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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

Certiorari to the Court of Appeals
APPEAL FROM RICHLAND COUNTY
Probate Court

Amy W. McCulloch
Probate Judge

Appellate Case No. 2024-001115

Julia B. Brooker, Respondent,

v.

Beacham O. Brooker, Jr., in his official Capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually as a Beneficiary of the Janet B. Brooker Trust, Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Julia B. Brooker, by and through undersigned counsel, files her brief requesting the Court deny the Petition for Writ for Certiorari ("the Petition") because the Petition does not present any special and important reasons warranting reconsideration. *See* Rule 242(b), SCACR; S.C. Code Ann. § 14-8-210. Examination of the South Carolina Court of Appeals Order dated May 8, 2024 ("the Appellate Court Order"), affirming the circuit court's March 22, 2021 Order ("the Circuit Court Order") and the following orders of the Honorable Judge Amy McCulloch: (1) Order on the Equalization Provision found in Janet B. Brooker's pour-over trust ("Equalization Order") (2) Judge McCulloch's Denial of Petitioners' Motion to Reconsider ("Reconsideration Order"), and (3) Judge McCulloch's Order Awarding Attorney's and Professional's Fees ("Fee Order") [collectively the Probate Court Orders], proves this point. After losing before three separate courts, the present Petition is simply a last-ditch effort to have the Court review the consistent and unanimous decisions of the lower courts' construction of the Equalization Provision found in the Janet B. Brooker Trust (the "Trust") simply because the Petitioners disagree with, and stubbornly refuse to accept, the Court of Appeals' rulings, the Circuit Court's ruling, and the Probate Court's rulings. Accordingly, the Petition should be denied.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err by affirming the finding that Settlor intended for the Equalization Provision to account for lifetime gifts made prior to the October 16, 2007, Trust Agreement?

2. Did the Court of Appeals err by affirming the construction of the Equalizing Provision to include lifetime gifts made by Settlor prior to the October 16, 2007, Trust Agreement in lieu of adopting the construction advocated by Mr. Johnson and Mr. Reynolds?

3. Did the Court of Appeals correctly affirm the award of attorneys' fees and professional's fees to Julia Brooker?

FACTS

Janet Bloom Brooker ("Settlor" or "Mother") was the mother of three children: Beacham Owens Brooker, Jr. ("Beacham"), Julia B. Brooker ("Julia" or "Respondent"), and Ellen Brooker Corontzes ("Ellen") [collectively the Children]. (Am. R. 411:18-23). Respondent has never been married and has no children. (Id. 412:10-13). Beacham is married to Elizabeth Brooker ("Beth") and Ellen is married to Arthur Constantine Corontzes ("Dino"), [collectively "Spouses"]. (Id. 412:14-21; 413:14-21). Beacham and Ellen each have two children with their Spouses [individually "Grandchild"; collectively "Grandchildren"].

After the death of her husband in 1990, Mother began making lifetime gifts to her Children, their Spouses, and her Grandchildren. (Id. 543-550). In June 1992, Mother set up a qualified personal residential trust ("QPRT") and deeded her residence in DeBordieu, South Carolina to the Children equally. (Id. 609-628). In May 1997, as part of her estate planning and with the assistance of Mr. Steve Johnson, her estate planning attorney, Mother created a family generation skipping trust for each of the Children, for the benefit of their issue. (Am. R. 415:3-7; 438:4-7). She also paid for the Grandchildren's primary school tuition and contributed to 529(c) college plans for each of them. (Id. 475:11 - 476:13; 543-549; 656-658). Mother intended that such tuition payments and 529(c) contributions be gifts to her Grandchildren. *See* (Id. 450:6-8 (recognizing tuition gift amount could vary depending on college attended by Grandchild); 451:18-19 (referring to 529(c) contributions as gifts); 457:5-19; 543-549 (identifying 529(c) contributions as items found in the 2007 Gift Tax Return provided by Bill Sellars); 571-572 (illustrating discussion of tuition distributions and 529(c) account contributions during meeting about accelerated gift-giving)).

By the fall of 2007, Settlor had gifted the Spouses and the Grandchildren approximately $1 Million (Id. 543-549 & 550). At that time, Mother requested Mr. Johnson again assist her with

estate planning. Mr. Johnson held a meeting with Settlor and the Children on September 25, 2015, to "discuss gifts of assets to children." (Id. 567).[1] At this meeting, Mr. Johnson proposed a plan of accelerated gift-giving by Settlor to the Children and Grandchildren. (Id. 440:8-14). Settlor did not want to agree to a plan that would disadvantage Julia for not having a spouse or children. (Id. 443:6-14). Thus, it was agreed that Julia would be "caught-up", or equalized, for lifetime gifts at Mother's death. (Id. 501:15-502:4).[2] Notes made contemporaneously by Mr. Johnson during the September 25, 2007, family meeting, indicate discussion of recent gifts made by Mother and those she intended to make, including the annual federal tax excluded gift and tuition for the Grandchildren.[3] Based on this discussion, Mr. Johnson's notes indicate his understanding that Mother's intentions would be best achieved through preparation of a " codicil – with [an] equalization provision." (Am. R. 571-572).

Shortly after this family meeting discussing lifetime gifts, Mr. Johnson met with CKO, a paralegal at his firm, and instructed her to draft a codicil setting forth an equalization provision. (Id. 459:2-8). Based on this discussion, CKO drafted a codicil that states:

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[1] Notably, Mr. Johnson's time entry reads "discuss gifts of assets to children." This entry, presumably made by Mr. Johnson following his meeting, is not qualified as "future gifting" or "acceleration of gifting," but rather refers to "gifts" signaling distributions that had already been made and could be made in the future. The codicil – drafted by a paralegal based on instructions given by Mr. Johnson regarding the desire of Mother at the family meeting – illustrates that Mr. Johnson understood "gifts" to include all lifetime gifts. A plain reading of the first and second sentence of Paragraph 1 of the codicil makes clear that "gifts" includes all gifts made "during [Mother's] lifetime" once "*given*" (Am. R. 573-574) (emphasis added).

[2] At the hearing, Beacham and Mr. Johnson refuted that lifetime gifts, as used in the equalization provision, included gifts made prior to execution of the Trust. Mr. William Reynolds, a law partner of Mr. Johnson who did not attend the September 25, 2007, meeting or have discussions with Settlor regarding the same, testified in support of Beacham and Mr. Johnson's position. However, as discussed *supra*, this position is refuted by Settlor's history of treating her children equally, the plain language of the Trust agreement, and additional documentary evidence from Mr. Johnson's firm probative of Settlor's intent at the time the Trust was executed.

[3] On October 1, 2007 – prior to execution of the Trust – Mother gifted $60,000 into each Grandchild's 529(c) account. (Am. R. 543-549).

> I give, devise and bequeath such amount as shall be necessary to equalize for gifts given to any child of mine during my life. Thus, to the extent that I have not equalized for such gifts ***during my lifetime***, I direct that at the time of my death my Personal Representative determine what gifts I made and whether I accomplished equalization and if not then I direct my Personal Representative to make equalizing gifts to my children or to such child's issue, per stirpes.

(Id. 573-574) (emphasis added). This codicil contemplates an equalization provision that accounts for all gifts made during Mother's lifetime and is not limited to just those made following execution of the Trust.

On October 15, 2007 – one day prior to Mother executing her estate documents and nearly two weeks after the codicil had been drafted– Mr. Johnson discarded the codicil, drafted the Trust, and had a call with Beacham. (Id. 564). Thereafter, Mr. Johnson made additional edits to the Trust and Settlor executed the same, as well as a Power of Attorney in the presence of Beacham on October 16, 2007. (Am. R. 564; 577; 592-607).[4] These documents appointed Beacham as Personal Representative in Settlor's Will, Trustee of Settlor's Estate, and granted him Power of Attorney for Settlor.

The Trust divided Mother's estate into three categories for distribution: (1) personal and household effects; (2) Julia's Equalizing Distribution; and (3) the Trust Estate. (Id. 578-579). Mother instructed that her personal and household effects be distributed among her Children "in equal shares." (Id.).[5] She also instructed that after distribution of her personal and household effects, as well as the amount due Julia under the Equalization Provision, the remainder of her

[4] Between the time the codicil was drafted, October 1, 2007, and the execution of the Trust, October 16, 2007, Mr. Johnson has two phone calls with Beacham, one in which Dino, Ellen's husband participated. Neither Mother nor Respondent were included in either call. (Am. R. 564 (documenting calls on 10/1/07 & 10/15/07)).

[5] Settlor could have left written memoranda instructing that her personal and household effects be distributed in an unequal manner. *See* (Id. 578-579). Her election not to exercise this option is further evidence of her desire that all her Children be treated equally.

estate be divided to her Children in "equal shares." (Id. 579). As to the amount due Julia under the Equalizing Provision, Mother expressed her intent as follows:

> (2) **Equalizing Distribution to the Settlor's Daughter, JULIA B. BROOKER.** The Settlor has *previously made lifetime gifts* and intends to continue such gifting program until the date of the Settlor's death to the Settlor's children, the Settlor's issue and spouses of the Settlor's children. Because the Settlor's daughter, JULIA B. BROOKER is not married and has no children or issue, the Settlor intends that at the Settlor's death, an equalizing distribution will be made to the Settlor's said daughter pursuant to the terms of this paragraph *for lifetime gifts made* to such daughter's siblings' spouses or siblings' issue which equalizing distribution will be determined as follows:
>
> (a) From the date of this trust forward the Trustee shall determine the date and the amount of any lifetime gifts made by the Settlor to issue of Ellen B. Corontzes and Beachum [sic] O. Brooker, Jr. as well as the spouses of Ellen B. Corontzes and Beachum [sic] O. Brooker, Jr.
>
> (b) To such amount specified above from the date of such gift an interest rate of five (5%) percent shall be applied to the amount of such gift which interest rate shall continue until this distribution is satisfied and which rate shall not compound.
>
> (c) The sum of (a) and (b) above shall be distributed to the Settlor's daughter, JULIA B. BROOKER if she shall survive the Settlor.
>
> (Am. R. 579) (emphasis added).

Following execution of the Trust on October 16, 2007, and "from [that] date forward" as instructed in subparagraph (2)(a) of the Equalization Provision, Beacham as Trustee was to determine the amount of the lifetime gifts to be made on behalf of Settlor. Once the Trust was executed, Beacham, exercising his authority as Settlor's Power of Attorney, continued to distribute tuition for the Grandchildren, as well as the annual federal tax excluded gifts to the Children, the Spouses, and the Grandchildren. (Id. 483:20-487:25). For purposes of the Equalizing Provision, distributions for tuition were considered lifetime gifts.

Following her death on April 16, 2015, (Id. 39), the Children had a meeting with Mr. Johnson that included discussion of the lifetime gifts made by Settlor. During this meeting,

Johnson used the phrase "lifetime gifts" which Julia understood to mean all gifts made during Mother's lifetime – not just those after execution of the Trust. (Id. 503:13-504:4). Additionally, notes made by Mr. Johnson's paralegal Billie McMahan following Settlor's death illustrate her understanding that Mother intended for "lifetime gifts," as used in the Equalization Provision, to include those gifts made prior to the Trust. (Id. 629; 467:24-468:21). Specifically, the estate paralegal's notes identified the following "needed information" for preparation of the estate tax return:

> 1. Need to know the amount of annual exclusion gifts to the children of Beach and Ellen, as well as the spouses of Beach and Ellen, beginning in May 1997. The amount of these gifts will accrue interest at 5% from the date of the gift until the amount is distributed to Julia. (Id. 629).

In his role as Trustee, Beacham initially offered Respondent a distribution of approximately $300,000 to satisfy the Estate's obligation under the Equalization Provision. (Am. R. 504:15-505:5). This figure was corroborated by Mr. Johnson's acknowledgement that his initial calculation of the amount owed Julia was $311,000. (Id. 467:13-19). Wanting to understand how Beacham calculated his initial offer, Julia asked for access to the backup documentation used to arrive at this figure. When she was unable to get this information from Beacham, Julia hired attorney David Siddons to help her get the same.[6] (Id. 504:19-507:9). Attorney Siddons requested the information on Julia's behalf and only after receipt of some of the requested information, did Julia learn that each Grandchild received a $60,000 gift into his/her 529(c) account – totaling a $240,000 distribution - on October 1, 2007, prior to the execution of the Trust. (Id. 505:10-506:3; 543-549).

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[6] Until her death, Mother saved every account statement at her home. Following her passing, Beach and Ellen destroyed these documents when the Children were cleaning out her home. Thus, Julia was unable to rely on the same in examining whether the proposed distribution to her under the Equalizing Provision was fair. (Am. R 506:22-507:14).

Subsequently, Mr. Johnson, as attorney for Beacham as Trustee, conveyed a new calculation of $529,528 to Attorney Siddons as the correct amount owed Julia under the Equalizing Provision. (Id. 656-658).[7] A spreadsheet prepared by Mr. Johnson and attached to an email dated February 24, 2016, reflects the gifts included in his calculation from 2007 to 2015. (Id. 444:14-20; 447:14-24; 474:2-12; 656-658). This is the most Mr. Johnson or Beacham ever suggested that Julia was entitled to under the Equalizing Provision prior to her filing her Petition for Declaratory Relief ("Petition") on March 17, 2017. (Id. 508:15-17; 100-129). Moreover, she was never offered a check for this amount. (Id. 454:21-455:3; 477:6-12; 510:17-19).

Julia's decision to retain her present counsel and file the Petition was only made after she was repeatedly denied the underlying statements used to support the calculation proposed by Beacham. (Am. R. 507:17-508:3). As part of their representation of Julia, counsel issued subpoenas to various entities in an effort to obtain documentation needed to identify all lifetime gifts made by Settlor to her Children, the Spouses, and the Grandchildren.[8] This information was then provided to Mr. George DuRant, a forensic accountant retained by Julia to determine the amount owed to her under the Equalization Provision of the Trust. Mr. DuRant relied upon this information to generate a detailed report identifying every lifetime gift made by Settlor to the Spouses and her Grandchildren. (Id. 543-549; 417:18-418:23 (documents reviewed and individual gift totals); 428:25-429:23 (review of estate tax returns); 432:10-25 (same)). Mr. DuRant also provided a summary chart that calculated gift totals, with interest, made to the Spouses and Grandchildren before and after execution of the Trust, as well as the total of all identified lifetime

[7] Respondent's Exhibits 1 and 4 contain the same spreadsheet. (Id. 632; 656-658).

[8] It was only after retaining current counsel and obtaining backup documentation through subpoenas that Julia learned Hammond tuition was not included in the calculation set forth in Respondent's Exhibits 1 and 4. (Am. R. 508:18-509:10).

gifts. (Id. 550; 423:7-425:18). As evidenced by Mr. DuRant's summary chart, and before interest, *Settlor made approximately $1.8 Million dollars in lifetime gifts to the Spouses and Grandchildren* from the time she began making gifts (following her husband's passing in 1990) until the date of her death in April 2015. (Id. 550). Approximately $1 Million of the $1.8 Million was gifted *prior* to execution of the Trust. (Id. 543-549 & 550).

Based on the plain language of the Trust, as well as the evidence before the probate court, including Mother's express desire that Julia not be disadvantaged because she did not have a spouse or children, Judge McCulloch held that "lifetime gifts" as used in the Equalization Provision meant all gifts made by Settlor during her lifetime. (Id. 39-40, ¶¶ 8-13). Accordingly, the probate court, using the figures provided by Mr. DuRant and following the formula set forth in subparts (a)-(c) of the Equalization Provision, found that Julia was entitled to an equalization distribution of $1,471,031.94. (Am. R. 40 ¶¶ 14-18).[9]

Subsequently, Julia filed an affidavit in support of an award of attorney's and professional's fees. The Petitioners opposed such award, challenging the amount of the fees.

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[9] The Petitioners note that Mr. DuRant did not determine whether each transfer was a gift or not and instead he simply counted and identified each transfer as a gift. (Pet. at 9). However, the Petitioners waived any argument that the gifts identified by Mr. DuRant were not in fact 'gifts' to be included in the Equalization Provision. Following the probate court's instruction to Beacham to review all records from September 2007-2015 (Am. R. 527), the Petitioners conceded that Mr. DuRant's calculation of lifetime gifts made post-Trust, including those smaller gifts identified by Mr. DuRant from the First Community records, was accurate (Id. 488:14-20; 489:24-496:17). Having conceded the post-Trust calculation was correct; it is unclear how the Petitioners now take issue with gifts included in the pre-Trust calculation done by Mr. DuRant; a calculation in which gifts were identified and totaled in the exact same manner as that utilized in his post-Trust calculation. (Id. 419:7-421:16) (explaining identification of all gifts on Pet. Ex. 3 (Id. 543-549)).

Finally, if the Petitioners took issue with Mr. DuRant's identification of gifts, they had eight months prior to the hearing to raise the same. Mr. DuRant provided his initial report and workpapers, as well as the underlying documents supporting the same with his initial report to the Petitioners in May 2018. (Id. 433:1-5). For the Petitioners to cry foul when they made no effort to compute a total for pre-Trust gifts before or during the hearing, when such information was readily available for them to do so, is disingenuous at best.

(Id. 335-340). Following examination of the fees incurred by both parties, the probate court found them comparable. (Id. 29-30). The probate court granted Respondent's motion and directed the fees be paid from the corpus of the Trust.

ARGUMENT

As is evidenced from the analysis below, none of the questions presented by the Petitioners involve a special or important reason warranting the Court grant the Petition. The authority to review a decision of the Court of Appeals is discretionary and "will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the court of appeals; the decision of the court of appeals is in conflict with a prior decision of this Court; substantial constitutional issues are directly involved; or a federal question is included, and the decision of the court of appeals conflicts with a decision of the United States Supreme Court." *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020) (referencing Rule 242(b), SCACR); *see also* S.C. Code Ann. § 14-8-210 ("Certification is appropriate where the case involves an issue of significant public interest or a legal principle of major importance, or in other cases the court considers appropriate."). As is clear from the Petition, the Petitioners seek review of the lower court's construction of the Trust based on its view of the preponderance of the evidence contained in the record. In short, the Petitioners disagree with the weight afforded the testimony of Mr. Johnson. However, such disagreement does not constitute a special or important reason warranting further appellate review. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE FINDING THAT SETTLOR INTENDED FOR THE EQUALIZATION PROVISION TO ACCOUNT FOR LIFETIME GIFTS MADE PRIOR TO THE OCTOBER 16, 2007, TRUST AGREEMENT.

South Carolina case law dictates that interpretation of the language in a testamentary trust must be reasonably supported by a plain reading of the document as a whole. *See Epworth Children's Home v. Beasley*, 616 S.E.2d 710, 715 (S.C. 2005); *see Barnacle Broad., Inc. v. Baker Broad., Inc.,* 538 S.E.2d 672, 675 (S.C. Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). The primary objective in construing the language of a trust is to discern the settlor's intent. *See Epworth Children's Home*, 616 S.E.2d at 715 (S.C. 2005) (citing *Bowles v. Bradley*, 461 S.E.2d 811, 813 (S.C. 1995)). Additionally, the Court may consider all pertinent facts and circumstances surrounding the creation of the trust to ascertain the settlor's intent. *See Harper v. S.C. Tax Comm'n*, 226 S.E.2d 699, 701–02 (S.C. 1976); *Columbia East Assocs. v. Bi–Lo, Inc.,* 386 S.E.2d 259, 261–62 (S.C. Ct. App. 1989) (holding that when interpreting a contract, courts must endeavor to determine "the situation of the parties, as well as their purposes, at the time the contract was entered.")

Applying this law to the facts of the present case, the Court of Appeals aptly reasoned that

> "Decedent's intent to treat Julia equally necessarily required including lifetime gifts that predated the Trust. The plain language of the equalization clause does not provide a clear answer, but equal means equal, and as we noted above, it is uncontested that Decedent intended to not only treat all of her children equally, but also to align Julia with the children and spouses of Beachman and Ellen. *See Bowles*, 3190 S.C. at 380, 461 S.E.2d at 813 ("The primary consideration in construing a trust is to discern the settlor's intent.")

(App. Ct. Order at 2). A review of the Trust as a whole supports the Court of Appeals' affirmation of Judge McCulloch's ruling that the phrase "[f]rom the date of this trust forward" does not limit

lifetime gifts to those made after the date of the Trust, but instead signals the beginning of Beacham's duties as Trustee. (Am. R. 26). As an initial matter, the phrase "equal shares" appears two times in Trust provisions other than the equalizing distribution. (Id. 579-580). The repetition of this phrase is evidence Mother intended that her Children receive equally under the Trust. (Id. 24-25). Moreover, the Petitioners admit that historically Settlor treated them equally. (Appellants' Ct. of App. Br. at 6) ("Janet had three children: Beach, Ellen, and Julia. At all times and by all accounts, she treated them equally").

Additionally, that Mother intended for this provision to apply to all lifetime gifts is evidenced by her acknowledgement in the first sentence of the applicable provision that she "*previously made lifetime gifts* and intends to continue such gifting program until the date of the Settlor's death to the Settlor's children, the Settlor's issue and spouses of the Settlor's children." (Am. R. 579)) (emphasis added). If Settlor had intended otherwise, the Trust language would have been worded in the future tense, such as "Settlor intends that at the Settlor's death, an equalizing distribution will be made to the Settlor's said daughter pursuant to the terms of this paragraph for lifetime gifts **[*to be made*], [*that will be made*], [*that Settlor intends to make pursuant to the gifting program*]** to such daughter's siblings' spouses or siblings' issue." However, such language does not exist. Instead, the Trust uses the past tense of the verb "make," stating that "and equalizing distribution will be made to the Settlor's said daughter pursuant to the terms of this paragraph for **lifetime gifts made** to such daughter's siblings' spouses or siblings' issue." As correctly held by Judge McCulloch, this phrase "is evidence that the Settlor intended that the previous lifetime gifts be included in the equalization calculation for Julia and comports with her [express] desire for Julia to be treated the same." (Am. R. 40, ¶13).

Moreover, the preponderance of the evidence presented at the hearing clearly illustrates that Mother's intent was that all of her Children be treated equally, and thus, she intended for the Equalization Provision to include lifetime gifts made prior to the execution of the Trust Agreement on October 16, 2007. In support of this conclusion, the probate court properly relied on evidence that Settlor always treated her Children equally and her intent that Julia would not be disadvantaged for not having a spouse or issue. (Id. 39, ¶¶ 8-11). Indeed, the Petitioners concede that "at all times… [Settlor] treated them equally." (Appellants' Ct. of App. Br. at 6). Mr. Johnson, who testified his conversations with Settlor only ever involved post-Trust gifts, admittedly was not aware there was approximately $1 Million of gifting done by Mother prior to execution of the Trust. (Am. R. 466:7-13). Nor did Mother ever explicitly instruct Mr. Johnson that the Equalization Provision was not to include pre-Trust gifting to the Spouses and Grandchildren. (Id. 458:23-459:1). Finally, documents prepared by two estate paralegals working for Mr. Johnson on Mother's estate illustrate an operating knowledge that pre-Trust gifts were to be included in the Equalizing Provision. (Id. 573-574 & 629).

The Petitioners even conceded in their brief to the Court of Appeals that Mother intended to treat her three children equally through her Trust. (Appellants' Ct. of App. Br. at 6). Despite this concession, and uncontradicted evidence of Settlor's intent, the Petitioners urge the Court to adopt an interpretation of the Equalization Provision that would disadvantage Julia and limit lifetime gifts to those occurring after the date of the Trust.[10] In support of this position, the

[10] Notably, Mr. Johnson and Beacham disagreed on whether Settlor intended for the 529(c) contributions and Hammond tuition to be included as lifetime gifts. This is true even though both were present at the family meeting on September 25, 2007, in which lifetime gifting of these items was discussed and is reflected in Mr. Johnson's notes. (Am. R. 571-272). It was Mr. Johnson's understanding both items constituted gifts under the Equalizing Provision (Id. 450:6-8; 451:18-19; 457:5-19). Beacham took the position that a strict reading of the Equalizing Provision would not include the 529(c) contributions ($240,000) made on October 1, 2007, because they pre-dated the

Petitioners argue that the probate court's interpretation of the phrase "[f]rom the date of this trust forward" renders this language redundant and meaningless and such a result is "disfavored by the rules of contract interpretation." (Pet. at 14-15). However, this position should be rejected because when interpreting a trust, rigid application of a rule of construction should not be used as a mere formalism when other indices of intent are present. *See Harper*, 267 S.C. at 150, 226 S.E.2d at 702; *see also Epworth Children's Home,* 616 S.E.2d at 715 (noting that "the rules of construction are of secondary importance to the need to ascertain what the testator meant by the terms used in the written instrument itself"); *Allison v. Wilson*, 411 S.E.2d 433, 435 (S.C. 1991). Thus, Judge McCulloch properly rejected the Petitioners' argument because it advocates a construction that prioritizes formality over effectuating a construction that comports with the clear evidence of Mother's intent that all of her children be treated equally.

The Petitioners also argue that the Court of Appeals' ruling is erroneous because it does not "appreciate…that Janet was keeping her children equalized by her own means before 2007." (Pet. at 15.) In support of this contention, the Petitioners attempt to say Julia was "equalized" pre-Trust by citing to several trips she took with Settlor prior to execution of the Trust in which Settlor paid for Julia's flights and hotel expenses. [11] (Id.; *see also* Pet. at 20 & n.7, *infra*). However, the record easily discredits this argument. First, Settlor also "gave trips to the other family members" and treated everyone evenly when it came to giving trips. (Am. R. 512:22-23; 513:4-21). Second, Settlor made approximately $1M in gifts to the Spouses and Grandchildren prior to the Trust. Even

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Trust and that distributions made for the Hammond tuition of Beach and Ellen's children did not constitute lifetime gifts. (Id. 475:8-477:1).

[11] Settlor did not pay for Respondent's travel expenses on every trip cited by the Petitioners. (*Compare, e.g.,* Am. R. 512:11-12 (Respondent paid for trip to Spain) *with* Pet. at 20 & n.7's (representing Settlor paid for Respondent's trip to Spain)). Nor is there any evidence in the record that Settlor paid for all of Respondent's travel expenses incurred in each trip, but rather covered flights and hotel expenses incurred during several trips.

if Settlor paid more of Julia's travel expenses than she did for Beach, Ellen, and their respective families, there is zero evidence that such discrepancy equates to the $1 Million in lifetime gifts made to the Spouses and Grandchildren prior to the Trust. Moreover, the Petitioners had ample opportunity to present the probate court with an accounting of any pre-Trust gifts they contend "equalized" Julia, but they did not. They cannot now allege error predicated on unaccounted travel expenses and unsupported notions "Janet could have equalized the children in other manners that she kept to herself." (Pet. at 15). Accordingly, this argument should be rejected.

Finally, as recognized by the Court of Appeals, the fact that Judge McCullough's ruling does not result in a windfall to Beacham, Ellen, or Julia is further evidence that it accomplishes the Settlor's intent: that her Children be treated equally. (App. Ct. Order at 1-2). At the evidentiary hearing, Respondent argued to the probate court that a plain reading of the Equalization Provision required a distribution to Julia equal to the sum of lifetime gifts to Beacham's and Ellen's spouses and grandchildren. However, in reading the document as a whole and examining the evidence before her, the court rejected this construction because it would result in a windfall to Julia. Similarly, the probate court rejected the Petitioners' position that pre-Trust gifts should not be included in the equalizing distribution, because it necessarily resulted in Beacham and Ellen each receiving a $1 Million windfall. Instead, the probate court took the total amount of pre-Trust and post-Trust lifetime gifts to Beacham's and Ellen's spouses and children and divided that amount by two to arrive at what Julia's fair share should be when compared to what her siblings' families received. (Am. R. 40). This calculation by the probate court makes sure Julia is not "disadvantaged" for never marrying or having children and illustrates how the well-reasoned construction of the probate court effectuates the Settlor's intent. (Id. 402:18-404:6).

Based on Judge McCullough's well-reasoned rulings relying on the evidence above, the Court of Appeals properly affirmed the probate court ruling that the Settlor intended for lifetime gifts to predate the Trust. (App. Ct. Order at 1-2). Accordingly, the Petition should be denied.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE PROBATE COURT'S CONSTRUCTION OF THE EQUALIZING PROVISION TO INCLUDE LIFETIME GIFTS MADE BY SETTLOR PRIOR TO THE OCTOBER 16, 2007, TRUST AGREEMENT IN LIEU OF ADOPTING THE CONSTRUCTION ADVOCATED BY MR. JOHNSON AND MR. REYNOLDS.

The Petitioners incorrectly assert that the Court of Appeals erred in affirming the probate court's construction of the Equalizing Provision because there was no "competent evidence" to support the finding that the Equalization Provision accounted for lifetime gifts made prior to October 16, 2007. (Pet. at 16-17). The Petitioners argue that the only "admissible and competent testimony regarding the Settlor's intent" is that of Mr. Johnson and Mr. Reynolds. Thus, the Petitioners contend that because the Court of Appeals affirmed the finding that "lifetime gifts" included pre-and post-Trust gifts, it necessarily ignored Mr. Johnson's testimony, thereby erring in its reasoning. The Court should reject this argument because Mr. Johnson's testimony, when considered in conjunction with the other testimony and documentary evidence properly before the probate court – *including notes and records from Mr. Johnson and his employees at the time the Trust was created* – support the Appellate Court Order. Thus, the same should be affirmed.

While *de novo* review is the broadest form of appellate review, "it does not require the Appellate court to disregard the findings below or ignore the fact that the trial Judge is in a better position to assess the credibility of witnesses." (Am. R. 10 (citing *Dorchester Cty. Dept. of Soc. Servs. v. Miller*, 477 S.E.2d 476, 486 (S.C. Ct. App. 1996)). To obtain reversal, the Petitioners are required to illustrate the Court of Appeals committed error. *Id.* As evidenced by the Appellate Court Order, as well as the Circuit Court Order, this requires more than mere disagreement with

the weight afforded Mr. Johnson's and Mr. Reynold's testimony.[12] There was ample evidence, as set forth below, from which the Court of Appeals properly concluded that "lifetime gifts" included gifts prior to creation of the Trust. Accordingly, the Court of Appeals correctly affirmed the probate court after finding that the preponderance of the evidence before the probate court supported the probate court's construction of the Equalizing Provision.[13] (Order at 1-2).

A. Julia Brooker

Julia testified that at both meetings with Mr. Johnson, she was led to believe that she would be equalized for all lifetime gifts made to her siblings, as well as their spouses and children, and not just those occurring after the date of the Trust. (Am. R. 501:15-502:1). Julia testified that Mr. Johnson "talked about that [M]other was going to exaggerate [*sic*] gifts, and that what [M]other was going to do is catch me up at the end." (Id. at 501:23-502:1). Following this testimony, Julia again confirmed that her understanding was based on what "Steve said." (Id. 502:3-4). She then testified that "she was led to believe" in both meetings with Mr. Johnson – including the one after Settlor's death - that the Equalizing Provision would include all lifetime gifts made to the Spouses and Grandchildren. (Am. R. 503:13-504:4). Finally, she testified that her mother paid for her flights and hotels on several trips and that Settlor treated everyone evenly when it came to giving

[12] On this point, as to the weight to be afforded Mr. Johnson's testimony, the Petitioners have cited to a string of cases from other jurisdictions assigning significant, and in some cases paramount, weight to the testimony of the drafting attorney when determining the intent of a settlor. (Pet. at 17-18). However, unlike those cases, and as discussed in Part II(B) *infra*, the drafting attorney's testimony in this case was impeached by prior deposition testimony and contradicted by notes made by Mr. Johnson, as well as notes and a codicil prepared by others at his firm, and his lack of awareness that Mother had gifted over $1 Million to Beach and Ellen's spouses and children prior to the execution of the Trust. Furthermore, the Petitioners concede that Mother sought to treat all her children equally, and that Julie not be disadvantaged because she was unmarried and childless.

[13] The Court of Appeals also concluded that the portion of Julia's testimony that the Petitioners challenged as being improperly admitted in violation of the Dead Man's statute was cumulative of other properly admitted testimony. Thus, to the extent it was error to admit such testimony, the error would be harmless. (App. Ct. Order at 2-3).

Respondent, the Petitioners, the Spouses, and the Grandchildren trips. (Am. R. 511:23-512:23; 513:4-21).

B. Steve Johnson

The Petitioners' recitation of Mr. Johnson's testimony, (Pet. at 19-20), notably excludes his admission that Mother never expressed a desire to him that lifetime gifts made prior to the Trust be excluded from the calculation of the Equalization Provision. (Am. R. 458:17-459:1). It also omits that Mr. Johnson was unaware that Settlor had made approximately $1 Million dollars in gifts to the Spouses and Grandchildren prior to the date of Trust. (Id. 466:7-13). Given the historically equal treatment of her Children (Id. 415:16-416:5, 493:14-25; 513:4-17), there is simply no explanation, nor can the Petitioners point to evidence of the same, as to why Settlor's intent - that Julia not be disadvantaged because of gifts made to the Spouses and Grandchildren - would only begin upon execution of the Trust.

Moreover, Mr. Johnson's credibility was impeached by Respondent's counsel using Mr. Johnson's deposition testimony at the hearing. Mr. Johnson testified to having a specific recollection of discussing the Equalizing Provision with Settlor and telling Settlor that "we'll catch Julia up at death for gifts made from the Trust Agreement forward so she won't be prejudiced." (Id. 463:11-16). However, in testimony a year prior, Mr. Johnson did not disclose this now-specific memory in response to a question warranting the same if true. Nor could he recall if he used the phrase "lifetime gifts" in his conversations with Settlor. (Id. 464:2-465:7). That Mr. Johnson somehow developed this specific recollection during the year between his deposition (January 2018) and the hearing before the probate court (February 2019) is probative as to the weight the probate court should assign to his hearing testimony.

C. William Reynolds

Not surprisingly, Mr. Reynolds' testimony concerning Settlor's intent, mirrors that of his law partner, Mr. Johnson. Mr. Reynolds testified at the hearing that his discussions with Mr. Johnson about the Equalizing Provision did not include mention of retroactive gifts. (Am. R. 480:22-24). His understanding of Mother's intent does not arise from a conversation with Mother, but rather comes from a ***mere 15 minutes*** of involvement with her Trust, during which time he not only had a discussion with Mr. Johnson but also reviewed and made edits to the Trust. (Id. 479:10-20; 482:19-20; 561). The probate court is entitled to consider his testimony in light of his limited involvement and given his relationship with Mr. Johnson. That the Petitioners do not agree with the weight afforded to his testimony, nor that of Mr. Johnson, does not warrant reversal of the probate court's ruling.

D. Codicil and Paralegal's Notes

The codicil referenced in Mr. Johnson's notes during the family meeting on September 25, 2007 (Id. 571-572) corroborates Julia's testimony that the Equalization Provision was to include lifetime gifts made by Mother prior to execution of the Trust. Mr. Johnson admits the codicil he instructed his paralegal, CKO, to draft right after the September 25, 2007, meeting does not make a distinction between lifetime gifts made before and after creation of the Trust. (Id. 459:2-461:3). Rather its expresses Settlor's desire that an equalizing distribution be made to Respondent in an amount to equalize her for gifts made "during [Settlor's] life." (Id. 573-574).

Mr. Johnson attempts to discount the weight that should be afforded the codicil by stating it was drafted by a paralegal and upon receipt, he deemed it inadequate and went to his software to draft the Trust Agreement. As an initial matter, the codicil was drafted based on instructions Mr. Johnson gave to the paralegal right after the family meeting in which Julia says "lifetime gifts"

as used in the Equalizing Provision included those gifts made prior to execution of the Trust. (Am. R. 459:2-13). Additionally, per the time records of Mr. Johnson's firm, the codicil was drafted in its entirety on October 1, 2007. It was not until two weeks later, on October 15, 2007, *after receiving a call from Beach the day before Settlor would execute the Trust*, that the Trust containing the Equalization Provision the Petitioners argue only applies to post-trust gifts, was drafted to replace the codicil that accounted for pre- and post-Trust gifts. (Id. 564). Thus, the insinuation in Mr. Johnson's testimony that he reviewed the codicil when it was available from his paralegal on October 1, rejected the same, and promptly drafted the Trust is refuted by the two-week lapse of time between the creation dates of the documents.

Notes from a second paralegal working for Mr. Johnson on Settlor's estate matters, Ms. McMahan, also corroborate Julia's position that Settlor intended for the Equalizing Provision to include gifts made prior to October 16, 2007. (Id. 629). These notes, made after Settlor's death in 2015, are independent evidence that corroborate Julia's testimony that following her mother's death she was again told in a meeting with Mr. Johnson that lifetime gifts included those made before the execution of the Trust. (Id. 501:20-502:1; 503:13-20). Moreover, the notes contemplate going back to May 1997 – the month in which Mother established generation skipping family trusts for each of her Children. (Id. 415:3-7; 438:4-7). Such an estate scheme benefits her Children with issue - Beach and Ellen, not Julia. Thus, it would be logical for the paralegal to earmark this date when inventorying lifetime gifts as part of a calculation to make sure Julia was not disadvantaged for being unmarried and without issue.

In short, work product of two separate employees of Mr. Johnson, who unlike Mr. Reynolds spent more than 15 minutes on Mother's estate planning, illustrate a working understanding that Mother's intent was to include pre-Trust gifts in the Equalizing Provision. This

documentary evidence, in addition to Mr. Johnson's ignorance of Settlor's extensive prior lifetime gifting, his testimony regarding Settlor's express desire that Julia not be disadvantaged, and other testimony and documents evidencing Settlor's equal treatment of her children during her lifetime is all evidence which the probate court properly relied on when construing the Trust. Accordingly, the Court of Appeals did not err in affirming the probate court's interpretation of the Equalization Provision and the Petition should be denied.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE AWARD OF ATTORNEYS' AND PROFESSIONAL'S FEES TO JULIA BROOKER.

"In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." S.C. Code Ann. § 62-7-1004. Judge McCulloch correctly ruled that Respondent's attorneys' and professional's fees should be paid from the corpus of the Trust because Respondent's construction of the Equalizing Provision was supported by a preponderance of the evidence and a reading of the plain language of the Trust as a whole. Such ruling is not only equitable given the Petitioners' comparable fees were paid out of the corpus of the Trust but is also just when examining the timeline of events leading up to and requiring Respondent's retention of these services.

Julia brought the present action only after Beacham failed to fully comply with her numerous requests for the documents underlying Mr. Johnson's calculation of the equalizing distribution. In fact, it was not until Julia retained counsel that Beacham increased his initial, undocumented, equalizing distribution calculation of $300,000 to over $500,000. (Am. R. 505:3-506:8). Such increase coincided with Attorney Siddons discovering a distribution of $240,000 to the Grandchildren's 529(c) accounts following the September 25, 2007, family meeting. Even

with Attorney Siddons' assistance, the email correspondence presented at the hearing illustrates that Julia still did not have all the documents she requested and should have been provided in August of 2016 – over a year after Settlor's passing. (*See, e.g.,* Am. R. 630 (illustrating she still had not been provided with all account statements)).

It was not until Julia retained present counsel and filed the Petition that she was able to obtain much of the information she requested.[14] Once she had the information, she then retained Mr. DuRant, a CPA, to review the records to identify all lifetime gifts made by Settlor. This exercise, for which Julia incurred over $60,000 in fees, was necessary for Julia to evaluate Beacham's calculations. As correctly recognized by the probate court, Julia's unwillingness to agree to Beacham's calculation until she was provided records to evaluate its validity was "logical" and the action of "a good business-minded person." (Id. 497:14-498:2).

Moreover, despite Mr. DuRant providing his initial report and the underlying documents supporting the same to the Petitioners in May 2018, Beacham made no attempt to validate his calculations. Even putting aside pre-Trust lifetime gifts, it was not until the probate court ordered him as part of his fiduciary duty to prepare a spreadsheet of post-Trust lifetime gifts based upon his review of all of the account statements that he engaged in such exercise. (Id. 527). Julia should not be punished for seeking legal and professional services that were necessary because of Beacham's dilatory behavior in providing her with records and his overall failure to fulfil his fiduciary responsibility to Julia as Trustee.

The Petitioners argue that Respondent's award for fees should be reduced because the probate court did not adopt Respondent's construction *in totem*. (Pet. at 21). However, this

[14] The attorneys' fees sought by Respondent do not include those she incurred with Attorney Siddons.

argument is without merit because Respondent was successful on the central issue driving this case: whether pre-Trust gifts should be included in the Equalizing Provision. Almost all of the testimony, documentary evidence, and briefing on the plain language of the Trust focused on whether the Equalizing Provision accounted for pre-Trust gifts. This issue is what accounts for Respondent's fees which are comparable to those incurred by the Petitioners in this matter. (Am. R. 30).[15]

Even though the Petitioners were not successful in depriving Julia of a distribution that included pre-Trust lifetime gifts to the Spouses and Grandchildren, their fees were nonetheless paid from the corpus of the Trust. Given Respondent's success on the central issue in this case, it would be patently unfair to require Respondent to personally pay for the fees she incurred. This is especially true, whereas here, the remainder of the trust estate will be distributed evenly between the Children after the equalizing distribution is made to Respondent and "having the Trust be responsible for some attorney's fees advantages some beneficiaries over others, reducing the amount of corpus left to be distributed to all beneficiaries." (Id. 30). Such a result is inequitable. Accordingly, the Court of Appeals' affirmance of the probate court's award of attorneys' and professional's fees to Julia was proper and the Petition should be denied.

CONCLUSION

Based on the preponderance of the evidence presented at the hearing and in conjunction with the plain language of the Trust, the Court of Appeals correctly affirmed the probate court's

[15] Following a hearing on the Motion for Attorneys' and Professional's fees, in which the Petitioners objected to the amount of fees incurred by Respondent, Judge McCulloch instructed each party to submit detailed time entries to her for *in camera* review. The same were provided, and as evidenced in her Fees Order, were found to be comparable. If requested, Counsel will submit these time entries for *in camera* review by the Court.

construction of the Equalization Provision. Additionally, given the inequity that would result from requiring Respondent to pay the fees she incurred when the Petitioners' fees were paid from the corpus of the Trust, the Court of Appeals correctly affirmed the probate court's award of fees to Respondent. Accordingly, because the Petition does not present any special or important reasons for review of the Appellate Court's Order, the same should be denied.

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