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James A. ...
Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-8667

October 3, 1985

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

Dear Judge Green:

You have inquired as to whether §21-15-1450, South Carolina Code of Laws, 1976, as amended, by Act 498 of 1984, applies to those estates opened prior to the amendment but still in administration. Section 21-15-1450 deals with the commission of personal representatives of estates. The statute, prior to amendment, allowed the personal representative a commission of 2½% of personal property received and 2½% of that property distributed. The statute, as amended, allows a 5% commission of the appraised value of the personal property of the estate.

The issue raised by your letter has not been directly addressed by the South Carolina courts, but in the majority of cases from other jurisdictions considering the effect of amendments to commission statutes subsequent to creation of a trust, or death of a testator or qualification of a fiduciary, the statutes have been held to act retrospectively. Basic challenges which have been made to the retroactive construction are that the effect will impair contract rights or interfere with private property interests. The former is clearly inapplicable since the commissions in question here are created by statute and the statutory commissions are made inapplicable where there is a contract or the will otherwise directs. Implied contract theories have only been applied where statutes decrease the amount of commission; in Pennsylvania, where beneficiaries were seemingly held to be protected by an implied contract arising out of the statute and effect at the time administration began; and, in Missouri and Alabama, where the implied contract theory seems to protect beneficiaries regarding fiduciary duties performed prior to amendments. A beneficiary's rights in a trust res are vested, but, in all jurisdictions

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considering this issue besides Pennsylvania, they are held to be subject to the inchoate right to administrative fees. It is conceivable that a South Carolina Court would adopt the implied contract or vested right argument presented with the issue but, to do so would clearly be in derogation of most of the case law in existence.

This Office, in a previous opinion dated March 21, 1980, written by then Assistant Attorney General Edwin Evans, dealing with the applicability of the newly enacted probate fees, stated that, "an Act relating to procedure, such as the fee act, is generally construed as applicable to pending cases absent a showing of contrary legislative intent. Ex parte De Hay, 3 S.C. 564, 565; Irwin vs. Brooks, 19 S.C. 96; Seaboard Coastline vs. Clarke, 122 Ga. App. 237, 176 S.E.2d 596; Turner vs. U.S., 410 F.2d 837 (5th); 2 Sutherland, Statutory Construction, §41.104 (4th Ed)."

This traditional rule of statutory construction has also been followed by the South Carolina Courts. In Howard vs. Allen, 368 F.Supp. 310, aff'd 487 F.2d 1397, cert. denied, 94 S.Ct. 2611, 417 U.S. 912, 41 L.Ed.2d 216, the Court stated, "Thus, while a principal rule of statutory construction is that statutes are to be construed to operate prospectively unless there is a clear legislative intent to the contrary, a principal exception to this is that remedial or procedural statutes are generally held to operate retroactively." See also Hercules, Inc. vs. South Carolina Tax Commission, 262 S.E.2d 45, 474 S.C. 137.

Therefore, on the basis of the Attorney General's opinion previously cited and the general principle that procedural statutes are to be applied retroactively, it is the opinion of this Office that the amended statute, §21-15-1450, allowing a 5% commission of the appraised value of the personal property would govern those estates opened prior to the amendment but still in administration. This does not mean, however, that an executor who has already collected 2½% under the old statute is now entitled to the full 5% under the new statute. The 2½% would have to be offset, so as to make the final total 5% of the appraised value of the personal property. The logic of this position can be seen in In Re Heck's Estate, 160 Cal.App.2d 162, 324 P.2d 733, when the court notes citing 21 California Jurisprudence 2d §893, p. 284, "the representative's compensation is for the total of his services to the estate, and any compensation granted before the final accounting is merely an advance allowance toward the full fee allowable which can be determined only at the final accounting." Clearly, it would not

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have been the intent of our legislature to allow a commission that would exceed 5% of the appraised value of the personal property of the estate. Therefore, any fee which has been paid to the administrator or executor under the old act should be subtracted from the value of 5% of the appraised value of the personal property and the balance paid.

Sincerely,

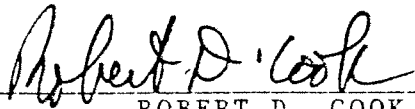


B. J. Willoughby
Assistant Attorney General

BJW/rho

cc: G. Monroe Black, III

REVIEWED AND APPROVED:



ROBERT D. COOK

Executive Assistant for Opinions