

1973 S.C. Op. Atty. Gen. 191 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3553, 1973 WL 21010

Office of the Attorney General

State of South Carolina

Opinion No. 3553

June 27, 1973

***1 A summons must not necessarily be signed and issued by a judge of probate in order to commence an action in probate court.**

Judge of Probate for Lee County

Bishopville, South Carolina

You have requested the opinion of this Office as to the validity and effect of a summons subscribed by an attorney for petitioner in an action in a court of probate. The summons to which you refer was not issued by you as provided for by Probate Court Rule 5.

Section 15–447, *S. C. Code Ann.* (1962) provides:

The Supreme Court may, from time to time, make rules regulating the practice and conduct of business in the courts of probate *in all cases not expressly provided for by law* [emphasis added]

Pursuant to this authority, the Supreme Court promulgated the *Rules of Practice for the Courts of Probate of South Carolina*, which are found in Vol. 15 of the Code. Rule 5 provides:

Summons.—After a petition or complaint has been filed, it shall be the duty of the Judge of Probate to issue his summons, directed to each of the defendants named in said petition or complaint, notifying them of the filing of such petition or complaint, and that unless they plead thereto within twenty days from the time of such summons, judgment will be rendered against them for the relief demanded. Such summons shall be served in the same manner and according to the same rules as are prescribed by law in the case of a summons in the Court of Common Pleas. . . .

The supposed conflict concerns statutes regarding ‘Summons Generally’, §§ 10–401, 10–402, et seq., *S. C. Code Ann.* (1962).

Section 10–401 provides:

Civil actions in the courts of record of this State shall be commenced by service of a summons.

The courts of probate are ‘courts of record.’ Section 15–422, *S. C. Code Ann.* (1962).

Section 10–402, provides:

The summons shall be subscribed by the plaintiff or his attorney and directed to the defendant. . . .

Also important, under ‘The Probate Courts’, is Section 15 448 which provides:

How proceedings commenced; procedure.—Proceedings in the court of probate *may be commenced* by petition or complaint to the judge of probate for the county to which the jurisdiction of the subject matter belongs, briefly setting forth the facts or grounds of the application. A summons shall be issued to the defendants in such proceedings. The manner of service, time for answering and other proceedings relating to the trial, except trial by jury, shall conform as nearly as may be to the practice in the Courts of Common Pleas as provided in this Code [emphasis added].

Due to the fact that Section 15–447 contains the words ‘in all cases not expressly provided for by law’; that Sections 10–401, 10–402, et seq. provide that civil actions in the ‘courts of record’ may be commenced by service of a summons (which may be subscribed by the attorney); that courts of probate are ‘courts of record’ (Section 15–422); and that Section 15–422 contains the language ‘may be commenced’, it is the opinion of this Office that a summons must not necessarily be signed and issued by a judge of probate in order to commence an action in probate court.

*2 The general rule is that where there is a conflict between a general statute and a special statute the special statute should prevail. *Criterion Ins. Co. v. Hoffman*, 258 S. C. 282, 188 S. E. 2d 459 (1972). This rule cannot control here, however, since the special statute regarding the courts of probate contains not mandatory language but permissive—‘may be commenced’. Also the statute under which Probate Court Rule 5 was promulgated specifically states that those rules shall control only ‘in all cases not expressly provided for by law.’

Accordingly, there is no conflict as supposed but merely one set of statutes and one set of statutes and rules—which two sets should be construed together so as to make both sets applicable so far as possible. See *West's South Carolina Digest*. Statutes, Key No. 223. No other harmonious construction is possible than that the provisions of Sections 10–401, 10–402, et seq., relating to ‘summons generally,’ must supercede those provisions under ‘The Probate Courts’ and the Probate Court Rules, which relate to ‘summons’. These latter provisions apply only in the alternative

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