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**SOUTH CAROLINA TAX COUNCIL  
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**PROBATE ADMINISTRATION**

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I. Introduction.

The law prefers for assets to be titled in the name of a living person or validly existing entity. When a person passes away with assets titled in their name with no one with the power or authority to transfer those assets, assistance from a court is required to retitle or dispose of the assets. The probate process is the means by which such assets are handled. Assets that have beneficiary designations and assets in a trust with a successor trustee are generally not required to go through the probate process. This outline discusses the probate process along with several tax and probate related items that practitioners need to be mindful of while advising their clients.

II. South Carolina Probate Code.

The South Carolina Probate Code (the “Probate Code”) governs the administration of estates and trusts in South Carolina. It is set forth in Title 62 of the South Carolina Code and is broken down as follows:

Article I	General Provisions, Definitions, Probate Jurisdiction of Court
	Part 1 Short Title, Construction, General Provisions
	Part 2 Definitions
	Part 3 Scope, Jurisdiction, and Courts
	Part 4 Notice, Parties and Representation in Estate Litigation and Other Matters
	Part 5 Uniform Simultaneous Death Act
Article II	Intestate Succession
	Part 1 Interstate Succession
	Part 2 Elective Share of Surviving Spouse
	Part 3 Spouse and Children Unprovided for in Wills
	Part 4 Exempt Property
	Part 5 Wills
	Part 6 Construction
	Part 7 Contractual Arrangements Relating to Death
	Part 8 General Provisions
	Part 9 Delivery and Suppression of Wills
	Part 10 Uniform Fiduciary Access to Digital Assets
Article III	Probate of Wills and Administration
	Part 1 General Provisions
	Part 2 Venue for Probate and Administration; Priority to Administer; Demand for Notice
	Part 3 Informal Probate and Appointment Proceedings
	Part 4 Formal Testacy and Appointment Proceedings
	Part 5 Administration Under Part 5
	Part 6 Personal Representative: Appointment, Control, and Termination of Authority
	Part 7 Duties and Powers of Personal Representatives
	Part 8 Creditors' Claims
	Part 9 Special Provisions Relating to Distribution
	Part 10 Closing Estates
	Part 11 Compromise of Controversies
	Part 12 Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates
	Part 13 Sale of Real Estate by Probate Court
Article IV	Local and Foreign Personal Representatives; Ancillary Administration
	Part 1 Definitions
	Part 2 Powers of Foreign Personal Representatives
	Part 3 Jurisdiction Over Foreign Personal Representatives
	Part 4 Judgments and Personal Representatives

Article V	Protection of Persons Under Disability and Their Property
	Part 1 General Provisions
	Part 2 Jurisdiction
	Part 3 Guardians of Incapacitated Persons
	Part 4 Protection of Property of Persons Under Disability and Minors
	Part 5 Health Care Powers of Attorney
	Part 6 Uniform Veterans' Guardianship Act (Repealed)
	Part 7 South Carolina Adult Guardianship and Protective Proceedings Jurisdiction Act
Article VI	Nonprobate Transfers
	Part 1 Definitions and General Provisions
	Part 2 Ownership as Between Parties and Others
	Part 3 Protection of Financial Institutions
Article VII	South Carolina Trust Code
	Part 1 General Provisions and Definitions
	Part 2 Judicial Proceedings
	Part 3 Representation
	Part 4 Creation, Validity, Modification, and Termination of Trusts
	Part 5 Creditors' Claims; Spendthrift and Discretionary Trusts
	Part 6 Revocable Trusts
	Part 7 Office of Trustee
	Part 8 Duties and Powers of Trustee
	Part 9 South Carolina Uniform Principal and Income Act
	Part 10 Liability of Trustees and Rights of Persons Dealing with Trustee
	Part 11 Miscellaneous Provisions
Article VIII	South Carolina Uniform Power of Attorney Act
	Part 1 General Provisions
	Part 2 Authority
	Part 3 Reserved
	Part 4 Miscellaneous Provisions

### III. Definition of Probate.

The technical definition of the term “probate” is a court procedure to determine if a will is the valid last will and testament of the decedent. The probate court reviews the decedent’s will to determine if it complies with the various statutory requirements. The term probate has generally been expanded and understood to include the process by which the decedent’s estate is administered.

IV. Requirements for Valid Last Will and Testament.

To be a valid last will and testament, the will must be 1) in writing, 2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction, and 3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.<sup>1</sup> The probate court will require that the witnesses appear before the court and prove that they in fact witnessed the execution of the will, unless it is self-proved by having the testator and at least one of the witnesses execute the will before a notary public.<sup>2</sup>

V. Testate vs. Intestate Estate.

An estate where the decedent had a valid last will and testament is referred to as a testate estate and an estate where the decedent died without a will is referred to as an intestate estate. The probate process and requirements are essentially the same for both. The main difference between the two is that with a testate estate the terms of the will determine how items pass and who will serve as personal representative, while the terms set forth in the South Carolina Probate Code determine how items pass with an intestate estate. The Probate Code also sets forth the priority for who serves as personal representative where one has not been named by the decedent.

For intestate estates, the Probate Code provides that when a person dies without a will and leaves a spouse and children, one half of the estate passes to the surviving spouse and one half passes to the surviving children. If a person dies with a spouse and no children, all assets pass to the spouse. Likewise, if a person dies with children and no spouse, all assets pass to their children. If

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<sup>1</sup> S.C. Code Ann. § 62-2-502 (1976, as amended).

<sup>2</sup> S.C. Code Ann. § 62-2-503 (1976, as amended).

a person dies without a spouse or children, their assets pass to their parents and then to their siblings or nieces and nephews, depending on who survives them.<sup>3</sup>

## VI. Probate Process.

The probate process<sup>4</sup> begins when a person makes application to the probate court for the administration of the decedent's estate. If the decedent had a will, then the will is included with the application and a testate estate is opened.<sup>5</sup> If the decedent did not have a will (or if the will cannot be located), the application would state as such and an intestate estate would be opened. The applications are generally filed in what are referred to as informal proceedings, which are proceedings that do not require a formal hearing. If a copy of the will is all that can be located, the probate court requires that the will be submitted and proved in a formal proceeding which would require a hearing before the probate judge. An estate may also be opened by a creditor of the decedent, if an estate has not otherwise commenced. This is done by the creditor making application to the probate for the appointment of a special administrator.<sup>6</sup>

A. Appointment of Personal Representative. After the will is filed and accepted into probate (or when an application for an intestate estate has been filed), the probate court appoints the personal representative to handle the estate administration. The personal representative's overall

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<sup>3</sup> S.C. Code Ann. §§ 62-2-102 and 62-2-103 (1976, as amended).

<sup>4</sup> The terms "probate process," "probate administration," and "estate administration" are synonymous and are used interchangeably in this outline.

<sup>5</sup> Within thirty (30) days after the decedent's death, a person in possession of a decedent's will is required by statute to file the will with the probate court or deliver the will to the person named in the will as personal representative. S.C. Code Ann. § 62-2-901 (1976, as amended).

<sup>6</sup> S.C. Code Ann. § 62-3-614 (1976, as amended).

responsibility in probate is to marshal (collect) the assets of the decedent, preserve and maintain the assets during the probate process, deal with any estate creditors, and then distribute the decedent's assets to the beneficiaries as directed by the decedent in the will or as set forth in the Probate Code if the decedent died without a will. The probate court issues a formal certificate of appointment that the personal representative will need when it seeks to gain access to the decedent's assets. A special administrator is appointed in limited cases where protection of an estate is needed either before a general personal representative can be appointed or after the general personal representative has been terminated, and, as mentioned above, in cases where a creditor of an estate institutes a proceeding.

VII. Duties and Powers of Personal Representative.

A. General Duties of Personal Representative. A personal representative has a duty to settle and distribute the decedent's estate in accordance with the terms of the probated and effective will and the Probate Code, and as expeditiously and efficiently as is consistent with the best interests of the estate.<sup>7</sup> Personal representatives must also observe the same standards of care of a trustee, including the same reasonable care, skill, and caution that a prudent person would observe, considering the purposes, terms, and distributional requirements of the trust. The duties of the personal representative commence when the probate court appoints them.<sup>8</sup>

B. Specific Duties of Personal Representative. In addition to the personal representative's general duties, the Probate Code sets forth several specific requirements of the personal representative.

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<sup>7</sup> S.C. Code Ann. § 62-3-703 (1976, as amended).

<sup>8</sup> S.C. Code Ann. § 62-3-701 (1976, as amended).

1. Notice to Creditors. Immediately after appointment the personal representative must publish notice to creditors in a newspaper of general circulation in the county where the estate is being administered and such notice shall run once a week for three successive weeks.<sup>9</sup> A personal representative may, but is not required to, give written notice by mail or other delivery to any creditor. In Horry County, the court prepares and files the notice to creditors for the personal representative and charges the estate for the newspaper fees for running the notice.

2. Possession and Protection of Estate. Upon appointment the personal representative has the right to and is charged with the responsibility of taking possession or control of the decedent's real and personal property. However, the decedent's property not needed in the administration may be surrendered to the presumptive beneficiary. The personal representative shall also take reasonable steps necessary to protect and preserve the estate assets, including paying any taxes related to estate property.<sup>10</sup>

3. Information to Heirs and Devises. Within thirty days after appointment the personal representative must give information of his appointment to the heirs (which are the people that would inherit the estate if the decedent had died without a will) and the devises (or beneficiaries) under the decedent's will. The information must include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, whether bond has been filed, and name the court where papers relating to the estate are filed.<sup>11</sup> Probate court form number 305ES is used to provide this information.

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<sup>9</sup> S.C. Code Ann. §§ 62-3-704(a) and 62-3-801 (1976, as amended).

<sup>10</sup> S.C. Code Ann. § 62-3-709 (1976, as amended).

<sup>11</sup> S.C. Code Ann. § 62-3-705 (1976, as amended).

4. Inventory and Appraisement. Within ninety days after appointment the personal representative must file an inventory and appraisal that sets forth the decedent's assets as of the date of death, describing the assets and their fair market value with reasonable detail.<sup>12</sup> Since it is often difficult to determine all of the decedent's assets within ninety days after appointment, the personal representative may request an extension from the court. If additional assets or relevant information about the value of the assets are discovered after the inventory and appraisal is filed, the personal representative is required to file a supplemental inventory and appraisal, with the updated information, and to serve the supplemental inventory in the same manner that the original inventory was filed and served.<sup>13</sup> Probate court form number 350ES is used for the initial Inventory and Appraisal.

5. Settlement of Estate Claims. After the expiration of the eight month creditor period, the personal representative shall proceed to pay or otherwise settle the claims of the estate that have not been disallowed. A personal representative has the option during probate administration to disallow any claim that the personal representative believes is not valid.<sup>14</sup> Claims should be allowed or disallowed within fourteen months after the decedent's death.<sup>15</sup> While it could be helpful in some cases, the personal representative is not required to state a specific reason for disallowing a claim. Unless otherwise provided for in a judgment or contract, allowed claims bear interest at the legal rate (as determined under §34-31-20(A)) for the period commencing upon the

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<sup>12</sup> S.C. Code Ann. §§ 62-3-704(b) and 62-3-706 (1976, as amended).

<sup>13</sup> S.C. Code Ann. § 62-3-708 (1976, as amended).

<sup>14</sup> Probate court form number 372PC is used to disallow a claim.

<sup>15</sup> S.C. Code Ann. § 62-3-806 (1976, as amended).

later of fourteen months after the decedent's death or the last date upon which the claim could have been properly presented.<sup>16</sup> It is very important for the personal representative to understand that he could subject himself to personal liability if the estate's assets are not sufficient to pay all of the allowed claims and the personal representative arbitrarily chooses to pay one claim over another claim of equal priority.<sup>17</sup> For this reason, it is imperative that the personal representative wait until the claims period has ended and all estate claims and their respective priority have been evaluated before paying any claims against the estate. If a claimant does not agree with their claim being disallowed, they can file for a hearing on the matter within thirty days after receipt of the disallowance.<sup>18</sup>

6. Final Accounting, Proposal for Distribution and Petition for Settlement.

Within one year after the first running of notice to creditors (or within ninety days after receipt of any applicable tax closing letter), a personal representative must file a full and complete accounting of all the decedent's assets as of the date of death, along with all receipts of the estate after the date of death and all disbursements from the estate from the date of the personal representative's appointment. If the estate administration cannot be completed within one year, or within a reasonable amount of time after one year, the personal representative may file an interim accounting to stay in compliance with the statutory requirements. Along with the final accounting, the personal representative must file a proposal for distribution of any remaining estate assets and an application for settlement of the estate, and must serve these documents on the interested parties of the estate

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<sup>16</sup> S.C. Code Ann. §62-3-806(d) (1976, as amended).

<sup>17</sup> S.C. Code Ann. §62-3-807(b) (1976, as amended).

<sup>18</sup> S.C. Code Ann. § 62-3-804 (1976, as amended).

(including claimants whose claims have not been barred or disallowed), together with a notice of right to demand a hearing. The Probate Code allows interested parties of an estate to waive some of the estate closing filing requirements, which could substantially simplify the estate administration.<sup>19</sup>

C. Summary Administration - Accounting Not Required. Estates that qualify for summary administration are not required to file a final accounting. An estate qualifies for summary administration when the net estate does not exceed twenty five thousand dollars or the personal representative(s) is/are either the sole heir(s) (when the decedent did not have a will) or sole devisee(s) (when the decedent had a will).<sup>20</sup> This section has been amended to also allow for a summary administration when the decedent had a revocable living trust and all assets pour over to a trustee who is the same as the personal representative.

In summary administration cases, the personal representative starts the probate administration the same way as a regular administration, except that after the inventory and appraisement is filed the personal representative can distribute the assets to the heirs or devisees and then file a verified closing statement that sets forth that to the best of the personal representative's knowledge: (i) the estate qualifies (and how it qualifies) for summary administration, (ii) that the personal representative has disbursed the estate assets to the heirs or devisees entitled thereto, and (iii) that the personal representative has sent a copy of the statement to the interested persons of the estate.<sup>21</sup> If no actions or proceedings involving the personal representative are commenced in the

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<sup>19</sup> S.C. Code Ann. § 62-3-1001(e) (1976, as amended).

<sup>20</sup> S.C. Code Ann. § 62-3-1203 (1976, as amended).

<sup>21</sup> S.C. Code Ann. § 62-3-1204 (1976, as amended).

probate court within one year after the closing statement is filed, the personal representative's appointment is terminated.

VIII. Powers of Personal Representative.

A. General Powers. Subject to the fiduciary duties imposed on personal representatives, a personal representative has all the powers over the decedent's estate granted by the decedent in his last will and testament. A personal representative has the same power over title to property of an estate that an absolute owner would have, in trust, however, for the benefit of the creditors and others interested in the estate. However, a personal representative may not sell the estate's real property (or personal property over \$10,000 that does not have a readily ascertainable value) without express authority to do so granted either in the will or court order.<sup>22</sup>

B. Specific Powers. Except as otherwise set forth in the decedent's will, the personal representative, acting reasonably for the benefit of the interested persons of the estate, may also exercise the following powers:<sup>23</sup>

1. Retain, receive and maintain assets of the estate pending distribution, which could include insuring the assets or paying taxes on them, or compromising a debt owed to the estate.
2. Perform, compromise, or refuse performance of the decedent's contracts.
3. Satisfy claims and written charitable pledges of the decedent.
4. Invest assets of the estate pending distribution, which could include investing in or selling (subject to S.C. Code Ann. § 62-3-711(b)), mortgaging, or leasing property of the estate.

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<sup>22</sup> S.C. Code Ann. § 62-3-711(b) (1976, as amended).

<sup>23</sup> The specific powers enumerated in this outline represent a summary of the powers set forth in S.C. Code Ann. § 62-3-715 (1976, as amended). This Code section provides much more detail about the specific powers.

5. Vote stocks or other securities or pay calls and assessments for securities of the decedent's estate pending distribution.
6. Allocate income or expense of the estate between income and principal.
7. Employ professionals to represent the personal representative in their fiduciary capacity.
8. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of their duties.
9. Continue any unincorporated business or venture of the decedent for up to four months or longer if court approved or none of the competent adult probable beneficiaries object.
10. Determine which assets to use to satisfy devises, without regard to its tax basis, and to have assets appraised and to use the appraised value for distribution purposes.
11. With court approval, compromise and settle wrongful death claims.
12. Donate a qualified conservation easement for tax purposes if heirs, beneficiaries, and devises whose interests are affected consent.

IX. Remedies if Personal Representative Breaches Duty.

A personal representative is liable to interested persons for damage or loss resulting from a breach of fiduciary duty.<sup>24</sup> In addition to preliminary injunctive relief,<sup>25</sup> there are essentially two remedies available to interested parties of an estate if the personal representative breaches his fiduciary duty.

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<sup>24</sup> S.C. Code Ann. § 62-3-712 (1976, as amended).

<sup>25</sup> S.C. Code Ann. § 62-3-607 (1976, as amended) sets forth a way for an interested person to seek a temporary order when it appears to the court that the personal representative may take some action which could jeopardize the estate.

A. Petition for Removal of Personal Representative. An interested person in an estate may petition the court for removal of the personal representative for cause. Once the personal representative is served with the summons and petition for removal, he shall not act except to account, to correct maladministration, or preserve the estate.<sup>26</sup> Cause for removal generally exists when a personal representative has intentionally mismanaged the estate, or is or becomes incapable of administering the estate.<sup>27</sup> The courts have made it clear that it is difficult to remove a personal representative for cause.

1. *Church v. McGee*<sup>28</sup> deals with a case where a beneficiary sought to remove a personal representative because the personal representative allegedly misrepresented the value of the Estate's assets. The Court of Appeals held that strong deference is to be shown to the personal representative chosen by the testator, and *Church* stands for the rule of law that "[t]he power to remove a personal representative should be [exercised] with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud."

2. *Blackmon v. Weaver*<sup>29</sup> involves facts where a personal representative was removed because she asked the court to construe a will and she advocated a position that favored her interests. Additionally, upon granting the removal of the personal representative, the lower court

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<sup>26</sup> S.C. Code Ann. § 62-3-611(a) (1976, as amended).

<sup>27</sup> S.C. Code Ann. § 62-3-611(b) (1976, as amended).

<sup>28</sup> 391 S.C. 334, 344, 705 S.E.2d 481, 486 (S.C. App. 2011) (quoting *Smith v. Heyward* 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)).

<sup>29</sup> 366 S.C. 245, 621 S.E.2d 42, 45 (S.C. App. 2005) (citing *Reed v. South Carolina Nat'l Bank*, 293 S.C. 357, 360 S.E.2d 527 (S.C. App. 1987)).

specifically discussed Blackmon’s hostility between her and other Estate beneficiaries. On appeal, the South Carolina Court of Appeals reversed, and held that “the mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along.”

B. Petition to Compel Personal Representative. If a personal representative does not timely file an accounting, proposal for distribution, and petition for settlement of the estate within one year after first notice to creditors, and if the personal representative fails to obtain an extension, any interested person may petition the probate court for an order compelling the personal representative to perform his duties.<sup>30</sup>

X. Other Probate Related Items.

A. Probate Costs. The probate costs are set forth in S.C. Code Ann. § 8-21-770 (1976, as amended) and are calculated based on the amount of the estate, similar to how income taxes are calculated. For an estate of \$500,000, the probate court fees would be \$695. For an estate of \$1,000,000, the probate court fees would be \$1,845.

B. Personal Representative Commission. The personal representative is generally entitled to five percent of the personal property of the estate and five percent of all property sold in the estate.

C. Interim or Partial Distributions. Oftentimes the personal representative or beneficiaries will want to receive something from the estate before the creditor claim period has run or before the estate closing documents have been filed. This can be done, but the personal

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<sup>30</sup> S.C. Code Ann. § 62-3-1001 (1976, as amended).

representative must be careful because if they distribute too much out of the estate and there is not enough in the estate to pay legitimate claims, then the personal representative can be personally liable to pay such claims.

D. Extensions. If additional time is needed to gather necessary information for required filings, the personal representative can file a request for an extension with the probate court. The court is generally very good about granting reasonable extensions. However, if there is not real reason for the estate to remain open, the court will push the personal representative to close the estate.

E. Demand for Notice. A party that has an interest in an estate may file a demand with the court that requires the personal representative to give the interested party notice of any filed documents and any hearings in the estate.<sup>31</sup>

F. Exempt Amounts. The surviving spouse or minor or dependent children of the decedent may receive up to Twenty Five Thousand (\$25,000) Dollars from the estate before any estate creditors (except for costs of administration and funeral expenses) are entitled to receive anything.<sup>32</sup>

G. Common Law Spouse. South Carolina still recognizes common law marriage. To form a common law marriage, the following elements must exist:

1. No Impediment to Marriage. This means that both parties are legally free to marry.
2. Cohabitation. The parties must live together.

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<sup>31</sup> S.C. Code Ann. § 62-3-204 (1976, as amended).

<sup>32</sup> S.C. Code Ann. § 62-2-401 (1976, as amended).

3. Intent to Be Married. There must be some form of intent to be married.
4. Holding Out as Married. Both parties must hold themselves out to the public as husband and wife.

H. Elective Share, Omitted Spouse and Pretermitted Children. If a person gets married and then does a will, leaving less than one third of their estate to their spouse, the surviving spouse has a right to an elective share of one third of the decedent's estate.<sup>33</sup> If a person does a will and then gets married, leaving nothing to their spouse, the surviving spouse has a claim for up to one half of the decedent's estate as an omitted spouse.<sup>34</sup> If a person does a will and then has or adopts a child, leaving nothing to the child, the child has a right as a pretermitted child to receive what he or she would have received if the decedent had died without a will (the intestate share).<sup>35</sup>

I. Ademption. What happens if the will leaves an asset to a beneficiary but the probate estate does not include the asset? If the asset was previously given to the beneficiary before the death of the decedent, it is considered adeemed by satisfaction.<sup>36</sup> If the asset was sold or otherwise disposed of by the decedent before their death, the asset is considered adeemed by extinction.

J. Questionable Capacity to Execute Will. It is important that a person have appropriate capacity (or be of sound mind) to execute their last will and testament. The capacity to execute a will is less than that required to execute a contract. To have capacity to execute a will a person must know: 1) who they are and that they are preparing a will, 2) who their family is (the objects of their

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<sup>33</sup> S.C. Code Ann. § 62-2-201 (1976, as amended).

<sup>34</sup> S.C. Code Ann. § 62-2-301 (1976, as amended).

<sup>35</sup> S.C. Code Ann. § 62-2-302 (1976, as amended).

<sup>36</sup> S.C. Code Ann. § 62-2-610 (1976, as amended).

bounty), 3) generally what assets they have, and 4) how they want their assets to pass. The capacity need only technically exist when the will is executed. A diagnosis of dementia is not, by itself, proof that a person did not have capacity to execute their will.

K. Probate Avoidance. Probate can be avoided in a number of different ways. For example a person can 1) transfer all of their assets to their beneficiaries before their death, 2) have only assets with beneficiary designations or as joint tenants with rights of survivorship, or 3) use some sort of trust to hold and distribute their assets.<sup>37</sup> To avoid probate, the last two ways usually make the most sense, when considering tax and creditor issues. By giving the assets to beneficiaries before death (unless a life estate is retained), would cause the beneficiary to lose the benefit of a stepped up tax basis. It would also subject the assets to liability exposure of the beneficiaries.

#### XI. Tax Related Matters.

A. Final 1040 Individual Income Tax Return. It is important to remember that the 1040 return for the year in which the decedent died must be filed by the same deadline that the decedent would have had to file it had he not died. This is the responsibility of the personal representative.

B. Qualified Disclaimer. A beneficiary may have a reason not to want to receive an asset from an estate, such as for tax or creditor purposes. The beneficiary can file a disclaimer and have the disposition of the asset treated as if the beneficiary predeceased the decedent. To comply with Internal Revenue Code (IRC) § 2518, the person must generally disclaim the property in writing within nine months of the decedent's death and could not have received the asset or its benefits. The Probate Code also has its own disclaimer section.<sup>38</sup>

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<sup>37</sup> The decedent could also do the unusual thing of consuming all of his assets before death.

<sup>38</sup> S.C. Code Ann. § 62-2-801 (1976, as amended).

C. Tax Basis of Probate Assets. It is important to determine the tax basis of assets from an estate. The IRS still allows us to step up the tax basis in assets received from an estate.<sup>39</sup> The valuations set forth on the inventory and appraisal are often relied upon to establish the value of an asset at the decedent's death. If a beneficiary does not agree with a valuation on the inventory and appraisal, he can have the property appraised by a licensed appraiser. Some assets that are not part of the probate estate may receive a stepped up tax basis, such as property where the decedent retained a life estate.<sup>40</sup> It is also important to consider whether it is necessary to file a IRC § 754 Election to obtain a stepped up tax basis in property owned in a partnership that the decedent owned.

D. Tax Deferral - IRC § 6166. If an estate is taxable and does not have the liquidity to pay the estate taxes, an election can be made to defer taxes by paying a low interest rate on the taxes for a certain period until the estate can obtain the necessary liquidity.

E. Individual Retirement Accounts. The personal representative will need to carefully navigate through the different options when an IRA is left to an estate either directly or by default (such as when no living beneficiary is named). Depending on the particular fact pattern, there are essentially four ways that IRAs can be distributed after a person dies: 1) continue to distribute the IRA over the decedent's IRS life expectancy, 2) distribute the IRA over the IRS life expectancy of any children that are designated beneficiaries (or the life of the oldest child if the children are beneficiaries but not designated beneficiaries), 3) distribute the IRA all within five years, or 4) distribute the IRA immediately in one lump sum. Each option has different tax consequences and each needs to be evaluated carefully.

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<sup>39</sup> IRC § 1014.

<sup>40</sup> IRC §§ 1014 and 2036.

F. Annual 1041 Fiduciary Income Tax Filing. The personal representative must also make sure that a 1041 estate income tax return is filed for any year in which the gross income of the estate is \$600 or more. The deadline for filing the 1041 return is the same as the deadline for individual income tax returns, except when the estate operates on a fiscal year, then the deadline is the 15<sup>th</sup> of the fourth month after the end of the fiscal year.

G. IRC § 645 Election. If the decedent had a revocable living trust, the personal representative and trustee of the trust should consider whether it makes sense to have the estate and trust taxed as one entity. If so, the personal representative will need to file a IRC § 645 election.

H. IRS Form 56. A personal representative will need to evaluate if he needs to put the IRS on notice of his fiduciary relationship. This can be done with Form 56. This form is usually included with the initial 1041 fiduciary return.

I. Estate or Trust as Beneficiary of S Corporation Stock. If a decedent owned an S corporation either individually or in a revocable living trust prior to his death, then upon his death, the fiduciary and his attorney or accountant need to consider how the S corporation will continue to be owned so that the S election will not be lost. An estate is an eligible S corporation shareholder for as long as reasonably necessary for the estate to be administered.<sup>41</sup> A decedent's grantor trust is an eligible shareholder of an S corporation for up to two years after the decedent's death. If a non-grantor trust will own the S corporation stock for longer than two years, it is important to consider whether an I.R.C. § 645 election (to have the estate and trust taxed as one entity), a Qualified Subchapter S Trust (QSST) election, or an Electing Small Trust (ESBT) election should be made to preserve the company's S corporation tax status.

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<sup>41</sup> IRC §§ 1361(b)(1)(B) and 641.

## XII. Conclusion.

An estate administration presents many opportunities for attorneys and accountants to assist clients. Many legal and tax related issues come up that call for competent professional representation. It is important to understand that estates often involve highly charged emotional events and it is important for estate related matters to be handled appropriately. The Probate Code sets forth a clear road map for how estates should be handled. However, there are a number of tax related issues that arise with estates that the Probate Code does not address and which tax professionals will need to know so that they can assist their clients. At the end of the day, successful administration of an estate by a fiduciary can be a very rewarding experience for both the fiduciary and the beneficiaries. Fiduciaries are encouraged to seek the counsel of an experienced estate and trust attorney and accountant to guide them through the process of estate administration.