

5112 Lubray

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

July 14, 1993

The Honorable Harriett Pierce Flynn
Probate Judge of Kershaw County
Room 302, Kershaw County Courthouse
Camden, South Carolina 29020

Dear Judge Flynn:

Considering the various provisions of the Probate Code, you have asked who would receive the rest and residue of an estate in the following situation:

Mother died testate. She devised jewelry to female grandchildren and cash to male grandchildren. The rest and residue was devised to her two (2) sons, James and William. William predeceased his mother and was survived by children.

You particularly reference S.C. Code Ann. §§ 62-2-603 and 62-2-604. It is assumed that the decedent's will did not provide otherwise for failure of part of the rest and residue, and that a devise has not been renounced or disclaimed.

Section 62-2-604

Failure of a testamentary provision is provided for in S.C. Code Ann. § 62-2-604, as follows:

(a) Except as provided in § 62-2-603, if a devise other than a residuary devise fails for any reason it becomes a part of the residue.

(b) Except as provided in § 62-2-603 if the residue is devised to two or more persons and the share of one of the residuary devises fails for any reason, his share passes to the

Respectfully,
T. Travis Medlock

The Honorable Harriett Pierce Flynn

Page 2

July 14, 1993

other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

The Reporter's Comments following this Code section states that the rule of § 62-2-604 applies to a failed devise "... unless the anti-lapse rule of Section 62-2-603 applies to preserve the otherwise failed devise."

Section 62-2-604 is a verbatim codification of § 2-606 of the Uniform Probate Code as it existed prior to amendment in 1990; now the UPC provision is § 2-604 and is substantively the same as § 62-2-604. The comment as to old § 2-606 found in volume 8, Uniform Laws Annotated, was that "If a devise fails by reason of lapse and the conditions of Section 2-605 [South Carolina's § 62-2-603] are met, the latter section governs rather than this section." As to the new § 2-604, the comments provide that "This section applies only if Section 2-603 [somewhat similar to our § 62-2-603 as to anti-lapse] does not produce a substitute taker for a devisee"

Applying § 62-2-604 to your factual situation, we observe that the residue was devised to two persons, the decedent's sons, and further that the share of one son failed because he predeceased his mother. The share of the deceased son would pass to the other son, as the remaining residuary beneficiary, unless § 62-2-603 should be applicable. Thus, it is necessary to determine whether § 62-2-603 applies in this instance.

Section 62-2-603

Section 62-2-603 is an anti-lapse rule and provides in relevant part that

If a devisee, who is a great-grandparent or a lineal descendant of a great-grandparent of the testator ... fails to survive the testator, ... the issue of the deceased devisee who survive the testator take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. ...

The Reporter's Comments to § 62-2-603 provide:

The rule preserves some devises which otherwise would be void or would lapse because of the failure of the devisees to survive to take the devise. The rule saves only devises to persons who are related to the testator as or through the testator's great-grandparents, whether they are individually

The Honorable Harriett Pierce Flynn

Page 3

July 14, 1993

named in the devise, or merely described by class terminology, and whether they predecease ... the testator's date of death Those of the devisee's issue ... who survive the testator take the devise in place of the devisee; they take among themselves per capita with per capita representation, as in intestate succession under Section 62-2-106

In the Uniform Probate Code before 1990 revisions, § 2-605 was the provision parallel to § 62-2-603; § 2-605 was modified to become our § 62-2-603. As to § 2-605, the comments state that "This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator."

Discussion

Considering both §§ 62-2-604 and 62-2-603 as applied to the factual situation you have presented, we are of the opinion that § 62-2-603 would be applicable in this instance. The decedent's son was a lineal descendant of the great-grandparents; his share of the residue would have lapsed since he predeceased his mother; and he has issue who can take the share he would have taken. In this instance, § 62-2-603 would take precedence over § 62-2-604, with the result that the deceased son's issue would take in the place of their father.

The foregoing represents the opinion of this Office as to the factual situation presented in your letter. A change in facts could, of course, cause a different result to be reached. Too, the foregoing is not intended to usurp the judgment of any court in any matter pending before that court.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions