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Wills: South Carolina

by Melody J.E. Breeden, Turner, Padget, Graham and Laney, P.A., and Practical Law Trusts & Estates

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A Q&A guide to the law of wills in South Carolina. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

For a Toolkit providing jurisdiction-neutral will forms that can be used with this Q&A and other resources to help counsel draft wills under South Carolina law, see State-Specific Will Drafting Toolkit.

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

The rules and laws pertaining to will and probate proceedings in South Carolina are found in:

- Sections of the South Carolina Probate Code (S.C. Code Ann. §§ 62-1-101 to 62-5-716)
- The South Carolina Trust Code, affecting testamentary trusts (S.C. Code Ann. §§ 62-7-101 to 62-7-1106).
- South Carolina case law.
- The South Carolina Judicial Branch's rules for the probate of wills (SC R PROB CT Rules 1 to 5).

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

To create a will in South Carolina, a person must be either:

- At least 18 years old.
- Emancipated by court order.
- Legally married.

(S.C. Code Ann. §§ 62-1-201(27) and 62-2-501.)

3. What is the standard of mental capacity required to create a will?

In South Carolina, an individual of sound mind may create a will (S.C. Code Ann. § 62-2-501). To be of sound mind sufficient to create a will (to have testamentary capacity), the testator must understand:

- The nature and extent of the testator's assets.
- The object of the testator's bounty.
- How the testator wants assets to pass at death.

(*In re Washington's Estate*, 46 S.E.2d 287, 289 (S.C. 1948).) A testator does not have to be of sound mind at all times, just at the time the testator executes the will. A testator who is insane generally may execute a valid will in South Carolina, if the testator does so during a sane interval (*Hairston v. McMillan*, 692 S.E. 2d 549, 552 (S.C. Ct. App. 2010).)

4. Can an agent under a power of attorney create a will on behalf of a testator?

In South Carolina, only the testator can create a will. South Carolina does not authorize an agent under a power of attorney to create a will for the testator.

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

A holographic will is generally understood to be a handwritten will that is signed by the testator but is not witnessed. Holographic wills are generally not valid in South Carolina. South Carolina permits a handwritten will if it is executed with the formalities required to execute a valid will in South Carolina (S.C. Code Ann. §§ 62-2-502 and 62-2-505; see Question 6).

Oral (Nuncupative) Wills

South Carolina does not recognize oral wills. All South Carolina wills must be in writing. (S.C. Code Ann. § 62-2-502.)

Contractual Wills

South Carolina recognizes contracts to make, revoke, or not revoke a will or devise if executed after January 1, 2014. These contracts can be established by either:

- A provision of the will stating the material provisions in the contract.
- An express reference in the will to a contract and extrinsic evidence proving the terms of the contract.
- A writing signed by the decedent showing the contract and extrinsic evidence proving the terms of the contract.

(S.C. Code Ann. § 62-2-701.)

The execution of a joint will or mutual wills does not create a presumption of a contract to not revoke the will or wills (S.C. Code Ann. § 62-2-701).

Individuals rarely use contracts to make, revoke, or to not revoke wills in South Carolina.

Statutory Wills

South Carolina law does not provide a statutory will form.

Electronic Wills

South Carolina law does not authorize electronic wills.

Out-of-State Wills

A written will is valid if it was executed in compliance with South Carolina law or the laws at the time of execution of the place where either:

- The will is executed.
- The testator is domiciled at the time of execution or at the time of death.

(S.C. Code Ann. § 62-2-505.) A testator's domicile is the principal place of the testator's residence and to which the testator has an intention to remain permanently or for an indefinite time (*Barfield v. J.L. Coker & Co.*, 53 S.E. 170, 171 (S.C. 1906)).

South Carolina does not permit oral wills even if valid in the state where created (S.C. Code Ann. §§ 62-5-502 and 62-2-505).

South Carolina counsel should review an out-of-state will that is meant to be probated in South Carolina. It is advisable for a testator who moved to South Carolina to prepare a South Carolina will. It is easier to probate and administer a South Carolina will in South Carolina rather than administering and probating an out-of-state document. In certain instances, a South Carolina court may reject an out-of-state will validly executed in that state even where statute may appear contradictory (for example, sometimes where a state allows the testator's spouse to sign the testator's will as one of the required witnesses and the spouse signed that will as a witness).

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

In South Carolina, a will must be signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction (S.C. Code Ann. § 62-2-502(2)).

The testator should actually sign the testator's will, if able. It is rare in South Carolina for a will to be signed on behalf of the testator at the testator's direction. If the testator's signature is shaky or the testator is otherwise unable to sign with the testator's usual signature, counsel should consider whether it is better for the testator to:

- Sign on the testator's own behalf with a signature that is different from the testator's usual signature or a mark.
- Have another person sign on the testator's behalf.

If the testator's signature looks different from prior signatures, or if the testator is only able to sign with initials or a mark, the attorney should document the file with:

- The reason the testator's signature is different from the testator's usual signature.
- The facts and circumstances of the will execution that show that the testator's signature or mark was intended to indicate the testator's assent to the will.

Witness Requirements

A South Carolina will must be signed by at least two individuals that witnessed either the signing of the will or the testator's acknowledgment of the signature of the will (S.C. Code Ann. § 62-2-502(3)).

A subscribing witness can attest to or prove a will even if the witness, the witness's spouse, or the witness's issue receives a gift under the will. However, unless there are two additional disinterested witnesses, the interested witness or the interested witness's spouse or issue generally cannot take under the will anything more than that to which that person is entitled in intestacy (S.C. Code Ann. § 62-2-504; see Question 16). Therefore, it is best practice to use two disinterested witnesses or it is possible that any interested witness or interested witness's spouse or issue may lose a benefit under the will.

Notary Requirements

South Carolina does not require a will to be notarized or acknowledged to be valid. However, South Carolina requires acknowledgment before an officer authorized to administer oaths to make the will self-proving (S.C. Code Ann. § 62-2-503). The testator and witnesses should make a will self-proving when executing the will (see Self-Proving Affidavit).

Sample Attestation Clause

A will's attestation clause states the testator signed or acknowledged the will in the presence of the witnesses and that the testator declared to each witness that the document is the testator's will (S.C. Code Ann. § 62-2-503). It is common practice in South Carolina to include the following attestation, along with a self-proving clause, as provided by statute:

> "I, [TESTATOR NAME], the testator, sign my name to this instrument this [DAY] day of [MONTH], [YEAR], and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older (or if under the age of eighteen, am married or emancipated as decreed by

a family court), of sound mind, and under no constraint or undue influence.

We, [FIRST WITNESS NAME] and [SECOND WITNESS NAME], the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare, generally and to the undersigned authority, that the testator signs and executes this instrument as the testator's last will and that the testator signs it willingly (or willingly directs another to sign for the testator), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence."

The testator and witnesses typically sign the will in the space directly below this clause.

Self-Proving Affidavit

A valid will does not require a self-proving affidavit. However, with a few exceptions, a will that includes this affidavit may be admitted to probate without having to submit additional proof that the will was properly executed. (S.C. Code Ann. §§ 62-2-503 and 62-3-303(c), 62-3-405, and 62-3-406.) It is advisable to include a self-proving affidavit with every South Carolina will. A will without the attestation and self-proving affidavit may require either of the following to probate the will:

- An additional sworn statement.
- An affidavit from a person with knowledge of the circumstances of the will's execution.

(S.C. Code Ann. § 62-3-303(c); see Standard Document, Signature Pages for Will and Self-Proving Affidavit (SC)). A self-proving affidavit is usually made a part of a will as an attachment at the end, but it can be prepared after the will's execution (S.C. Code Ann. § 62-2-503(b)).

Electronic Will Execution Requirements

South Carolina does not authorize electronic wills.

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Personal Representatives

In South Carolina, a will can generally provide for gifts to personal representatives of a decedent's estate. A personal representative includes:

- An executor.
- An administrator.
- A successor personal representative.
- A person that performs substantially the same function under the law.

(S.C. Code Ann. § 62-1-201(33).)

It is common practice in South Carolina to use only the term personal representative when referring to these individuals.

Gifts to Trustees Named in the Will

In South Carolina, a will can generally provide for gifts to the trustees named in the will.

Gifts to Guardians

In South Carolina, a will can generally provide for gifts to the guardians named in the will.

Gifts to Lawyer Draftsperson

Unless the testator is related to the attorney draftsperson, it may be an improper conflict of interest for the attorney to draft a will in which the attorney or a relative of the attorney is a beneficiary. This can result in the South Carolina Supreme Court

sanctioning the attorney. (SCACR, Rules of Prof. Conduct, Rule 1.8(c); see *In the Matter of Reniers*, 374 S.E.2d 672, 673-74 (S.C. 1988).)

If the testator wants to give a bequest to the attorney draftsperson, the attorney should obtain informed written consent from the testator and generally advise the testator to seek guidance from independent counsel and give the testator a reasonable opportunity to do so (SCACR, Rules of Prof. Conduct, Rule 1.8(a)).

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

Disinheriting a Testator's Spouse

In South Carolina, a testator cannot disinherit a surviving spouse without a valid written waiver of spousal rights, voluntarily signed by the waiving party after the testator giving fair and reasonable written disclosures to the waiving party of the testator's property and financial obligations, in either:

- A prenuptial agreement.
- A postnuptial agreement.
- A waiver document.

(S.C. Code Ann. § 62-2-204(A).)

Without a valid waiver, the surviving spouse of a South Carolina resident decedent has an elective share right to claim against the decedent's probate estate in an amount of one-third of the decedent's probate estate (S.C. Code Ann. §§ 62-2-201 to 62-2-207).

South Carolina courts may include assets in a revocable trust in the calculation of the surviving spouse's elective share if the court finds the revocable trust is illusory for those purposes (S.C. Code Ann. §§ 62-2-202(b) and 62-7-401(c); see State Q&A, Revocable Trusts: South Carolina: Question 10). However, in calculating the elective share, the spouse is charged for gifts received because of the decedent's death, including those from the decedent's revocable trust (S.C. Code Ann. § 62-2-207).

If the decedent was not a South Carolina resident, the surviving spouse's elective share for South Carolina property is governed by the law of the decedent's domicile (S.C. Code Ann. § 62-2-201(b)).

In addition to the surviving spouse's elective share right, the surviving spouse of a South Carolina resident decedent is also generally entitled to:

- Exempt property, which is a net value not exceeding $25,000 in household furniture, automobiles, furnishings, appliances, and personal effects (S.C. Code Ann. § 62-2-401).
- Homestead allowance (S.C. Code Ann. §§ 15-41-10, 15-41-30, and 62-2-204, Rptr. Cmts.).

In certain cases, a spouse married to the testator may have certain rights to claim an intestate share of the decedent's estate (see Question 14: Effect of Marriage After Execution of Will).

The drafting attorney should ensure that the testator is aware of the surviving spouse's rights, if applicable, and draft accordingly.

Disinheriting a Child of the Testator

There is no right of a child to inherit from a parent unless either:

- The parent's estate is an intestate estate (S.C. Code Ann. § 62-2-103(1); see Question 16).
- In certain cases, the child was born after the testator executed the testator's will (see Question 14: After-Born Child).

However, if there is no surviving spouse, a decedent's minor or dependent children generally may be entitled to:

- Exempt property, which is a net value not exceeding $25,000 in household furniture, automobiles, furnishings, appliances, and personal effects (S.C. Code Ann. § 62-2-401).
- Homestead allowance (S.C. Code Ann. §§ 15-41-10, 15-41-30, and 62-2-204, Rptr. Cmts.).

Common Will Provisions

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

Incorporation by Reference

Incorporation by reference is a general doctrine that sometimes allows a testator to refer to outside documents and incorporate their provisions into a will. A testator in South Carolina may incorporate into a will any writing in existence when the testator executes the will if the will language both:

- Shows the testator's intent to incorporate the writing.
- Describes the writing so that the writing may be identified.

(S.C. Code Ann. § 62-2-509.) For example, a South Carolina pour-over will can incorporate the terms of a trust instrument by reference. The will can refer to the trust instrument and its terms and provisions and direct that those terms and provisions apply if the trust instrument is no longer in existence at the time of the testator's death.

However, testators rarely use incorporation by reference, except in the case of a personal property memorandum. The common practice in South Carolina is to include all written terms in the will.

Personal Property Memorandum

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, typically referred to as a personal property memorandum. The memorandum:

- May not include money.
- May not include property used in trade or business.
- Must be either in the testator's handwriting or signed by the testator.
- Describe the items and beneficiaries with reasonable certainty.
- May be prepared before or after the testator executes the will.

(S.C. Code Ann. § 62-2-512.)

Testator's commonly use a personal property memorandum with a will.

Disposition of Remains or Funeral Wishes

In South Carolina, testators do not typically include in their will provisions related to the disposition of remains or funeral wishes. A testator normally includes these provisions in a separate prepaid funeral home agreement or on a separate sheet entitled final wishes, not in a will or health care power of attorney (see Standard Document, Health Care Power of Attorney (SC)). Counsel does not typically prepare these.

No-Contest Clause

No-contest clauses (also known as *in terrorem* clauses) are provisions in a will which penalize an interested party that either:

- Contests the will.
- Institutes proceedings related to the estate.

These clauses generally provide that the interested party forfeits the interested party's bequest if the contest or proceeding is unsuccessful and are often included in a will to deter challenges to a testator's dispositive estate plan.

In South Carolina, no-contest clauses are permitted but unenforceable if probable cause exists for instituting the proceeding (S.C. Code Ann. § 62-3-905). Probable cause exists when at the time of the contest there was evidence that would lead a reasonable person, properly informed and advised, to conclude there was a substantial likelihood the challenge would be successful. Probable cause is factual matter the court must find if supported by any evidence. (*Deborah Dereede Living Tr. dated December 18, 2013 v. Karp*, 831 S.E.2d 435, 440 (S.C. Ct. App. 2019).)

Rule Against Perpetuities

In South Carolina, a nonvested property interest is invalid unless one of the following applies:

- When the interest is created, it vests or terminates no later than 21 years after the last life in being at the creation of the interest.
- The interest vests or terminates within 90 years after its creation.

(S.C. Code Ann. § 27-6-20(A).)

Sample Rule Against Perpetuities Provision

> "Notwithstanding anything herein to the contrary, the trusts created hereunder shall terminate not later than the later of either Twenty-One (21) years after the death of the last survivor of my beneficiaries living on the date of my death or Ninety (90) years after creation of the respective trust, and at that time, the Trustee shall distribute each remaining trust hereunder to the beneficiary or beneficiaries entitled to receive the current income thereof, and if there is more than one beneficiary, in the proportion in which they are beneficiaries or if no proportion is designated in equal shares to such beneficiaries."

Personal Representatives

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executor.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology Used to Identify Person in Charge of Estate

The personal representative is the person in charge of administering a decedent's South Carolina estate. A personal representative includes:

- An executor.
- An administrator.
- A successor personal representative.
- A special administrator.
- Any person performing substantially the same function under applicable law.

(S.C. Code Ann. § 62-1-201(33).)

Qualification as Personal Representative

A person may not serve as personal representative if any of the following apply:

- The person is under age 18.
- The court finds the person to be unsuitable in formal proceedings.
- The decedent was domiciled in South Carolina and the proposed personal representative is a corporation not doing business in South Carolina. A corporation includes an officer, employee, or agent of a foreign corporation, if the person is acting on behalf of the corporation.
- The person is a probate judge and the estate is the estate of any person within the probate judge's jurisdiction that is not a family member.

(S.C. Code Ann. § 62-3-203(e).)

To acquire the powers and undertake the duties of a personal representative, a person must:

- File the appropriate paperwork.
- Be appointed by a probate court order.
- Qualify as a personal representative, which includes filing any required bond and a statement accepting the personal representative's duties (S.C. Code Ann. § 62-3-601).
- Be issued letters of appointment by the court.

(S.C. Code Ann. § 62-3-103; see State Q&A, Probate: South Carolina.)

Compensation of Personal Representative

Unless otherwise approved by the probate court for extraordinary services, the personal representative receives a fee for the personal representative's services that does not exceed the total of:

- Five percent of the appraised value of the personal property plus the sales proceeds of real property received for sales directed or authorized by the will or court order (except sales to the personal representative).
- Five percent of the probate estate's earned income (though, this is not payable if the court determines a personal representative acted unreasonably in administering the estate or that there was unreasonable delay).

(S.C. Code Ann. § 62-3-719(a), (b).)

The parties can contract for a different amount of fees and the will can specify a different fee or no fee at all (S.C. Code Ann. § 62-3-719(c)). If there is more than one personal representative, the fee is split among them. The fee is normally split evenly, but the probate court can apportion the fee. (S.C. Code Ann. § 62-3-719(e).)

Most corporate fiduciaries have published fee schedules and may not agree to serve unless the fee schedules are expressly incorporated into the will. It is common for a South Carolina will to contain language regarding the fee for the personal representative.

Any personal representative may renounce the right to compensation for administering the decedent's estate (S.C. Code Ann. § 62-3-719(d)).

Drafting Attorney as Personal Representative

South Carolina does not prohibit the drafting attorney from serving as personal representative. However, the drafting attorney should both:

- Be careful to avoid conflicts of interest.
- Provide the client with sufficient information so that the client can make an informed decision before naming the drafting attorney to serve as personal representative, and obtain informed written consent from the client.

(SCACR, Rules of Prof. Conduct, Rules 1.4 and 1.8.)

Out of an abundance of caution, some attorneys may get a written waiver from the client or advise the client to consult an independent attorney (SCACR, Rules of Prof. Conduct, Rule 1.8(a).)

To avoid any sanctions or grievances, the drafting attorney should ensure that the testator has both:

- Explored all possible options for a different personal representative.
- Fully understands how the attorney intends to charge as personal representative.

Failure of Named Personal Representative to Qualify

If the original named personal representative does not wish to serve, ceases to serve, or cannot serve, the successor personal representative named in the will generally serves (S.C. Code Ann. §§ 62-2-601 and 62-3-613).

The priority of appointment as personal representative is:

- The person named as personal representative in the will or the person nominated by a power granted in the will.
- The surviving spouse of the decedent that is a devisee. A devisee is any person designated to receive a devise (a testamentary disposition) in a will or trust (S.C. Code Ann. § 62-1-201(7), (8)).
- The decedent's other devisees.
- The decedent's surviving spouse, if not a devisee.
- The decedent's other heirs.
- 45 days after death, any creditor of the decedent that properly presents a creditor's claim under S.C. Code Ann. § 62-3-804.
- Four months after death, on application of the South Carolina Department of Revenue, a person suitable to the court.

(S.C. Code Ann. § 62-3-203(a).)

Unless the decedent expresses a contrary intent in the decedent's will, a person with priority to act under S.C. Code Ann. § 62-3-203(a) may nominate another person to serve as personal representative. That nominated person has the same priority as the person making the nomination. (S.C. Code Ann. § 62-3-203(a)(8).)

Multiple Personal Representatives

Unless the will provides otherwise, if two or more persons are appointed co-representatives, they must act jointly except in certain circumstances, such as:

- When any co-representative receives and receipts for property due the estate.
- When emergency action is necessary to preserve the estate and the agreement of all co-representatives cannot be obtained in reasonable time.
- When a co-representative is delegated to act for the others by a written notice setting out the duties delegated that is:
  - signed by the other co-representatives; and
  - filed with the court.

(S.C. Code Ann. § 62-3-717.)

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

There are no statutory requirements to serve as a testamentary trustee in South Carolina. However, trustees may be removed by the court if:

- The trustee committed a serious breach of trust (see, for example, *Floyd v. Floyd*, 365 S.C. 56, 95-96 (Ct. App. 2005), overturned on other grounds due to legislative action).
- Lack of cooperation among co-trustees substantially impairs the trust's administration.
- Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines removal is in the beneficiaries' best interest.
- There was a substantial change in circumstances or removal was requested by all of the qualified beneficiaries and the following apply:
  - the court finds that trustee's removal best serves the interests of all of the beneficiaries;
  - the removal is not inconsistent with a material purpose of the trust; and
  - a suitable co-trustee or successor trustee is available.

(S.C. Code Ann. § 62-7-706(b).) A qualified beneficiary is a living beneficiary who, on the date the beneficiary's qualification is determined: to be either a distributee or permissible distributee:

- Is a distributee or permissible distributee of trust income or principal.
- Would be a distributee or permissible distributee of trust income or principal if:
  - the interests of the above distributees terminated on that date but the termination of those interests did not terminate the trust; or
  - the trust terminated on that date.

(S.C. Code § 62-7-103(12).)

Acceptance of Trusteeship

The terms of the testamentary trust under the testator's will may set out the way in which the named trustee accepts the role of trustee. If the trust terms are silent or not exclusive, regarding acceptance, the trustee accepts the trusteeship by either:

- Accepting delivery of the trust property.
- Exercising powers or performing duties as trustee.
- Otherwise indicating acceptance of the trusteeship.

(S.C. Code Ann. § 62-7-701(a).)

If a designated trustee does not accept the trusteeship within a reasonable time after knowing of the designation, the person is deemed to have rejected the trusteeship (S.C. Code Ann. § 62-7-701(b)).

A person designated as trustee may, without accepting the trusteeship, do the following:

- Act to preserve the trust property, but then, within a reasonable time after acting, send a rejection of the trusteeship to the settlor, or if the settlor is dead or lacks capacity, to a qualified beneficiary.

- Inspect or investigate trust property to determine potential liability under environmental or other law, or for any other purpose.

(S.C. Code Ann. § 62-7-701(c).)

Compensation of Trustee

In South Carolina, if the testamentary trust terms do not specify trustee compensation, a trustee is entitled to reasonable compensation under the circumstances (S.C. Code Ann. § 62-7-708(a)). If the testamentary trust terms specify the trustee's compensation, the trustee is entitled to the compensation specified. However, the court may allow more or less compensation if either:

- The trustee's duties are substantially different than the duties contemplated when the trust was created.
- The specified compensation is unreasonably high or low.

(S.C. Code Ann. § 62-7-708(b).)

Most corporate trustees typically take compensation according to their fee schedule and sometimes require specific language to be included in the trust. If the settlor wants a corporate trustee, counsel should contact the corporate trustee to discuss trustee fees and any language that should be included in the testamentary trust.

Failure of Named Trustee

If the first named trustee cannot serve, the named successor serves. If there is no named successor trustee willing and able to act, then a trustee vacancy exists. A trustee vacancy occurs if:

- A person designated as trustee rejects the trusteeship.
- A person designated as trustee does not exist or cannot be identified.
- A trustee resigns.
- A trustee is disqualified or removed.
- A trustee dies.
- A guardian or conservator is appointed for an individual trustee.

(S.C. Code Ann. § 62-7-704(a).)

The testamentary trust terms may state how to fill a trustee vacancy. A vacancy in the trusteeship of a noncharitable trust must be filled by persons, in the following order of priority:

- Designated in the testamentary trust to act as successor trustee.
- Appointed by unanimous agreement of the qualified beneficiaries.
- Appointed by the court.

(S.C. Code Ann. § 62-7-704(c).) A testamentary trust must have a trustee. If there is no trustee, the probate court can fill a vacancy in the trusteeship and appoint a successor trustee (S.C. Code Ann. § 62-7-704(b), (c).)

Multiple Trustees

Unless the will provides otherwise:

- If there are two co-trustees, the trustees must agree on the proposed action.
- If there are more than two co-trustees unable to reach a unanimous decision, they may act by majority decision.
- If a vacancy occurs, the remaining co-trustees may act for the trust.

(S.C. Code Ann. § 62-7-703(a), (b).)

A co-trustee must participate in the performance of a trustee's functions unless the co-trustee is not available to perform the function due to:

- Absence.
- Illness.
- Disqualification under other law.
- Temporary incapacity.
- The co-trustee proper delegating the performance of the function to another trustee.

(S.C. Code Ann. § 62-7-703(c).) However, if a co-trustee is unavailable and prompt action is necessary, to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the testamentary trust (S.C. Code Ann. § 62-7-703(d)).

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian

In South Carolina:

- A conservator is a person appointed by the court to manage the estate of another person.
- A guardian is a person appointed by the court to make decisions regarding another's health, education, maintenance, and support.

(S.C. Code Ann. § 62-5-101(3), (9).)

South Carolina does not have strict requirements for those qualified to act as conservator for a minor child, though the court must approve and appoint the conservator (S.C. Code Ann. § 62-5-404).

The South Carolina Family Court:

- Has jurisdiction over the care, custody, and control of minors (guardian of the minor's person).
- Must qualify and appoint a competent individual as the guardian of the person of a minor child, considering the statutory priority of certain persons to serve. As to individuals with similar priority, the court selects the person it considers beat qualified to serve as guardian.

(S.C. Code Ann. §§ 62-5-201, 62-5-308, 62-5-402, and 62-5-408.)

Guardianship Binding or Persuasive

Parents can designate guardians for their minor children in their wills in case both parents of a minor child are deceased. If there is a surviving parent, the surviving parent has priority to serve as guardian. The family court makes the appointment of a guardian for a minor child. (S.C. Code Ann. §§ 21-21-25 and 62-5-201.) The family court generally appoints the guardian named in the later deceased parent's will unless someone objects to that appointment.

The will in which a parent makes the guardianship appointment generally contains a testamentary trust (or the parent created a separate revocable trust), which provides that a trustee will manage the finances of the minor child. Therefore, a conservatorship appointment, which addresses the minor's financial affairs, is usually not necessary.

Termination of Guardianship

The guardianship terminates when the minor turns 18 (S.C. Const. art. XVII, § 14).

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

In South Carolina, a testator can use a codicil to change a will. The codicil must be executed with the same formalities as a will. A codicil and any testamentary instrument that merely appoints an executor or revokes or revises a will are included in the definition of will. (S.C. Code Ann. § 62-1-201(53); see Question 6.) Courts read wills and applicable codicils together as one document to give effect to the testator's intent (*Des Portes v. Des Portes*, 154 S.E. 426, 429 (S.C. 1930)).

If a codicil involves numerous or significant changes (or there are numerous codicils in existence), it is generally better to execute a new will incorporating all the revisions rather than a codicil.

Using a codicil to change a Will requires that the codicil be filed with the Will. It is advisable to prepare an entirely new Will, especially if there is a reduction in a beneficiary's share. There is no reason for a beneficiary to see that they were in a prior document or that their share was reduced.

Revocation of a Will

A will or any part of a will is revoked by:

- Executing a new will that revokes the previous will in part or whole, expressly, or by inconsistency.
- Being burned, torn, canceled, obliterated, or destroyed with the testator's intent and for the purpose of revoking the will.

(S.C. Code Ann. § 62-2-506(a).) Revoking a will also revokes all codicils to the will (S.C. Code Ann. §§ 62-1-201(53) and 62-2-506).

Out of an abundance of caution, attorneys generally include language in a will that expressly revokes all prior wills.

Reinstatement of a Will

A revoked will can be revived by clear and convincing evidence that the testator intended to revive the previous will (S.C. Code Ann. § 62-2-508). However, many attorneys prepare a new will for the testator rather than relying on this statutory provision.

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive (Lapse)

In South Carolina, unless a contrary intent appears in the will, if a beneficiary does not survive the testator or is treated as if the beneficiary predeceased the testator, the devise to that beneficiary:

- Does not lapse if the devisee was testator's great-grandparent or a lineal descendant of a great-grandparent. In this case, the devise is distributed to the beneficiary's issue surviving the testator as follows:
  - if the surviving issue are all of the same degree of kinship to the devisee, they take equally; or
  - if the surviving issue are of unequal degree of kinship to the devisee, then those of more remote degree take by representation.

  (S.C. Code Ann. §§ 62-2-106 and 62-2-603(A).)
- Lapses for any devisee that was not the testator's great-grandparent or a lineal descendant of a great-grandparent and is not a residuary devisee. In this case, the property passes as part of the residue of the estate. (S.C. Code Ann. § 62-2-604(A).) Unless otherwise provided in the will, for a residuary devisee, if the residue is devised to two or more persons, the share of the residuary devise that fails passes to the other residuary devisee or devisees in proportion to their interests in the residue (S.C. Code Ann. § 62-2-604(B)).

Attorneys often include language (for example, such as "if [he/she/they] shall survive me"), to clarify that the devise to a particular beneficiary is contingent on that beneficiary's survival, and that the assets do not pass to the devisee's heirs if the devisee does not survive.

Gift Not Owned by Testator at Death (Ademption)

If the testator disposes of a specific item of property in the testator's will, but does not own that specific property at the testator's death, the devise generally adeems (that is, is not made), except as otherwise provided by statute. For example, the beneficiary may receive certain sums or property the testator received for the sale, condemnation, or exchange of, or from insurance payments on, the devised property. (S.C. Code Ann. §§ 62-2-605 and 62-2-606.)

Not Enough Assets (Abatement)

If an estate does not have enough assets to pay all obligations and dispositions under the will and any claims or statutory shares, the various bequests in the will abate (are reduced or eliminated) for payment. Unless the will expresses an order of abatement or if the testamentary plan is otherwise defeated by the statutory order of abatement, shares of distributees abate in the following order, without any preference between real and personal property:

- Property not disposed of by the will.
- Residuary devises.
- General devises.
- Specific devises.

(S.C. Code Ann. § 62-3-902.)

Gifted Property Encumbered

Unless the will provides otherwise, a specific devise passes subject to any mortgage, pledge, security interest, or other lien existing at the date of death without right of exoneration, regardless of a general directive in the will to pay all debts (S.C. Code Ann. § 62-2-607). If the testator wants a debt paid from other estate assets before distribution of the devise, the testator must specifically including language in the will saying so.

Effect of Divorce

Unless otherwise provided in the testator's will, on divorce or annulment:

- The former spouse is not considered the testator's surviving spouse (unless the spouses remarry and are married at the decedent's death).
- Provisions in a testator's will that affect the testator's former spouse are void. The former spouse is treated as if the spouse predeceased the testator.

(S.C. Code Ann. §§ 62-2-507 and 62-2-802.)

Attorneys generally recommend that the testator execute a new will after a divorce is final or in anticipation of a pending divorce.

Effect of Marriage After Execution of Will

If a testator fails to provide by will for the testator's surviving spouse who married the testator after the execution of the will, the omitted spouse can claim an intestate share of the probate estate, unless either of the following apply:

- It appears from the will that the omission was intentional.
- The testator provided for the surviving spouse by transfer outside the will and evidence supports that the testator intended the transfer be instead of a devise in the will.

(S.C. Code Ann. § 62-2-301(a).) The omitted spouse's share of the probate estate is one-half of the probate estate if there are surviving issue and all of the probate estate if there are no issue (S.C. Code Ann. § 62-2-102).

To make this claim, the omitted spouse must file and serve a summons and petition within the statutory deadlines (S.C. Code Ann. § 62-2-301(c)). The omitted spouse can waive this claim in a prenuptial agreement, just as a surviving spouse, married before the testator executed the testator's will, can waive an elective share claim (S.C. Code Ann. § 62-2-204).

Attorneys generally recommend the testator update the testator's will after marriage so the testator's intentions to provide or not provide for a surviving spouse are clear (see Question 8: Disinheriting a Testator's Spouse).

After-Born Child

If a testator fails to provide in the testator's will for any children born or adopted after the will was executed, the omitted child can claim a statutory intestate share of the estate, unless any of the following apply:

- It appears from the will that the omission was intentional.
- When the will was executed, the testator devised substantially all of the testator's estate to the testator's spouse.
- The testator provided for the child by transfer outside the will and evidence supports that the testator intended that the transfer be instead of a devise in the will.

(S.C. Code Ann. § 62-2-302(a).) If a testator fails to provide in the testator's will for a living child solely because the testator believed that child to be dead at that time, the child is entitled to an intestate share of the testator's estate (S.C. Code Ann. § 62-2-302(b)).

To make these claims, the omitted child must file and serve a summons and petition within the statutory deadlines (S.C. Code Ann. § 62-2-302(d)).

The testator should review and may decide to update the testator's will when life-changing events occur, such as the birth or adoption of a child. Many attorneys draft wills to expressly include after-born heirs in the definition of heirs. Counsel should discuss this issue with the testator and draft accordingly.

Beneficiary Causes Testator's Death

An individual feloniously and intentionally killing the decedent is not entitled to any benefits under the decedent's will, trust, bond, life insurance policy, retirement plan, annuity, or other contract. The decedent's property passes as if the killer predeceased the decedent. (S.C. Code Ann. § 62-2-803(a), (c).)

The killer also has no survivorship rights in joint tenancy property. Joint tenancy assets are treated as though the interest of the decedent is severed and the decedent's share passes as the decedent's property. (S.C. Code Ann. § 62-2-803(b).)

Any nomination of the killer to serve in a fiduciary role in a will or other document is revoked (S.C. Code Ann. § 62-2-803(e)).

Simultaneous Death

Unless the will provides otherwise, beneficiaries generally must survive the testator by 120 hours to receive their bequests, subject to certain limited exceptions (S.C. Code Ann. §§ 62-1-502 and 62-1-506).

Many attorneys include a provision in the will dealing with simultaneous deaths and specifying the rules that apply to determine which person died first.

Lost Wills

15. Please describe what happens if the original will is lost.

In South Carolina, to probate a lost will (where the original is lost or inadvertently destroyed), a formal proceeding must be commenced with a summons and petition and service on all interested parties along with the notice of the hearing (S.C. Code Ann. §§ 62-3-401 and 62-3-407). The petition must state the will's contents and indicate it is lost, destroyed, or unavailable (S.C. Code Ann. § 62-3-402(a)).

The probate court holds a hearing to determine whether or not a copy of the will can be admitted to probate (S.C. Code Ann. §§ 62-3-401 to 62-3-407).

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

The intestate share of the surviving spouse is:

- The entire intestate estate if there are no surviving issue of the decedent.
- One-half of the entire intestate estate if there are surviving issue.

(S.C. Code Ann. § 62-2-102.)

The part of the intestate estate not passing to the surviving spouse or the entire intestate estate, if there is no surviving spouse, passes to the following persons, in the following order:

- To the decedent's issue as follows:
  - equally, if they are the same degree of kinship; and
  - those of more remote degree of kinship take by representation, if they are of an unequal degree of kinship.
- If there are no surviving issue, to the decedent's parents equally.
- If there are no surviving issue or parents, to the issue of the parents or either of them by representation.
- If there are no surviving issue, parents, or issue of parents, but the decedent is survived by one or more grandparents or issue of the grandparents, half of the estate passes to the paternal grandparents, if both survive, or to the surviving paternal grandparent or to the issue of the paternal grandparents if both are deceased and the other half passes to the maternal relatives in the same way. If there are no surviving grandparents or issue of grandparents on one side of the family, then the entire estate passes to the side of the family with survivors.

- If there are no surviving grandparents or issue of grandparents, the statute provides for additional intestate distributions.

(S.C. Code Ann. §§ 62-2-103 and 62-2-105.)

Many attorneys draft the will with contingent provisions intended to distribute all of the testator's property so that no property passes in intestacy.