

1973 WL 26953 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 5, 1973

*1 Honorable J. William Davenport
Probate Judge
Probate Court of Spartanburg County
County Courthouse
Spartanburg, South Carolina

Dear Judge Davenport:

In your letter of recent date you requested the opinion of this Office as to whether the holding of [In Re McClam's Estate](#), 245 S.C. 315, 140 S.E. 2d 478 (1965), is applicable to executors.

In the McClam case, the petitioner was appointed as Committee for his sister, an incompetent. At the death of his sister he, as one of her heirs at law, filed a petition in Probate Court seeking appointment as the Administrator of her estate, since the deceased died intestate. He was opposed in this request by a brother, sisters and a nephew of the deceased. The Probate Court granted the petitioner's application. However, on appeal, the Circuit Court held that as a matter of law, the petitioner was disqualified to act as Administrator. The Circuit Court reasoned that since the petitioner was her Committee, he would have to make an accounting of his own acts to himself, hence a conflict of interests. ' . . . his disqualification to act arises out of his relationship to the business and affairs of the intestate which he conducted as her Committee.' [Ex Parte Tolbert](#), 206 S.C. 300, 34 S.E. 2d 49 (1944). The Circuit Court then appointed the Citizens and Southern National Bank as administrator. On appeal to the South Carolina Supreme Court, it was held that the position taken by the Circuit Court regarding the issue of conflict of interest was correct. The Court held that a conflict of interest would exist if the petitioner were appointed administrator of the estate of the deceased incompetent after having served as her Committee. But, with respect to the appointment of the Citizens and Southern National Bank as administrator, the Supreme Court disagreed with the lower Court. The Court noted that the granting of letters of administration is not automatic or mandatory, as the person having the statutory priority may not be granted the administration if just cause be given. However, Section 19-403 is mandatory to the extent that letters of administration shall be granted in the order of priority set forth in the statute, provided the applicant is qualified and willing to serve. [Ex Parte Tolbert](#), supra. In the words of the Court:

'The fact that Moseley C. Coleman is not entitled to the administration of his sister's estate in no way prejudices the rights of the intestate's remaining brothers and sisters.' [In Re McClam's Estate](#), supra at 320.

In other words, the fact that one of the qualified class of persons was unacceptable did not render the entire class unacceptable, and the Circuit Court was precluded under Section 19-403 from appointing any other as administrator until it had exhausted all persons within each priority.

Notwithstanding the above, it would appear that the principal reason why executors are not affected by the decision in [In Re McClam's Estate](#) is that the basis of their selection and power is different.

*2 The Common Law doctrine is that an executor derives his authority from the Will by which he is appointed, and not from the probate of such Will, which is held to be only evidence of his right. However, the modern view is that, while an executor's authority is derived primarily from the Will, it is not derived solely therefrom in the sense that mere nomination in the Will standing alone is sufficient to constitute one an executor, but the full powers of an executor come from the court of

probate jurisdiction, which, recognizing and confirming the testator's selection, clothes the executor therein named with plenary authority by issuing to him letters testamentary, which are usually granted in connection with the probate of the Will.

Since the authority and powers of an executor are derived from the Will and not from the probate judge, and the only express statutory restrictions upon a party serving as executor relate to legal capacity, it is the opinion of this Office that the holding of In Re McClam's Estate must be limited specifically to conflicts of interest involving administrators.

Respectfully yours,

Raymond G. Halford
Assistant Attorney General

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