

## The State of South Carolina



## Office of the Attorney General

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April 27, 1990

The Honorable Julien Weinberg  
Probate Judge of Clarendon County  
Post Office Box 152  
Manning, South Carolina 29102

Dear Judge Weinberg:

You have requested the opinion of this Office as to Section 8-21-760 et seq. of the South Carolina Code of Laws relative to the adoption of the new South Carolina Probate Code and the use of Probate Form #350PC, concerning the computation of fees. In particular, you have asked:

1. Are probate fees computed on the recapitulation from form #350PC on the total gross estate?
2. Are probate fees computed on the net worth?
3. Are probate fees computed on a combination of the gross value of the estate?

You advise that since you have been Probate Judge, fees have been computed on a combination of the gross estate. Since July 1987, with the new Probate Code and new forms, this question has arisen.

To fully respond to your inquiry, it is necessary to examine the various statutory provisions and probate forms relevant to fees and appraisal of property.

Section 8-21-770

Fees and costs payable to the probate court which are relevant to your inquiry are established in Section 8-21-770 (a)(1) of the Code, which provides: "To determine the property evaluation for

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estate administration, the totals of items (2) and (3) of the Warrant of Appraisement shall be used." No other statutory provision otherwise establishes fees to be charged by probate courts for administration of estates.

With the adoption of the new Probate Code and the forms related thereto, there is no longer a form entitled "Warrant of Appraisement." Instead, the form which contains the same basic information formerly on the Warrant of Appraisement is #350PC, entitled "Inventory and Appraisement." It is similar to the Estate Tax Form 706 and is set up in a similar format; however, the form does not contain items (2) and (3) as those were listed on the old Warrant of Appraisement. Thus, whether Section 8-21-770 (a)(1) is still viable in the absence of a Warrant of Appraisement must be determined.

#### Section 62-3-706

Section 62-3-706 of the Code, a part of the new Probate Code, requires personal representatives to, among other things,

prepare an inventory of property owned by the decedent at the time of his death, together with such other information as may be required by the South Carolina Tax Commission, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item... .

Exactly what is meant by the term "encumbrance" is unclear, since that term is not defined in the Probate Code. Because apparently only Sections 62-3-1201 through 62-3-1204 then make use of liens and encumbrances to determine whether an estate is small enough to be probated in summary fashion, it appears that the listing of encumbrances on #350PC may be to accommodate the requirements of Section 62-3-706 and the format of Estate Tax Form 706, other than to follow Sections 62-3-1201 et seq. It is noted that Section 3-706 of the Uniform Probate Code, which was modified by the General Assembly in its adoption of Section 62-3-706, refers to the listing of type and amount of any encumbrance which may exist as to any item.

#### Probate Forms

The former Warrant of Appraisement was undertaken pursuant to old Section 21-15-350 et seq. following the filing of the inventory required by old Section 21-15-320, in such form as prescribed by

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the South Carolina Tax Commission. Items (2) and (3), referred to in Section 8-21-770 of the Code, contain an inventory of: (2) cash on hand at death, cash in banks or other depositories, stocks and bonds, mutual funds, undeposited or uncashed checks, life insurance payable to the estate, household goods, personal effects, and the like; and (3) real estate owned as tenants-in-common. Item (2) items are evaluated by the personal representative as to face value and then by the appraisers, who establish the appraised value. Item (3) real estate parcels are evaluated as to assessed value for the year of decedent's death, appraised value, and appraised value of decedent's interest. Nowhere in the old statutes or in items (2) and (3) on the Warrant of Appraisement is an encumbrance listed, discounted, or otherwise taken into account.

The format of the Inventory and Appraisement, or #350PC, as noted, is different from the Warrant of Appraisement. The section titled "Recapitulation" sets forth the various schedules of the form, as described; the amounts per schedule distinguish between in-state and out-of-state property:

Schedule A - Real Estate  
Schedule B - Stocks and Bonds  
Schedule C - Mortgages, Notes and Cash  
Schedule D - Insurance on Decedent's Life  
    Part 1 - Payable to Estate  
    Part 2 - Payable to Beneficiary  
Schedule E - Jointly Owned Property  
Schedule F - Other Miscellaneous  
Schedule G - Transfers during Decedent's Life  
Schedule H - Powers of Appointment  
Schedule I - Annuities  
TOTAL GROSS VALUE           (sum of all schedules)  
    ENCUMBRANCES           (subtracted)  
TOTAL NET WORTH

A comparison of the old and new forms shows that schedules A, B, C, D(1), and F, combined, of the new form would contain the same information as to the appraised value of the specified items inventoried, as would be found in items (2) and (3) of the old Warrant of Appraisement. Encumbrances were not considered in the old Warrant of Appraisement and are listed separately on the new Inventory and Appraisement form, i.e., not on one of the schedules. Encumbrances are subtracted from the total gross value of the estate to determine the total net worth, which, as far as this Office has been able to determine, is apparently useful only in determining whether Sections 62-3-1201 et seq. may be utilized, as far as the Probate Court may be concerned.

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### Discussion

Whether the relevant portions of #350PC may be utilized in place of items (2) and (3) of the Warrant of Appraisement to determine fees assessed pursuant to Section 8-21-770 must be determined. In other words, the continued viability of Section 8-21-770(a)(1) in the absence of a Warrant of Appraisement is questioned.

In the adoption of the new Probate Code, many statutes inconsistent therewith were expressly repealed. See Section 2 of Act No. 539, 1986 Acts and Joint Resolutions. Section 8-21-770 was neither amended nor repealed by that act, however. Whether Section 8-21-770(a)(1) may have been impliedly repealed since the Warrant of Appraisement no longer exists is questionable. Repeal by implication is disfavored, and such a construction should be avoided unless no other reasonable construction can be applied. State ex rel. McLeod v. Ellisor, 259 S.C. 364, 192 S.E. 2d 188 (1972). Repeal by implication will be resorted to only in the event two statutes are completely irreconcilable and repugnant. In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980).

In the Reconciliation Table which is a part of Act No. 539 of 1986, it is noted that

where the Reconciliation Table reflects a particular section of the 1976 Code as being "repealed" by the South Carolina Probate Code, this is set out for the purpose of showing what provision of the Probate Code has superseded the provision of the 1976 Code and on the effective date of this act this 1976 Code provision is repealed.

Section 21-15-320 as to inventory was repealed and superseded by Section 62-3-706. Sections 21-15-340 and 21-15-350 were repealed and both superseded by Sections 62-3-706 and 62-3-707. Thus, it could be argued that the Warrant of Appraisement pursuant to Section 21-15-350 has been superseded by the Inventory and Appraisement pursuant to Section 62-3-706.

Courts have permitted the substitution of one term for another in cases of statutory construction "where it is necessary to make the act harmonious or to avoid repugnancy or inconsistency, ...where the substitution will make the act sensible, give it force and effect, or make it rational..." 2A Sutherland Statutory Construction, §47.36 (4th Ed. 1984). If the language relative to the corresponding schedules of the Inventory and Appraisement form were to be substituted for the language in Section 8-21-770 relative to items (2) and (3) of the old Warrant of Appraisement, such would have the

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effect of reconciling all relevant statutes and preventing the implied, and disfavored, repeal of Section 8-21-770(a)(1). See also 2A Sutherland Statutory Construction, §51.01 (statutes on same subject matter should be construed together; such principle is "a re-statement of the presumption against the implied repeal of statutes").

To conclude that Section 8-21-770(a)(1) may have been impliedly repealed would leave no statutory mechanism by which the fees formerly assessed against an estate could now be assessed. There is no legislative enactment or other expression of legislative intent that such be the case. In such an instance, either no fees would be assessed, or some other entity would attempt to establish comparable fees, which could lead to equal protection questions. Thus, it is the opinion of this Office that the better course to follow is to substitute the appropriate schedules of the Inventory and Appraisement for items (2) and (3) of the Warrant of Appraisement in calculating the fees due under Section 8-21-770(a)(1).

We are aware that a bill is pending before the House of Representatives which would cure the problem which you have identified. House Bill 3646 would amend Section 8-21-770 of the Code to bring it into conformity with the new Probate Code and practice in probate court and also to revise some of the fees listed therein. Our conclusion expressed herein would be in accord with the proposal to amend Section 8-21-770(a)(1). To fully correct the problem, it would be desirable that legislation be adopted (either H. 3646 or some other bill which would reflect current terminology and practice) by the General Assembly. Though no legislation is pending currently, it might be desirable for the General Assembly to define the term "encumbrance" and clarify under what circumstances an encumbrance is to be considered, particularly since encumbrances have not previously been taken into account in assessing fees in probate court. Until such enactments are forthcoming, we suggest a construction of Section 8-21-770(a)(1) be adopted which will most closely resemble the previous practice in assessing fees in probate courts.

### Conclusions

Based on the foregoing, we advise as follows on your specific questions:

1. There is no apparent basis to conclude that probate court fees be computed on all of the items listed in the Recapitulation section of form #350PC.

2. There is no apparent basis to conclude that probate court fees be computed on the net worth (derived from the Recapitulation section) of the estate.

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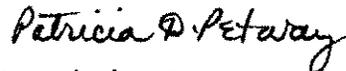
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3. To avoid an implied repeal of Section 8-21-770(a)(1), the better course would be to compute probate court fees based on the schedules of #350PC which are comparable to items (2) and (3) of the old Warrant of Appraisement, those schedules being A, B, C, D(1), and F. We can identify no statute which suggests that encumbrances (which are not listed in the above schedules) be deducted prior to computing probate court fees.

To ensure that the opinion of this Office comports with legislative intent, it would be desirable to have the foregoing clarified by the General Assembly.

With kindest regards, I am

Sincerely,



Patricia D. Petway  
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:



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