under section 62-7-103(12)(A) or (B) and one under section 62-7-103(12)(C) who are not under a legal disability or a representative of a qualified beneficiary; and no person objects within 90 days. Similarly, the section would allow an interested trustee, if there is no non-interested trustee, to do the same actions with the same requirements except the trustee would be required to appoint a disinterested person to conduct the actions. Next, the section would have the following requirements if the trust is a charitable trust for which a federal or state deduction is taken: instead of notice to persons as above, notice would have to be given to the charitable organization; and the trustee would be required to distribute the greater of the unitrust amount or the amount required by the IRC. Lastly, section 62-7-109 regarding notices and sending documents would apply to this section.

Section 62-7-904D Conversion with court approval

This section would be added to allow a trustee to petition the court to take an action under 62-7-904C when the trustee cannot do the action itself under that section. The section would allow a beneficiary to request the trustee take such action and petition the court to do so if the trustee refuses.

Section 62-7-904E Determination of the trust amount

This section would be added to require a determination of the fair market value of the trust assets at least annually using a method selected by the trustee. The trustee could use the fair market value on the same date for the current fiscal year and the preceding fiscal years. The section would require the trustee to determine the unitrust amount by using a reasonable return from the trust that it not less than 3% and not more than 5%. If an income trust is converted to a unitrust, the trustee would have to consider the unitrust amount as paid from net accounting income as if the trust were not a unitrust; consider the unitrust amount as paid from an ordinary income not allocable to net accounting income; the trustee may consider the unitrust amount as paid from net short-term gain and then from net long-term capital gain; and then consider the unitrust amount as coming from the principal of the trust.

Section 62-7-904F Matters in trustee's discretion

This section would be added to allow the trustee to determine: the effective date of the conversion; the timing of distributions; whether the payments are to be in cash; the effective date of the reconversion to an income trust; and any other administrative issues as appropriate under section 62-7-904A through 62-7-904P.

Section 62-7-904G No effect on principal distribution

Conversion to a total return unitrust shall not affect other provisions of the terms of the trust regarding distributions of principal.

Section 62-7-904H (*No Title*)

This section would be added to state that the trustee or disinterested person acting in good faith is no liable for failing to take action or for taking action under sections 62-7-904B through 62-7-904P

Section 62-7-904I Applicability

This section would be added to state that sections 62-7-904B through 62-7-904P apply to all trusts in existence or created after the effective date of this act. However, there would be three exceptions: if the governing instrument contains a provision indicating that the settlor wanted the beneficiaries to receive an amount other than a reasonable return; the trust is one described in section170(f)(2)(B), 664(d), 2702(a)(3) or 2702(b) of the IRC; or if any amount of the trust has been set aside for charitable purposes unless it is a charitable trust.

Section 62-7-904J [RESERVED]

Section 62-7-904K [RESERVED]

Section 62-7-904L [RESERVED]

Section 62-7-904M Determination of unitrust amount.

This section would be added to state that the unitrust amount to be distributed by an express total return unitrust may be determined by the terms of the unitrust instrument by reference to the net fair market value of the trust's assets. The section would allow the unitrust instrument to use valuation methods that the trustee considers reasonable and appropriate for assets which a fair market value cannot be readily ascertained and the instrument could allow the trustee to exclude the fair market value of any real or personal property in computing the unitrust amount.

Section 62-7-904N Effect of distribution of unitrust amount

This section would be added to provided that a unitrust return from 3% to 5% is a reasonable apportionment between income and principal beneficiaries.

Section 62-7-904O Change or conversion of unitrust amount

This section would be added to allow the express total unitrust instrument to grant the powers in section 62-7-904C. However, if the instrument did not reference these powers, then the trustee would not have that power.

Section 62-7-904P Determination of character of unitrust amount

This section would be added to require the trustee to consider the express total return unitrust amount as paid from net accounting income as if the trust were not a unitrust; consider the unitrust amount as paid from an ordinary income not allocable to net accounting income; the trustee may consider the unitrust amount as paid from net short-term gain and then from net long-term capital gain; and then consider the unitrust amount as coming from the principal of the trust.

SC Uniform Prudent Investor Act

The prefatory note and comment would be added.

Section 62-7-933. Uniform Prudent Investor Act.

This section would be amended to add labels to the subsections to make the section easier to navigate. The section would continue to provide the Prudent Investor Rule, the standard of care, portfolio strategy, and other investor guidelines.

PART 10. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

The general comment would be amended to update the code sections.

Section 62-7-1005A. Limitation of Trustee's Liability if Trust Protector appointed

This section would allow the trustee to follow the direction of a trust protector if the governing instrument so requires and be generally protected from liability. The trustee would also be protected from liability if the trust protector is required to give consent or permission for an act and the trustee is unable to obtain consent. If the trust protector is unable or unwilling to serve, then the trustee would be able to petition the court to appoint one unless the governing instrument provides for a successor. The section would require that the trust protector perform its duties in good faith and in accordance with the trust. Lastly, it would exclude a trust protector from being a fiduciary with respect to powers reserved exclusively to other trustees, trust advisors or trust protectors.

Section 62-7-1005B. Limitation of Trustee's liability if Trust Investment Advisor Appointed This section would allow the trustee to follow the direction of a Trust Investment Advisor ("TIA") if the governing instrument so requires and be generally protected from liability. The trustee would also be protected from liability if the TIA is required to give consent or permission for an act and the trustee is unable to obtain consent. If the TIA is unable or unwilling to serve, then the trustee would be able to petition the court to appoint one unless the governing instrument provides for a successor. The section would require that the TIA perform its duties in good faith and in accordance with the trust. Lastly, it would exclude a TIA from being a fiduciary with respect to powers reserved exclusively to other trustees, trust advisors or trust protectors.