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

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S.C. SUPREME COURT

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

Amy W. McCulloch
Probate Judge

Supreme Court Case No. 2024-001115

Julia B. Brooker,……Respondent

v.

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

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. Did the Court of Appeals Err When It Affirmed that the Trust is Ambiguous and that Pre-Trust Gifts Should be Included in the Equalization Distribution Even Though the Trust Agreement Unambiguously Provides that Gifts Should be Calculated from "the [D]ate of [T]his [T]rust [F]orward"?

II. Did the Court of Appeals Err When It Affirmed the Finding that Ignores the Testimony of the Settlor's Drafting Attorney Regarding the Settlor's Intent Behind the Equalization Provision?

III. Did the Court of Appeals Err When It Affirmed an Award of Attorney's Fees When the Sole Competent Evidence Supports that Only Post-Trust Gifts Should be Considered in the Equalization Distribution?

INTRODUCTION

This is a case about a mother trying to treat her three children equally in her estate planning, while trying to decrease the estate's tax liability due to soaring values of her largest asset, Lockheed Martin stock. The mother is Janet Brooker ("Janet"), and the three children are Beacham Brooker Jr. ("Beach"), Ellen Corontzes ("Ellen"), and Julia Brooker ("Julia"). The estate plan ("Trust Agreement") and the estate planner (W. Steven Johnson, Esquire) state that she intended for all of her children to be treated as equally as possible through this new estate plan, just as they have been treated in the past. The major change in the estate plan was that the spouses of the children and the grandchildren of Janet were now going to receive large gifts that fell under the annual gift tax exclusion.[1] In other words, Janet was now going to include spouses in her estate plan (when prior she had been giving only to her children in equal shares and to her grandchildren periodically) because she needed to engage in an aggressive gifting system. She wanted to include other recipients of her wealth to lessen the value of her estate, but not to the detriment of any of her three children.

To ensure that no child was disadvantaged, she stated that her unmarried, childless daughter, Julia, would receive an equalization distribution to make her whole as a result of this new, aggressive gifting program. The Trust Agreement provided that "from the date of the trust forward" gifts to spouses and grandchildren were to be calculated, and then after Janet's death, Julia was to receive her share of funds that she would have received if she had children and a spouse. To reach this result, the co-trustees (Janet and Beach, and then only Beach after Janet's death) were to take all gifts to the spouses and grandchildren given under this new aggressive

[1] Prior to the Trust Agreement, the grandchildren received annual exclusion gifts, but not every year. (App. 552-555.) From the date of the Trust Agreement forward, the grandchildren were going to receive the annual exclusion gift every year.

gifting program, total them, divide them in half (one half representing Beach's share for his wife and children and the other half representing Ellen's share for her husband and children), then 5% interest was added. An example would look like the following:

Child	**Gifts to Children from Date of Trust**	**Gifts to Spouse from Date of Trust**	**Gifts to Grandchildren from Date of Trust**	**Total of Julia's Equalization Distribution (less interest)**	**Total Gifts at Death of Mother**	**Total Gifts Received with Equalization Distribution**
Beach	$1MM	$100,000	$200,000		$1.3MM	$1.3MM
Ellen	$1MM	$100,000	$200,000		$1.3MM	$1.3MM
Julia	$1MM	$0	$0	$300,000	$1MM	$1.3MM

This methodology was drafted by Mr. Johnson and was agreed to by Janet. But Julia objected. In contravention of the import and intent of the aggressive gifting program, Julia claims she is entitled to a calculation including all payments (regardless of whether they were gifts) conveyed to spouses or grandchildren, pre- or post-Trust. This could include a $20 birthday present to a grandchild. Julia claims she is entitled to a credit for a portion of that payment. Stated simply, every penny conveyed to any grandchild or spouse must be accounted for and credit for such pennies must be given to Julia, even though she may have received the equivalent penny.

This argument contradicts the language of the Trust Agreement and the testimony of Mr. Johnson. The facts and the law support only two conclusions. First, the Trust Agreement unambiguously provides only gifts from the date of the trust forward are to be considered in the equalizing distribution to Julia because of the language "from the date of this trust forward." Second, to the extent the Trust Agreement is ambiguous, Mr. Johnson's testimony that Janet only wanted gifts "from the date of the trust forward" to be considered in the equalization distribution is dispositive. The Trust Agreement and the testimony of Mr. Johnson are the only competent sources of evidence that may be considered by this Court. These two sources necessarily lead to

the conclusion that the gifts included in the calculation of the equalization distribution begin on the date of the execution of the Trust. Julia cannot look before this date in an attempt to increase her share so that she receives more than her two siblings.

STATEMENT OF THE CASE

This appeal originated from a Petition for Declaratory Relief filed in Richland County Probate Court on March 17, 2017 by Julia against Beach, in his official capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust and Ellen, individually as a Beneficiary of the Janet B. Brooker Trust. (App. 101-130.) The petition sought relief based on the interpretation of the Trust Agreement signed by Janet, the parties' mother. Beach and Ellen filed their Answer on May 17, 2017, denying that Julia is entitled to the relief requested and stating that their interpretation of the Trust Agreement is correct. (App. 131-136.)

On February 5, 2019, the matter was tried non-jury before the probate court. The proceeding concluded on February 7, 2019. At the trial, Julia offered her own testimony and that of her expert George DuRant, CPA to support her case. Beach and Ellen offered the testimony of Beach, Mr. Johnson, and Mr. William Reynolds, Mr. Johnson's law partner, who reviewed the draft of the equalization provision.

On June 20, 2019, the probate court issued its Order Calculating Equalization Distribution of Lifetime Gifts in favor of Julia, ordering that Julia was entitled to $1,471,031.94, as of February 5, 2019 as her equalization distribution. (App. 32-41.) Beach and Ellen appealed this Order on July 1, 2019 (Appeal Case No. 2017-CP-40-03582) (App. 384-395.) In addition to the notice of appeal, Beach and Ellen filed a Motion for Reconsideration and to Alter or Amend Under Rules 52 and 59(e), SCRCP in the probate court (App. 348-383) and Motion for Limited Remand in the circuit court on the same date, July 1, 2019. (App. 43-95.)

On August 5, 2019, the probate court issued its Order Allowing Attorney Fees in favor of Julia, in which it ordered Julia's attorney's and professional fees in the amount of $170,666.28 to be paid out of the Janet B. Brooker Trust. (App. 30-31.) Beach and Ellen appealed this order on August 13, 2019 (Appeal Case No. 2019-CP-40-04463) (App. 396-399.)

On August 27, 2019, the circuit court entered the Consent Order for Limited Remand and to Stay. (App. 20-23.) On October 28, 2019, the probate court denied the motion for reconsideration via Order Regarding Motion for Reconsideration and to Alter or Amend Under Rules 52 and 59(e), SCRCP. (App. 24-29.) Beach and Ellen appealed this Order on November 5, 2019 (Appeal Case No. 2019-CP-40-06229) (App. 400-407.)[2]

On March 22, 2021, the circuit court issued its Order affirming the rulings of the probate court. (App. 7-16.) In response, Beach and Ellen timely filed a notice of appeal with the Court of Appeals on March 26, 2021.

In an unpublished opinion, the Court of Appeals affirmed on May 8, 2024 the orders of the probate court and circuit court. (App. 745-748.) On May 22, 2024, Beach and Ellen filed their Petition for Rehearing. (App. 749-759.) On June 7, 2024, the Court of Appeals denied the Petition. (App. 760-761.) Beach and Ellen filed a Petition for Writ of Certiorari on July 3, 2024. This Court granted the Petition on September 13, 2024.

[2] The three orders on appeal were consolidated by the circuit court into one appeal, bearing Civil Action Number 2019-CP-40-03582. (App. 17-19.) The three orders are (1) Order Calculating Equalization Distribution of Lifetime Gifts, dated June 20, 2019, (2) Order Allowing Attorney Fees, dated August 5, 2019, and (3) Order Regarding Motion for Reconsideration and to Alter or Amend Under Rules 52 and 59(e), SCRCP, dated October 28, 2019. (App. 24-41.) The notices of appeal were timely filed and served on July 2, 2019, August 13, 2019, and November 5, 2019. (App. 384-407.) These three orders are now before this Court.

FACTS

I. The Equalization Distribution Language and Calculation.

Janet had three children: Beach, Ellen, and Julia. At all times and by all accounts, she treated them equally. This is true even when Beach and Ellen started their own families and Julia did not. This had not been an issue until Janet began to consider an aggressive gifting program, which would start gifting to spouses and regular gifting to grandchildren. (App. 271, 273.) Janet recognized that this gifting schedule could place Julia in an unfair position where Beach's and Ellen's respective families were receiving more than Julia. (App. 271.) To address this issue, she requested that Mr. Johnson make Julia whole for the gifts made under the aggressive gifting plan. (*Id*.) Mr. Johnson resolved the issue with the equalization distribution language in the Trust Agreement, which provides, in pertinent part, 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 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.

(App. 649 (emphasis added in underline; bold text in original).) The plain language of the Trust Agreement provides that "[f]rom the date of this trust forward," the Trustee[3] shall determine the amount of the gifts made to the children and spouses of Beach and Ellen. Once that figure is calculated, interest is added and the distribution is to be offered to Julia, and this was accomplished and communicated to Julia on February 24. 2016. (App. 454:14 – 455:11; App. 663-664.) In sum, Mr. Johnson drafted this language to make sure Julia was made whole from the aggressive gifting plan which began in October 2007.

After the execution of the Trust Agreement, each year, as soon as the new tax year began, Janet and Beach would cause Dino Corontzes, who handled Janet's accounts at Smith Barney and later Stephens, Inc., to transfer stock or cash in the amount of the annual federal gift tax exclusion to the three children, the spouses, and the grandchildren. (R. 472-473.) During the period between 2007 and the date of death in 2015, the annual exclusion amount increased by law from $12,000 per gift to $13,000, then $14,000. (*Id.*)

On April 16, 2015, Janet died. After Janet's death, Beach began calculations for the equalization share to be paid to Julia. Beach multiplied the amount of the annual gift exclusion each year by six, included $240,000 ($60,000 per child) funding for 529 "Future Scholar" accounts, and $24,000 given to the spouses of Beach and Ellen in 2007, immediately prior to and in contemplation of the Trust. (App. 479-480; *see also* App. 639.) He then divided that sum by two to reflect the gift total to each family and added 5% interest from the date of each gift to the present. (App. 458:14 – 459:4.) The resulting amount, $525,528 was proffered to Julia through

[3] Until Janet's death, Beach and Janet were to calculate the gifts, as they were co-Trustees. (App. 647.) After Janet's death, Beach solely took on this duty.

her then attorney, David Siddons, via email on February 24, 2016. (App. 453 & 454:14 – 455:11; App. 663-664.)

At the trial, Julia called two witnesses, Julia and her expert witness George DuRant, CPA. Mr. DuRant testified from a ledger he had created based upon brokerage and bank statements of Janet. (App. 426:11-22.) He testified that he collected all transfers to the spouses of Beacham Brooker and Ellen Corontzes and to their children. (App. 427:6 – 428:16.) No attempt was made to determine whether those transfers were paired with identical gifts to Julia (App. 433:11-24) or whether they were gifts at all. (App. 435:6 – 438:14, App. 662.) Additionally, Julia argued that she was entitled to a sum of transfers to both Beach's and Ellen's families. (App. 35, 431-432 & 557.) In other words, she argued that the total was not to be divided by two. Thus, if Ellen's family received $100 and Beach's family received $100, Julia should receive $200. Under Julia's argument, she would be treated differently; she would be advantaged to the detriment of Beach and Ellen.

After the close of testimony, the probate court made certain determinations and asked the parties for their calculations of the equalization amount based upon those determinations. (App. 521-533.) Specifically, the probate court indicated during the trial that it was only going to consider post-Trust gifts. (*See* App. 36.) Julia's calculation was $732,235.86, approximately $12,000 lower than Beach's calculation. (App. 528:9 – 529:13 & App. 638.) The Court then took the matter under advisement. (App. 533.)

On June 20, 2018, the probate court issued its Order Calculating Equalization Distribution of Lifetime Gifts. (App. 32-41.) In it, the probate court reversed its course and held that it was going to consider pre-Trust gifts, despite its indication throughout the trial that it was only going to consider post-Trust gifts. (App. 36.) In its order, the probate court adopted Julia's argument,

finding Janet intended to compensate Julia for all transfers to spouses and grandchildren made pre- and post-Trust and awarded Julia $1,471,031.94 (App. 41.)

II. The Testimony of W. Steven Johnson, Esquire

Mr. Johnson is a certified specialist in estate planning and probate by the South Carolina Supreme Court. (App. 444:3-14.) He is one of the founding members of Todd & Johnson, one of the top estate planning firms in the State. (App. 443:11 – 444:14.) Mr. Johnson has practiced at Todd & Johnson since 1980. (*Id.*) Julia's own expert praised Mr. Johnson with the following testimony: "I have great respect for Steve Johnson. I've relied on him all my career just about since 1986; he's a top lawyer, and I don't dispute a word he says." (App. 434:18-21.) Mr. Johnson began working with the Brooker family when Janet's husband died in 1990 in helping the Brooker family with the administration of Mr. Brooker's estate. (App. 444:15-23.) Mr. Johnson also helped Janet in setting up trusts for her grandchildren, establishing a qualified personal residence trust ("QPRT") for her residence and vacation home, and setting up generation-skipping trusts for Janet's three children and other devices. (App. 444:23 – 445:7.) He was no stranger to Janet or her family when he met with them about the aggressive gifting plan or resulting estate planning documents, which included the equalization distribution.

Once the Brookers discovered Janet's estate would be substantial, Janet came to Mr. Johnson to revise her estate planning. (App. 445:10 – 446:13.) A family meeting with Janet, all three children, and Mr. Johnson happened on September 25, 2007 to discuss, among other things, the aggressive gifting plan. (App. 441:21 – 442:9 & 447:8 – 448:21.) When Janet raised the issue that gifts to spouses may disadvantage Julia, Mr. Johnson discussed the possibility of an equalization distribution. (App. 449:5 – 450:14.) After the meeting, Mr. Johnson drafted the Last Will and Testament and the Trust Agreement. (App. 447:2-7.) Importantly, there was <u>never</u> a

discussion about an equalization of retrospective gifts before, during, or after the execution until this lawsuit. (App. 448:23 – 449:4.) The only conversation with Janet was related to prospective gifts. (App. 449:2-4.) As testified to by Mr. Johnson, "[w]e never had a discussion about retroactive gifts so the discussion, ***the whole discussion*** centered around gifts going forward. Q: Was there ever any discussion whatsoever about gifts going backward? A: ***No***." (App. 451:5-13 (emphasis added).) In fact, he has a "specific recollection of discussing with [Janet] the terms of the equalization provision" in which he said, "***we'll catch Julie up at death for gifts made from the Trust Agreement forward so that she won't be prejudiced***." (App. 470:8-16 (emphasis added).)

"The subject [of previous gifts] never came up; we never discussed it." (App. 465:23 – 466:1.) He testified as to the following:

> My interpretation or my instructions of Mrs. Brooker's intent was to look at gifts that were given to Ellen's family and to look at gifts that were given to Beach's family from 2007, not looking back looking forward, to determine which was the larger number to add five percent to it and to distribute that much to Julie as an equalizing distribution. So she would not be disadvantaged; she would receive at least as much as of the higher amount that was either going to Ellen's side of the family or to Beach's side of the family.

(App. 455:24 – 4456:10.) "The whole conversation with Janet was about prospective gifts, not retrospective gifts." (App. 472:14-15.)

Mr. Johnson testified "Janet, you know, was only going from 2007 forward." (App. 473:10-11.) If Janet had brought up gifts prior to 2007, Mr. Johnson testified he would have told Janet the following:

> I would have said to her let's equalize it right this minute, let's make a gift to her right this minute, let's give her – let's make a gift to Julie right now if she's been so disadvantaged. We're trying to reduce the size of your estate, let's give her an amount right now that will make her equal.

(App. 473:16-23.) This advice makes sense not only from a tax perspective: the need to reduce the tax estate, but also from a common sense perspective: Janet was in the best position to know the gifts she made to the various children and their families. She would have the knowledge in 2007 to easily make that distribution, rather than waiting for her death and placing such a burden on Beach to calculate all gifts, little of which he would have personal knowledge.

The testimony of Mr. Johnson establishes that Janet intended only for post-trust gifts to be included in the equalization distribution. His testimony is bolstered by the language in the Trust Agreement itself, which provides that "[f]rom the date of the trust forward" the value of the gifts to Beach's and Ellen's children and spouses should be calculated, interest added, and equalization amount distributed to Julia. (App. 586.) The sole competent evidence of the Trust Agreement and Mr. Johnson's testimony provides that the equalization distribution should be calculated only from post-trust gifts, not pre- and post-trust gifts. The probate court's ruling to the contrary (and the Court of Appeals' affirmance) should be overturned, and judgment should be entered in favor of Beach and Ellen.

STANDARD OF REVIEW

A proceeding in probate court may be at law or in equity, depending on the nature of the action. *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). "Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *Id.* An action to construe or interpret a trust is equitable in nature. *Waddell v. Kahdy*, 309 S.C. 1, 4-5, 419 S.E.2d 783, 785-86 (1992) (stating "[i]t is firmly recognized as a rule and principle of law in this State that all possible trusts, *whether express or implied*, are within the jurisdiction of the chancellor . . . if [t]here is *an element* of trust in this case, *which, wherever it exists*, always confers jurisdiction in equity." (alterations and emphasis in original)).

"In an action in equity, tried by a judge alone without reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). "'It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases where the appellant satisfies this court that the finding is against the preponderance of the evidence.'" *Id.* (quoting *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)). This standard of review is called de novo, which "literally means 'anew.'" Jean Hoefer Toal, et.al., *Appellate Practice in South Carolina* 224 (3d ed. 2016) (quoting *Black's Law Dictionary* 368 (8th ed. 2005); *see also Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) ("We review factual findings and legal conclusions in an equitable action de novo.").

De novo review is the "broadest form of appellate review, as it 'permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.'" *Id.* (quoting *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)). "'De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.'" *ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (quoting *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55).

When applying this standard to the present matter, this Court should reverse the lower court for incorrect applications of the law, in addition to unsupportable factual findings. A de novo analysis of the underlying facts and law shows that the probate court erred and judgment should be entered in favor of Beach and Ellen.

ARGUMENT

I. The Court of Appeals Erred in Affirming that the Trust Agreement is Ambiguous and that Pre-Trust Gifts Should be Included in the Equalization Distribution Even Though the Trust Unambiguously Provides that the Trustees Shall Calculate the Gifts "[F]rom the [D]ate of this [T]rust [F]orward[.]"

A cardinal rule of contract or trust interpretation is that the choice and use of words in a document must mean something. 17A C.J.S. *Contracts* §399-400 ("Without violating the plain language of the instrument or the parties' clear purpose, all parts of a contract must be taken into consideration and be given effect and assumed to have been inserted for a purpose. All words are to be given effect when consistent with the parties' intent and are to be made to operate according to that intent."); *Babb v. Wade Hampton Golf Club, Inc.*, No. 1:21-CV-333-MOC-WCM, 2024 WL 189029, at *4 (W.D.N.C. Jan. 17, 2024) ("In contract construction, as in statutory interpretation, it is axiomatic . . . that each word is to be given meaning and effect.") (internal quotation marks omitted). The interpretation of the equalization clause by the probate court, affirmed by the Court of Appeals, renders the phrase "[f]rom the date of this trust forward" nugatory.

More specifically, the probate court stated that its holding that the language merely indicated the beginning of the Trustee's duties is supported by the rules of contract interpretation which differ from the rules of statutory construction. (App. 27.) This is incorrect as noted in the *Babb* case referenced above. The probate court's reading of the law is erroneous. *See Babb, supra*. Likewise, its reading of the language "from the date of this trust forward" is erroneous. This language means that Beach and Janet (until her death) were to start counting all tax-advantageous gifts Janet made to her children's spouses and children from October 2007 forward (the date of the trust). It cannot be lost that one of the main reasons Janet entered into this new

estate plan, including the Trust, was to substantially reduce her Estate through gifting because it was going to face severe tax consequences. (App. 445-448.)

The Trust Agreement contains numerous duties of the Trustee which are to occur or may occur at varying times after the establishment of the Trust and the appointment of the Trustee. These are both inter vivos and post mortem and continuing and one-time duties. The only duty that is prefaced by the words, "[f]rom the date of this trust forward" is the clause requiring the equalization provision. The probate court's reading of this clause would cause "from the date of this Trust forward" to be meaningless, superfluous, or surplusage. Like every other duty imposed on the Trustee, Janet could have simply stated "the Trustee shall . . ." But she did not. She specifically treated this duty differently with the inclusion of "from the date of this trust forward." Thus, the probate court's holding that the phrase "from the date of this trust forward," as denoting only the date that began the duties of the Trustee is redundant to his designation as Trustee in the first instance and simple surplusage. This is disfavored by the rules of contract interpretation.

Additionally, the Court of Appeals took a logical leap without appreciating the import of the factual background. Specifically, the Court of Appeals says, "[t]he 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 Beacham and Ellen." (App. 747.) But what is not appreciated with respect to this statement is that Janet was keeping her children equalized by her own means before 2007. In other words, prior to 2007, Janet equalized gifts among her three children through various means. She made annual exclusion gifts to her grandchildren, but she paid for trips around the world for Julia. (App. 552-555 & 519.) Additionally, Janet could have equalized the children in other manners that she kept to herself. She expressed no concern about

Julia being disadvantaged pre-trust; it was only when the spouses were going to start receiving gifts that Janet became concerned with Julia being disadvantaged, as discussed below.

Under the Court of Appeals' construction of the equalization provision, Julia is being favored. She is getting credit for every birthday gift that Janet gave to her grandchildren. She is getting credit for every transfer of cash or stock to the grandchildren even if an equivalent gift was given to Julia.[4] It is only when the non-blood members of the Brooker family started receiving gifts from Janet did Janet express a concern of Julia not being treated fairly. She resolved this concern by having Mr. Johnson draft an equalization provision that states that her Trustee Beach was to equalize Julia "from the date of the trust forward." She did not intend for Beach to look backwards to calculate gifts from before he became the trustee. It makes no common sense. The phrase "from the date of this trust forward" means that Beach and Janet, as co-Trustees, were to calculate the gifts from October 2007 forward, and then Beach was directed to issue an equalization distribution pursuant to the Trust.

II. The Court of Appeals Erred in Ignoring the Testimony of the Estate Plan Drafter.

The only admissible and competent testimony regarding the Settlor's intent, as a matter of law, is the testimony of Mr. Johnson, the Settlor's estate planner.[5] There was no competent

[4] Notably, no gifts were given to spouses before 2007. The spreadsheet noting all gifts shows a loan forgiveness to Ellen's spouse in 1995. (App. 554.) However, this was a gift to Ellen because the property securing the loan that was in her spouse's name for estate planning purposes. Julia received the same loan forgiveness as Ellen did, although it was noted on the books as forgiveness for Ellen's spouse. Thus, Julia is getting a credit for a gift to Ellen when Julia received the same gift.

[5] William Reynolds, Mr. Johnson's law partner, also testified as he consulted with Mr. Johnson when Mr. Johnson was drafting the equalization provision. Mr. Reynolds' testimony supported the interpretation adopted by Beach and Mr. Johnson. Mr. Reynolds' testimony is competent and relevant, but it is duplicative with that of Mr. Johnson.

evidence presented to support the probate court's finding that it was Janet's intent that the equalization distribution include gifts made prior to the creation of the Trust and establishment of the equalization clause in the Trust Agreement. Neither of Julia's witnesses presented any testimony that Janet intended that gifts made prior to the date of the Trust to be included in the Trustee's calculation of the equalization payment to Julia after Janet's death.

The testimony of the drafting attorney is critical to understanding Janet's intent when the document is ambiguous. Courts have held that it is in error to ignore the testimony of the drafting attorney when consideration of that testimony would have clarified the ambiguity in the estate planning document. *See, e.g., In re Resler's Estate*, 278 P.2d 1, 6 (Cal. 1954) (holding the trial court erred in excluding testimony of the attorney who drafted the will regarding the decedent's intent "[a]s proof of such intention would determine the amount of the bequest under [the will]"); *In re Trust Created by Agreement Dated Dec. 20, 1961, ex rel. Johnson & Hoffman, Lienhard & Perry*, 944 A.2d 33, 40–45 (N.J. Super. Ct. App. Div. 2006) (affirming trial court's admission of testimony by drafting attorney, noting that "[a]s the drafter of the 1961 Trust, he was in a particularly favored position to understand the purpose of the 1961 Trust and the intent of the grantor[,]" and that "the exclusion of this testimony would have been error" as the drafting attorney "was in a unique position to provide information about the circumstances surrounding the drafting and execution of the instrument").

At a minimum, the drafting attorney's testimony is significant to determine the testator's intent. *See, e.g., In re Estate of Deupree*, 54 P.3d 542, 546 (N.M. Ct. App. 2002) ("Of the evidence presented [as to testamentary intent], we find most significant the testimony of the attorney who drafted the trust instrument[,]" noting "[n]one of [the other] witnesses had firsthand knowledge of [decedent's] intent in drafting the specific trust provisions in question"); *Schroeder v. Gebhard*,

825 So. 2d 442, 443 (Fla. Dist. Ct. App. 2002) ("While there was conflicting testimony at trial regarding [testator's] intent to include all, or some of the adopted in and adopted out children in the trust in the event that [testator's son] predeceased her, the most relevant testimony regarding her intentions and the trust drafting process came from Stalnaker, the attorney who drafted the trust agreement."); *In re Segal*, Nos. 1 CA-CV 06-0101, 1 CA-CV 07-0157, 2008 WL 3919187, at *7 (Ariz. Ct. App. 2008) (noting the lower court "found the 'only credible evidence' regarding [decedent's] intent came from the attorney who represented [decedent] and drafted the 1996 Trust Amendments"); *Danelczyk v. Tynek*, 616 A.2d 1311, 1314 (N.J. Super. Ct. App. Div. 1992) (affirming trial court's interpretation of a will, noting the trial court's finding that "the 'most significant testimony' revealing testator's intent came from . . . the attorney who drafted the will"); *Trupp v. Naughton*, No. 320843, 2015 WL 3389414, at *1, 4 (Mich. Ct. App. May 26, 2015) (holding probate court did not err in relying on deposition testimony of drafting attorney to determine settlor's intent and meaning of phrase in the trust); *Cf. In re Estate of Combee*, 583 So. 2d 708, 712 (Fla. Dist. Ct. App. 1991) (holding that for an estate to overcome a statutory presumption, it must show "a clear statement of a contrary intent by the deceased, or evidence of a contrary intent based upon testimony from the attorney who prepared the probated will, a bank employee or a person with special knowledge regarding the decedent's estate plan").

Against the backdrop of this long line of cases, Mr. Johnson's testimony must be given significant weight.[6] Mr. Johnson testified as follows:

[6] After all, if Beach did not follow Mr. Johnson's advice (who is the sole competent witness who can testify about Janet's intent), he would be exposing himself to a breach of fiduciary duty lawsuit. *See Floyd v. Floyd*, 365 S.C. 56, 98-99, 615 S.E.2d 465, 487-88 (Ct. App. 2005) (stating failure to follow the advice of counsel as to his duties as trustee provides foundation for removal of trustee and breach of fiduciary duty claim).

- "At that point in time, there was a heightened awareness of the -- this was in '07 -- of the need to make some gifts to accelerate her gifting program so that at her death the estate taxes would be somewhat lessened." (App. 446.)

- At a September 25, 2007 meeting with Mr. Johnson, Janet, and her children, all of the parties discussed "[t]hat we would accelerate the gifts that Mrs. Brooker was going to make; that we were going to make gifts not only to children and grandchildren, but that we would also make gifts to in-laws. As an estate planner, you know, I was primarily relying on Internal Revenue Code Section 2503 and Code Section 529. And I talked with Mrs. Brooker at that time about the avenues that would be available to her to make gifts to the children, the grandchildren, and the spouses of the children." (App. 447-448.)

- "You can make gifts to grandchildren and you can make gifts to spouses of children. And her [Janet's] comment to me at that particular point in time was that, if I make gifts -- if I make gifts to Dino and … Beach's wife, that that will disadvantage Julie. She said, that will disadvantage Julie. And I said to her at that time, well, if you decide to go ahead and make those gifts, you can put a provision in the document that at your death will catch the -- will catch Julie up for the gifts going forward that have been made to the spouses of children. Also, we talked about accelerating the pace of the gifts to the children through what's known as a 529 account." (App. 271.)

- "when I suggested to her that she could make annual gifts not only to children and grandchildren, she could make gifts to spouses of children, and she gave me some pushback at that time saying that would disadvantage Julie. And I said well, it will not disadvantage Julie if we catch Julie up at your death as to gifts that are going to be made to the grandchildren as well as the spouses." (App. 450.)

- "the whole discussion centered around gifts going forward." (App. 451.)

- "the whole conversation with Janet was about prospective gifts, not retrospective gifts. . . . It was going forward, not looking back." (App. 184.)

- "we'll catch Julie up at death for gifts made from the Trust Agreement forward so that she won't be prejudiced." (App. 470.)

- Janet didn't have concern about Julia being disadvantaged because of gifting to grandchildren, but disadvantaged because of gifting to spouses (App. 273.)

- Regarding the language of the Trust Agreement, Mr. Johnson testified "previously made lifetime gifts … is qualified by Paragraph (a), which says from the date of this trust forward. You have to read the four corners of Paragraph 2 and it says from the date of the trust forward looking at the lifetime gifts." (App. 185.)

- If Janet brought up past gifts to Ellen or Beach and said Julia needs to be "equalized for that, I would have said to her let's equalize it right his minute, let's make a gift to her right this minute, let's give her -- let's make a gift to Julie right now if she's been so disadvantaged. We're trying to reduce the size of your estate, let's give her an amount right now that will make her equal." (App. 365.)

In sum, the conversation with Janet was about prospective gifts. (App. 449.) Further, he testifies if Janet wanted to consider pre-trust gifts, he would have advised Janet to equalize Julia at the time he was drafting the estate plan. The Court of Appeals expressed some concern over "the mathematical fact that it was not possible to treat Julia equally without accounting for the substantial pre-trust gifts Decedent made, particularly to her grandchildren." (App. 748.) But, this concern is undercut by the fact that Janet never talked about these pre-trust gifts with Mr. Johnson. If she thought these pre-trust gifts were going to disadvantage Julia, she would have discussed her concerns with Mr. Johnson, but she did not. This is because Janet, by herself, was equalizing all gifts among her children. For example, she paid for numerous trips around the world for Julia.[7] (App. 518-519.) Notably, Julia has never contended that she was not treated equally before the execution of the Trust Agreement.

Moreover, as Mr. Johnson testified, Janet was not concerned about the gifts to the grandchildren. Rather, she was concerned about the gifts to the spouses, which started for the first time with the execution of the Trust. (App. 271 & 273.) Undisputably, she had been making annual exclusion gifts to her grandchildren before the Trust. She was equalizing Julia, whether it be through the trips around the world or some other means. But, it speaks volumes that she did not express any concern to Mr. Johnson about pre-trust gifts. The logical conclusion is she was not worried about Julia being disadvantaged. This is especially true when the fact that she voiced

[7] These experiences included trips to Peru, Galapagos Islands, Japan, Bali, Hong Kong, Indonesia, China, and Beijing, Spain, France (with Ellen Corontzes), Africa, and safari in Kenya. (App. 519.)

no concern about pre-trust gifts is juxtaposed to the fact that she was concerned about post-trust gifts to "non-blood," i.e. spouses, and the resulting disadvantage to Julia. The totality of Mr. Johnson's testimony is compelling, explains any ambiguity in the Trust, and should be considered in its totality to understand fully Janet's intent.

III. The Court of Appeals Erred in Affirming the Award of Attorney's Fees When the Equalization Distribution Should Only Include Post-Trust Gifts.

Because the probate court should have ruled in favor of Beach and Ellen, no award of attorney's and professional's fees to Julia should have been made. In this case, the probate court awarded attorney's fees pursuant to section 62-7-1004, which provides that "[i]n 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 . . . ." If the Court of Appeals and the probate court erred in their analyses and ultimate findings and conclusions, justice and equity do not support an award of attorney's fees and expenses to Julia.

Additionally, even if the probate court was correct with its orders, it did not find in favor of Julia, *in toto*. Typically, a court determines a prevailing party by evaluating the degree of success obtained. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (holding one factor for attorney's fee analysis is "beneficial results obtained."). Julia pursued a claim that the total amount of gifts to Beach's family and the total amount of gifts to Ellen's family should simply be added and then interest applied, without dividing the sum by two to equalize Julia. (App. 35, 431-432 & 557.) Stated differently, Julia claimed the equalization provision stated that if Beach's family received $100 and Ellen's family received $100, then Julia should be entitled to $200, plus the applicable interest. The proper calculation, however, was to divide the $200 by two so that Julia would receive the equal share of $100, just as Beach's and Ellen's families did. Julia was seeking a windfall from this interpretation, and her expert's analysis focused on this

point. (App. 35, 431-432 & 557.) But the probate court did not agree and found that the sum had to be divided by two to render the siblings equal. Julia did not prevail on this issue, and therefore, she should not be awarded attorney's fees for this significant issue in the case. To the contrary, fees and costs should be awarded to Petitioners, should this Court rule in their favor.

CONCLUSION

For the above-reasons, this Court should reverse the Court of Appeals and enter judgment in favor of the Petitioners.

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