

1983 WL 181874 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 5, 1983

Re: Annual Accounting by a Testamentary Trustee

*1 Honorable Alexander S. Macaulay
Member
South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Alex:

Thank you for your request to this office for an opinion with regard to the filing of annual accountings of testamentary trust with the Probate Court. Our research concludes that a testamentary trustee appointed or named by will is not required to file an annual accounting with the Court of Probate.

There appears to be no statute requiring the annual accounting of a testamentary trustee named by will. Section 21-29-80, CODE OF LAWS OF SOUTH CAROLINA, 1976, provides:

Every trustee appointed by the court shall make an annual return of the estate in his possession, setting out all the items of money received and paid out with the proper vouchers. The judge of probate shall set apart certain days for the examination of such accounts and give notice thereof to all trustees whose duty it shall be to account before him. [Emphasis added.]

It is evident from the language used that, Section 21-29-80 requires only court-appointed trustees to annually account to the probate court. Professor Karesh has commented that:

. . . it is sufficient to say that the language of the statute [§ 21-29-80] as it has been interpreted, cannot be ignored; and we must conclude that a trustee named in a will—who is not court-appointed—is under no original duty to make periodic returns to the Probate Court, or to any other court for that matter—at least, as to the latter, in the absence of litigation.

Karesh, Probate Court Jurisdiction Over Testamentary Trust, 2 S.C.L.O. 13, 54 (1950). In addition, the Court in Ex Parte Mayrant, Rich.Eq.Cas. 1 (1831) realized the significance of the words ‘appointed by the court’. The Court therein noted that a return was not required of an original trustee, but that a substitute trustee appointed by the court was compelled to make annual returns.

The only contrary authority appears to be found in Strauss v. U.S.F. & G. Co., 63 F.2d 174 (4th Cir. 1933) wherein the Fourth Circuit noted in passing, that the predecessor to Section 21-29-80 required the filing of returns by a testamentary trustee. There is no discussion or consideration of the requirement of this provision by the court and it was but briefly mentioned. Such a casual comment by the Fourth-Circuit upon South Carolina law cannot be considered as authoritative.

As you noted in your letter, there is a great deal of confusion regarding the jurisdiction and authority of the Probate Court over testamentary trusts. Professor Karesh’s review at 2 S.C.L.Q. 13 emphasizes this confusion and notes the various conflicting statutory provisions which promote the confusion. He points out that, ‘when we come to the specific statutes which have been discussed, everyone of them which couples the trustee with other fiduciaries accountable to the Probate Court, or which seems to give the Probate Court jurisdiction, is a jumble of conflict and uncertainty.’ Ibid, at 85. Thus, regrettably this question or

any other question relating to the Probate Court's jurisdiction and authority regarding testamentary trusts cannot be answered without doubt.

Very truly yours,

*2 Edwin E. Evans
Senior Assistant Attorney General

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