

The State of South Carolina



*Deposition No. 86-64
1227*

Office of the Attorney General

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June 6, 1986

The Honorable John V. Green
Judge of Probate, Richland County
P. O. Box 192
Columbia, SC 29202

Dear Judge Green:

You have requested the opinion of this Office as to interpretation of Section 21-15-1450, Code of Laws of South Carolina, 1976, as amended, effective March 1, 1985. You have asked eight specific questions; however, the answers all turn generally on interpretation of some key words in the statute. Therefore, we address first its general provisions.

The section is as follows:

§21-15-1450. Commissions.
Every executor or administrator shall for his care in the execution of his duties receive from estate funds not to exceed five percent of the appraised value of the personal property of the estate in which he acts as fiduciary. The minimum commission payable is fifty dollars and no less, regardless of the value of the personal property of the estate. Additionally, every executor or administrator who invests money of the estate in which he acts as fiduciary is entitled to receive a sum not to exceed ten percent of the interest or increments earned on such investments. No such additional commission is payable by any estate unless the probate judge determines that the executor or administrator has acted reasonably in the accomplishment of the assigned duties, and that no unreasonable delay has been encountered. The same commissions provided above must be paid to executors or administrators for the sale of real estate when directed by will or by proper court order. When the executor or administrator is

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the purchaser at the sale a commission may not be paid. The provisions of this section do not apply in any case where there is a contract providing for the compensation to be paid for such services or where the will otherwise directs.

This new statute has not yet received any reported judicial construction by our courts, so we turn to the general rules of statutory interpretation for guidance. In construing a statute, the language used should be given its plain and ordinary meaning and usage. State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983). And the intent of the Legislature is best determined by reliance upon the ordinary and popular significance of the words used in the statute. Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 99 (1955).

The operative words or phrases concerned in your questions are (a) "his care in the execution of his duties," (b) "invests money," and (c) "the interest or increments earned on such investments."

(a) "Care" is a relative term defined generally as: "responsibility, care, or oversight; watchful regard and attention." 6 Words and Phrases 246. See, generally, Thomas v. Atlantic Greyhound Corp., 204 S.C. 247, 29 S.E.2d 196 (1944). "Duty" is an obligation imposed by law requiring one to do a particular thing or perform a particular act. Walker v. Bignoll, 100 Wis.2d 256, 301 N.W.2d 447, 22 ALR 4th 611. The duty of care placed upon a fiduciary such as an executor, administrator or trustee is to exercise good faith and diligence in the management and administration of the estate they represent, so as to protect it from loss. Pruitt v. S. C. National Bank, 268 S.C. 221, 232 S.E.2d 892 (1977); 31 Am.Jur.2d, Executors and Administrators, Sec. 180. It follows, therefore, that the executor, administrator or trustee is entitled to his commissions or fees upon proper performance of the duties placed upon him, i.e., "his care in the execution of his duties." See, anno. 83 ALR 720; Bendall v. Bendall, 24 Ala. 295.

(b) The words "invests money" are not of doubtful meaning, rather their significance here is to clearly limit or define the activity of the executor or administrator which will entitle him to additional commissions. Thus, for example, such fiduciary activities as accounting for, and distributing assets are not functions which would entitle the executor to additional compensation above the basic 5% commission.

(c) If the executor or administrator does "invest money," he will then be entitled to additional commissions not to exceed 10% of the "interest or increments earned on such investments." We

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emphasize the word "earned" because it modifies the word "increments." "Increment" is generally defined as "increase or growth in bulk, quantity, value, etc.," Black's Law Dictionary, 4th Ed. Rev. 1968; In re Corning's Will, 289 N.Y. Supp. 1101, and is not a term of precise legal art. Therefore, the statutory provision limiting increments to the estate for which extra commissions will be paid to earned increments practically reduces increments to income from the investments made. Income, of course, is not a gain accruing to capital or growth in the value of an investment, but is a profit "proceeding from the [investment]" as distinguished from the capital. Goodrich v. Edwards, 255 U.S. 527, 41 S.Ct. 390. "Yield" is also a synonym for "income," and in property law refers to such forms of income as interest on investments or rents from property. 46 Words and Phrases 538, 539. Finally, construction of the statute is made simpler by noting that appreciation or increase in the value of an investment or property is a capital gain not an earned increment or income, Pridemark, Inc. v. Commr. of Int. Rev., 345 F.2d 35 (4th Cir. 1965). One court characterized appreciation in value as "the so-called unearned increment," People ex rel. Adirondack Power & Light Corp. v. Pub. Ser. Comm., 193 N.Y. Supp. 186, [emphasis added].

With these definitions in mind, we may proceed to consideration of the questions you have asked.

1. If an executor receives an estate consisting of stocks and bonds, and makes no changes in investment during the period of his administration, is he entitled to any commission on the income?

In our opinion, the executor would be entitled to commissions not to exceed 10% on interest and dividend income received by the estate on stocks and bonds, in addition to his 5% commission on the appraised value of such personal property. Dividend income is an "earned increment" within the definitions above set out. The receiving, holding and final distribution of the property of the estate in a proper manner ("care in the execution of his duties") constitutes performance of his duties as executor, even though he makes no changes in the investments during the period of administration.

2. Would the rolling over of a CD (Certificate of Deposit) be an investment made by an executor?

Yes, as he is investing money. He would be entitled additional commissions not to exceed

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10% on any "interest or increments earned," whether he permits or requests investment in a new CD (rolling over) or invests the proceeds of the original CD in other investments.

3. If the same executor sold the stocks and bonds that came into his hands and bought other stocks and bonds, would he be entitled to commissions on all of the income or only on the "interest" from the bonds and not on the "dividends" from the stocks?

The executor would be entitled to additional commissions not to exceed 10% on both the interest and dividend income earned by the estate. He would not be entitled to a commission on stock dividends or stock splits, which are capital gains or appreciation in value of the investment and not income.

4. Are the "same commissions" to which an executor is entitled for the sale of real estate computed at 5%, or at 10%?

When the executor is authorized to sell real property, he would be entitled to a commission of 5% of the sale price. Section 21-15-1450 does not provide for any other commission on real estate, and if the property increased in value during the time the estate is in administration, the increase is a capital gain and not "interest or increments earned" on investment.

5. Does the word "increments," as used in the Act, embrace capital gains?

No. Interest or increments subject to the additional commission must be "earned" on investment. Capital gain or appreciation in value of property are not "yield" or income.

6. Does Code Section 21-29-70, governing commissions of trustees, now apply to Section 21-15-1450, as amended, or to the section as it existed prior to this Act?

Commissions to trustees under Section 21-29-70 would be as provided in new Section 21-15-1450. The substantial amendment contained in the new statute has the legal effect of obliterating the prior statute. Independence Ins. Co. v.

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Independent Life & Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399. In any event, this section concerning returns and commissions is a procedural or remedial statute and, as such, would be given retroactive effect. See, Op. Atty. Gen. Oct. 3, 1985, copy attached.

7. Under the old Act, a trustee was allowed 2½% on personal property received, and 2½% on personal property distributed. Under the new Act, he is allowed not to exceed 5% of the appraised value of the personal property. When is he authorized to collect the 5%? Upon receipt?

Although the appraised value is determined promptly after his appointment (Code Section 21-15-350), the contemplation of law is that an executor or administrator is not entitled to payment of his commissions until the final accounting of the estate. 31 Am.Jur.2d, Executors and Administrators, Sec. 486. If the Probate Court allows payments on commissions in advance, such as at the time of regular accountings, which is the usual procedure in our State, they are considered merely advance allowances on the total commissions as determined at the time of the final accounting. In re Heck's Estate, 160 Cal.App. 162, 324 P.2d 733.

8. A trustee acts over a long period of years, collecting commissions annually. Is he required annually to obtain approval of the Probate Judge for the performance of his duties before he can collect his annual commissions on income?

Chapter 29 of Title 21, Code of Laws, 1976, (Sections 21-29-10, et seq.), creates a dual jurisdiction in the Probate Court and the Court of Common Pleas. "Original jurisdiction," as to trustees appointed by will, is in the Probate Court, Section 21-29-10. However, the Court of Common Pleas appoints trustees or successor trustees in event the trust instrument does not name the trustee, or in event of a vacancy, or when trustees are substituted, Sections 21-29-20 and 21-29-30. Then Section 21-29-80 provides that all court-appointed trustees shall render annual accountings to the Judge of Probate. It

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seems implicit in this provision that a court-appointed trustee's annual accountings must be approved by the Probate Judge, which would include approval of commissions paid to the trustee. See, generally, Re Gandolfo, 173 La. 190, 136 So. 56, 83 ALR 720.

The situation as to a trustee appointed by will or other trust instrument appears otherwise. In a testamentary trust, the property bequeathed to a trust is distributed in due course by the executor to the trustee; or, in the case of real property, title generally vests in the trustee upon the death of the testator. Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 ALR3d 918. It would, therefore, appear that the trust is then vested and the Probate Court would have no further jurisdiction once the distributions by the executor to the trustee are approved. Rights of action against the trustee or to enforce the trust thereafter are in the jurisdiction of the Court of Common Pleas, Wingard v. Hennessee, 206 S.C. 159, 33 S.E.2d 390.

In summary, our opinion is: (1) That a court-appointed trustee is required by statute to make an annual accounting to the Probate Court. That court's power to review the accounts includes the necessarily implied power to approve them, and annual approval of commissions to court-appointed trustees would be included. (2) That a trustee appointed by will or other trust instrument, once the trust estate is distributed to or title vested in him, is not thereafter required to render any accounting to the Probate Court and it has no further jurisdiction of the trust estate.

The answers to all of the above questions presuppose, in the language of Section 21-15-1450:

The provisions of this section do not apply in any case where there is a contract providing for the compensation to be paid for such services or where the will otherwise directs.

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Please call upon us if you have further questions.

Sincerely,

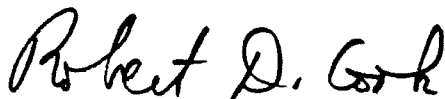


Frank K. Sloan
Chief Deputy Attorney General

FKS/rho

Enclosure

REVIEWED AND APPROVED:



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