RECEIVED
Nov 22 2024
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

Supreme Court 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.

BRIEF OF RESPONDENT

---

s/James M. Griffin
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
Griffin Humphries LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
(803) 744-0800
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes

INTRODUCTION

Respondent Julia B. Brooker, by and through undersigned counsel, files her brief requesting the Court affirm 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] because Judge McCulloch's construction of the Equalization Provision found in the Janet B. Brooker Trust (the "Trust") is supported by a plain reading of the Trust as a whole and by a preponderance of the evidence presented at the trial and fee hearing on this matter. While Petitioners Beacham O. Brooker, in his individual capacity as Trustee and individually, and Ellen B. Corontzes ("Petitioners") take umbrage with a construction contrary to Mr. Steve Johnson's testimony that Settlor intended for the Equalization Provision to apply only to post-Trust lifetime gifts, his testimony was not the only evidence probative of settlor Janet B. Brooker's intent. Mr. Johnson's testimony was also contradicted by his own calculations that included pre-Trust lifetime gifts, his ignorance of the magnitude of pre-Trust lifetime gifts, documentary evidence made by his firm contemporaneously with the execution of the Trust, as well as at the time of Settlor's death – all of which corroborate Julia's testimony that Johnson, *not Settlor*, told her what "lifetime gifts" meant at a meeting around the time the Trust was executed (2007) and subsequently at another meeting upon Mother's death (2015). Finally, having found Settlor's intent was to treat all of Settlor's children equally, the Fee Order does just that – it requires Julia be reimbursed for personally incurred attorneys' fees given Petitioners incurred a similar

amount but had paid them out of the Trust. Accordingly, the Court should affirm the Appellate Court Order.

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm that the Trust was ambiguous, and that Settlor intended for the Equalization Provision to account for lifetime gifts made prior to execution of the Trust on October 16. 2007?

2. Did the Court of Appeals err in affirming a construction of the Equalization Provision that did not adopt Mr. Johnson's testimony *in toto*?

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

FACTS

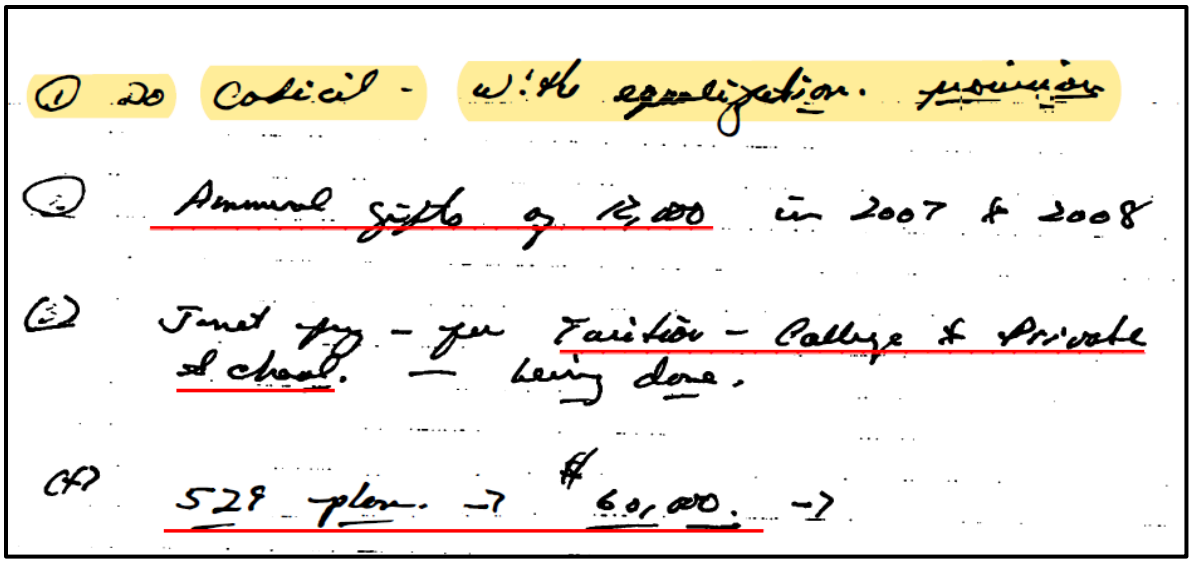
Janet Bloom Brooker ("Settlor" or "Mother") was the mother of three children: Beacham Owens Brooker, Jr. ("Beacham"), Julia B. Brooker ("Julia" or "Respondent"), and Ellen Brooker Corontzes ("Ellen") [collectively the Children]. (App. 418:18-23). Respondent has never been married and has no children. (App. 419:10-13). Beacham is married to Elizabeth Brooker ("Beth") and Ellen is married to Arthur Constantine Corontzes ("Dino"), [collectively "Spouses"]. (App. 419:14-21; 420:14-21). 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. (App. 550-557). In June 1992, Mother set up a qualified personal residential trust ("QPRT") and deeded her residence in DeBordieu, South Carolina to the Children equally. (App. 616-635). 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. (App. 422:3-7; 445:4-7). She also paid for the Grandchildren's primary school tuition and contributed to 529(c) college plans

for each of them. (App. 482:11-483:13; 550-556; 663-665). Mother intended that such tuition payments and 529(c) contributions be gifts to her Grandchildren. *See* (App. 457:6-8) (recognizing tuition gift amount could vary depending on college attended by Grandchild); App. 458:18-19 (referring to 529(c) contributions as gifts); App. 464:5-19; 550-556 (identifying 529(c) contributions as items found in the 2007 Gift Tax Return provided by Bill Sellars); App. 578-579 (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 (App. 550-556 & 557). 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." (App. 574).[1] At this meeting, Mr. Johnson proposed a plan of accelerated gift-giving by Settlor to the Children and Grandchildren. (App. 447:8-14). Settlor did not want to agree to a plan that would disadvantage Julia for not having a spouse or children. (App. 450:6-14). Thus, it was agreed that Julia would be "caught-up", or equalized, for lifetime gifts at Mother's death. (App. 508:15-509:4). The following notes were made by Mr. Johnson during the September 25, 2007, family meeting:

[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.*" (App. 580-581) (emphasis added).



These notes indicate discussion during the meeting of recent lifetime gifts made by Mother and those she intended to make, including the annual federal tax excluded gift and tuition for the Grandchildren.[2] Based on this discussion, Mr. Johnson's notes reflect his understanding at that time that Mother's intentions would be best achieved through preparation of a "codicil – with [an] equalization provision." (App. 578).

The following day, Mr. Johnson met with CKO, a paralegal at his firm, and he instructed her to draft a codicil setting forth an equalization provision. (App. 466:2-8). Based on the facts presented to her from Mr. Johnson about Settlor's intent– again, in the meeting with Settlor and her Children less than 24 hours prior – CKO drafted a codicil that states:

> (1) 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. Such equalization shall be made for the value of the gift given at the time such gift wase made with no interest thereon. My Personal Representative's best faith effort to determine the value shall be final and binding upon any beneficiaries hereunder.

[2] On October 1, 2007 – prior to execution of the Trust – Mother gifted $60,000 into each Grandchild's 529(c) account. (App. 550-556).

(App. 580) (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 had a call with Beacham, discarded the codicil, and drafted the Trust. (App. 571). 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. (App. 571; 584; 599-614).[3] 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. (App. 585-586). Mother instructed that her personal and household effects be distributed among her Children "in equal shares." (Id.).[4] 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 estate be divided to her Children in "equal shares." (App. 586). As to the amount due Julia under the Equalizing Provision, Mother expressed her intent as follows:

---

[3] 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. (App. 571 (documenting calls on 10/1/07 & 10/15/07)).

[4] Settlor could have left written memoranda instructing that her personal and household effects be distributed in an unequal manner. *See* (App. 585-586). Her election not to exercise this option is further evidence of her desire that all her Children be treated equally.

(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 O. Brooker, Jr. as well as the spouses of Ellen B. Corontzes and Beachum 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. 586) (emphasis added).

Following execution of the Trust in October 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. (App. 490:20-494:25). For purposes of the Equalizing Provision, distributions for tuition were considered lifetime gifts.

Following her death on April 16, 2015, (App. 40), the Children had a meeting with Mr. Johnson that included discussion of the "lifetime gifts" made by Settlor. During this meeting, Johnson reaffirmed Julia's understanding from him based on the October 2007 meeting that this meant all gifts made during Mother's lifetime – not just those after execution of the Trust. (App. 510:13-511:4). 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. (App. 636; 474:24-475:21).

Specifically, the estate paralegal's notes identified the following "needed information" for preparation of the estate tax return:

> **Janet Brooker Estate - needed information**
>
> 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 of 1997. The amount of these gifts will accrue interest at 5% from the date of the gift until the amount is distributed to Julia.**

(App. 636) (emphasis added).

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. (App. 511:15- 512:5). This figure was corroborated by Mr. Johnson's acknowledgement that his initial calculation of the amount owed Julia was $311,000. (App. 474:13-19). Julia asked for access to the backup documentation used to arrive at this figure; however, when her request went unanswered, Julia hired attorney David Siddons to help her get the same.[5] (App. 511:19-514:9). 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. (App. 512:10-513:3; 550-556).

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. (App. 663-665).[6] 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. (App.

---

[5] 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. (App. 513:22-514:14).

[6] Petitioners' Exhibits 1 and 4 contain the same spreadsheet. (*Compare* App. 639 *with* 663-665 (including handwritten notes requested by lower court).

451:14-20; 454:14-24; 481:2-12; 663-666). Notably, it includes gifts prior to the date of the Trust. 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 on March 17, 2017. (App. 515:15-17; 101-130). Moreover, she was never offered a check for this amount. (App. 461:21-462:3; 484:6-12; 517:17-19).

Julia's decision to retain her undersigned counsel and file a petition was only made after she was repeatedly denied the underlying statements used to support the calculations proposed by Beacham. (App. 514:17-515:3). 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.[7] 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, reviewing over 10,000 pages of bank/brokerage account statements and tax returns, to generate a detailed report identifying every lifetime gift made by Settlor to the Spouses and her Grandchildren. (App. 550-556; 424:18-425:23 (documents reviewed and individual gift totals); App. 435:25-436:23 (review of estate tax returns); App. 439:10-25 (same)). The probate court was presented with this itemized report, as well Mr. DuRant's 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 gifts. (App. 557; 430:7-432:18). As evidenced by the

[7] It was only after retaining current counsel and obtaining backup documentation through subpoenas that Julia learned Hammond tuition for the Grandchildren was not included in the calculation set forth in Respondents' Exhibits 1 and 4. (App. 515:18-516:10).

summary chart, and before interest, *Settlor made approximately $1 Million dollars in lifetime gifts to the Spouses and Grandchildren* **prior** to the Trust's execution on October 16, 2007. (App. 557).

	Gifts	Interest	Total
Gifts made prior to October 16, 2007			
Spouse & issue of Ellen B. Corontzes:			
Dino Corontzes	21,883.00	18,244.23	40,127.23
Arthur B. Corontzes	245,744.33	207,598.60	453,342.93
Beacham O. Corontzes	235,128.58	193,645.35	428,773.93
Totals - spouse & issue of Ellen B. Corontzes	502,755.92	419,488.18	922,244.09
Spouse & issue of Beacham O. Brooker, Jr.:			
Beth Brooker	15,400.00	9,769.67	25,169.67
Elizabeth K. Brooker	244,687.33	206,888.19	451,575.53
Grace H. Brooker	235,026.58	193,566.82	428,593.40
Totals - spouse & issue of Beacham O. Brooker, Jr.	495,113.92	410,224.69	905,338.60
TOTAL GIFTS PRIOR TO OCTOBER 16, 2007	997,869.83	829,712.87	1,827,582.70
daily interest after February 5, 2019		136.69	
Gifts made after October 15, 2007			
Spouse & issue of Ellen B. Corontzes:			
Dino Corontzes	118,043.23	45,754.77	163,798.00
Arthur B. Corontzes	139,182.00	53,793.13	192,975.13
Beacham O. Corontzes	139,080.00	53,729.25	192,809.25
Totals - spouse & issue of Ellen B. Corontzes	396,305.23	153,277.15	549,582.38
Spouse & issue of Beacham O. Brooker, Jr.:			
Beth Brooker	143,000.00	55,744.11	198,744.11
Elizabeth K. Brooker	126,532.00	47,418.32	173,950.32
Grace H. Brooker	138,662.00	53,542.36	192,204.36
Totals - spouse & issue of Beacham O. Brooker, Jr.	408,194.00	156,704.79	564,898.79
TOTAL GIFTS AFTER OCTOBER 15, 2007	804,499.23	309,981.94	1,114,481.17
daily interest after February 5, 2019		110.21	
GRAND TOTAL LIFETIME GIFTS	**1,802,369.06**	**1,139,694.81**	**2,942,063.87**
daily interest after February 5, 2019		246.90	
(interest computed at 5% per annum from the date of gift to February 5, 2019)			

Application of the interest rate set forth in Equalization Provision to this total almost doubles this figure. (Id.). Even though Mr. DuRant provided his initial report and workpapers, as well as the underlying documents supporting the same with his initial report to Petitioners in May 2018 (eight months prior to trial), Petitioners did not present an alternate calculation of pre-Trust lifetime gifts to the Spouses and Grandchildren to the probate court for consideration. (App. 440:1-5).

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. (App. 40-41, ¶¶ 8-13). Accordingly, the probate court, using the figures provided by Mr. DuRant, found that Julia was entitled to an equalization distribution of $1,471,031.94. (App. 41 ¶¶ 14-18).

Subsequently, Julia filed an affidavit in support of an award of attorneys' and professionals' fees. Petitioners opposed such award, challenging the amount of the fees. (App. 342-347). Following examination of the fees incurred by both parties, the probate court found them comparable. (App. 30-31). The probate court granted Respondent's motion and directed the fees be paid from the corpus of the Trust.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THAT THE TRUST WAS AMBIGUOUS AND THAT SETTLOR INTENDED FOR THE EQUALIZATION PROVISION TO ACCOUNT FOR LIFETIME GIFTS MADE PRIOR TO EXECUTION OF THE TRUST ON OCTOBER 16, 2007.

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*.") (emphasis added).

The Court of Appeals correctly affirmed the probate court's rejection of Petitioners' position that "lifetime gifts" did not include pre-Trust gifts because "equal means equal…[and] 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). A review of the Trust as a whole supports the probate court's construction. As an initial matter, the phrase "equal shares" appears two times in Trust provisions other than the equalizing distribution. (App. 586-587). The repetition of this phrase is evidence Mother intended that her Children receive equally under the Trust. (App. 25-26). Moreover, Petitioners admit that historically Settlor treated them equally. (Petrs.' Br. at 13).

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." (App. 586) (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 "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." (emphasis added).

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." (App. 41, ¶13).

Moreover, the preponderance of the evidence presented at the trial 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. (App. 40, ¶¶ 8-11). Indeed, Petitioners concede that "at all times… [Settlor] treated them equally." (Petrs.' Br. at 6). Mr. Johnson, who testified his conversations with Settlor only ever involved post-Trust gifts, admittedly was not aware that there was approximately $1 Million (excluding interest) of gifting done by Mother to the Spouses and Grandchildren prior to execution of the Trust. (App. 473:7-13). Nor did Mother ever explicitly instruct Mr. Johnson that the Equalization Provision was not to include pre-Trust gifting to the Spouses and Grandchildren. (App. 465:23-466:1). 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. (App. 580-581 & 636).

Yet, despite this undisputed evidence of Settlor's intent, Petitioners urge the Court to adopt an interpretation of the Equalization Provision that would limit lifetime gifts to those occurring after the date of the Trust and would result in a windfall to Beach and Ellen.[8] In support of this

[8] Contrary to Petitioners' argument that the Equalization Provision is not ambiguous, 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. (App. 578-579). It was Mr. Johnson's understanding both

position, 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." (Petrs.' Br. at 14-15). However, the lower court correctly rejected this position 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, the lower court properly rejected 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 the equalization provision included all gifts made during her lifetime. Additionally, the lower court's finding that the phrase "[f]rom the date of this trust forward" signals the beginning of Beacham's duties as Trustee, *i.e.* the point in time when he began making gifts on behalf of Settlor from her estate, comports with the evidence in the record that Beacham, began making gifts to the Children, Spouses, and Grandchildren on behalf of the Settlor following execution of the Trust. (App. 27; App. 500:1-13).

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." (Petrs.' Br. at 14.) In support of this contention, the Petitioners posit Julia was "equalized" pre-Trust by citing to several trips she took with Settlor prior to execution of the Trust in which Settlor

---

items constituted gifts under the Equalizing Provision (App. 457:6-8; 458:18-19; 464:5-19). 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 Trust and that distributions made for the Hammond tuition of Beach and Ellen's children did not constitute lifetime gifts. (App. 482:8-484:1).

paid for Julia's flights and hotel expenses. [9] (Id.; *see also* Petr. Br. at 19 & 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. (App. 519:22-23; 520:4-21). Second, Settlor made approximately $1 Million in lifetime gifts to the Spouses and Grandchildren prior to the Trust. Even if Settlor paid more of Julia's travel expenses than she did for Petitioners 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. There is simply no evidence supporting Petitioners' last-ditch attempt to explain how their construction of the Equalization Provision would not result in an inequitable result for Julia because she did not get married or have children.

Moreover, the Petitioners had ample opportunity to present the probate court with an accounting of any pre-Trust lifetime gifts they contend "equalized" Julia, but they did not. They cannot now allege error predicated on unaccounted travel expenses and unsupported notions that "Janet could have equalized the children in other manners that she kept to herself." (Petrs.' Br. at 15). The power court relied on the only evidence presented at the trial that identified and quantified pre-Trust lifetime gifts. If Petitioners disagreed with Mr. DuRant's identification of pre-Trust lifetime gifts, they had eight months prior to the trial to prepare an accounting to refute the same. Mr. DuRant provided his initial report and workpapers, as well as the underlying documents supporting the same with his initial report to Petitioners in May 2018. (App. 440:1-5). Petitioners had ample opportunity to refute these figures, but they did not. This failure cannot be rectified in

[9] Settlor did not pay for Respondent's travel expenses on every trip cited by the Petitioners. *Compare, e.g.,* (App. 519:11-12 (Respondent paid for trip to Spain)) *with* Petrs.' Br. at 19 & n.7 (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.

their briefing. *See, i.e.*, (Petrs.' Br. at 15, n.4) (injecting discussion of pre-Trust loan that has no factual basis in the record and was never presented to lower court.) It is nonsensical to argue the probate court did not consider evidence that was never before it, and thus, Petitioners were prejudiced because the probate court's construction of the Equalizing Provision favors Julia. [10]

Nor is it appropriate for Petitioners to imply that statements made by the probate court during trial excuse their failure to be adequately prepared to present their own evidence on pre-Trust lifetime gifts. (Petrs.' Br. at 8). That the probate court changed its position after considering all of the evidence before it, does not excuse this failure. The fact remains that had Petitioners taken Julia's claim seriously, been prepared to refute her pre-Trust lifetime gifts calculation, and introduced such evidence, the probate court could have considered the same after the close of testimony when arriving at her award. For Petitioners to cry foul when they made no effort to compute a total for pre-Trust lifetime gifts before or during the trial and when such information was readily available for months for them to do so, is disingenuous at best.

Finally, the fact that the probate court's construction of the Equalization Provision 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. At trial, 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 children. However, in reading the

[10] Petitioners take issue with the calculation of pre-Trust lifetime gifting arguing the pre-Trust gift calculation should have been offset by the gifts given to Julia during this time. (Petrs.' Br. at 15) (noting the Court of Appeals' construction of the Equalization Provision gives Julia credit for transfers of cash and stock to the Grandchildren even if Julia received an equivalent gift)). However, this argument rings hollow because none of the gifts given to any of Settlor's children (Beach, Ellen, and Julia) were included in the $1 Million pre-Trust lifetime gift calculation completed by Mr. DuRant. Nor should they have been since the Equalization Provision was intended to make Respondent equal for those gifts given to the spouses and issue of Petitioners.

document as a whole and examining the evidence before her, the probate court rejected this construction because it would result in a windfall to Julia. Similarly, the probate court rejected Petitioners' position that pre-Trust gifts should not be included in the equalizing distribution, because it necessarily resulted in Petitioners receiving a windfall of approximately $1 Million, a figure that nearly doubles when interest is included. (App. 557). Instead, the probate court took the total amount of pre-Trust and post-Trust lifetime gifts to Respondents' 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. (App. 41). 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. (App. 409:18-411:6).

Based on the probate court's well-reasoned rulings relying on the evidence above, the Court of Appeals properly affirmed the lower court rulings that the Settlor intended for lifetime gifts to predate the Trust. (App. 11-13). Accordingly, the Appellate Court Order should be affirmed.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED A CONSTRUCTION OF THE EQUALIZATION PROVISION THAT DID NOT ADOPT MR. JOHNSON'S TESTIMONY *IN TOTO*.

Petitioners incorrectly assert that it was error for the Court of Appeals to affirm the Probate Court Orders and Circuit Court Order because there was no "competent evidence" presented during the trial to support the probate court's finding that the Equalization Provision accounted for lifetime gifts made prior to October 16, 2007. (Petrs.' Br. at 15). This argument is premised on Petitioners' incorrect assumption that the probate court could only consider the testimony of Mr. Johnson and the Trust when discerning the Settlor's intent, and thus, to have ruled in favor of Julia, the probate court necessarily ignored Mr. Johnson's testimony. (Id. at 15-16). However, such

position is not supported by the law, nor a complete review of the evidence in the record before the probate court.

The Court of Appeals' affirmance of the probate court's construction adheres to the proper standard of review in this matter – *de novo review.* While *de novo review* does permit the reviewing court to make factual findings according to its own view of the preponderance of the evidence, it does not prohibit a reviewing court from deferring to the probate court's evaluation of witness credibility and the weight that should be afforded the same. *See* (App. 11) (citing *Dorchester Cty. Dept. of Soc. Servs. v. Miller*, 477 S.E.2d 476, 486 (S.C. Ct. App. 1996) (recognizing *de novo* review "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.")). Rather, a reviewing court "still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." (App. 746) (citing *In re Est. of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-45 (2018) *and* (*Lewis v. Lewis*, 392 S.C. 381, 389, 709, S.E.2d 650, 654 (2011) ("The presence of *de novo* review and a willingness, after review, to defer to the fact finder should not be viewed as contradictory positions.")).

Thus, that the construction of the Equalization Provision affirmed by the Appellate Court Order includes pre-Trust lifetime gifts is not in and of itself indicative of error on the part of the Court of Appeals. Rather, as discussed below, it reflects a finding that the preponderance of the evidence before the probate court supported a construction of the Trust that achieved Settlor's intent – that all of her Children be treated equally and that Julia not be disadvantaged. Accordingly, the Appellate Court Order should be affirmed.

A. Steve Johnson[11]

The Court of Appeals correctly held that the mere fact that the probate court's construction did not adopt Mr. Johnson's testimony *in toto*, is not evidence that the same was ignored. To the contrary, it reflects a result "largely driven by [Mr. Johnson's] testimony that [Settlor] intended for her children to be treated equally and for Julia to not be disadvantaged" for not getting married and having children. (App. 747). Mr. Johnson's testimony was not ignored, and thus, the cases cited by Petitioners for the proposition that it was error to ignore testimony from the drafting attorney are inapposite. *See* (Petrs. Br. at 16.)

Unable to establish Mr. Johnson's testimony was ignored, Petitioners' argument boils down to their stubborn refusal to accept the weight the probate court afforded to Mr. Johnson's testimony concerning whether pre-Trust lifetime gifts should be included in the Equalizing Provision. In support of their argument that the probate court should have deferred to Mr. Johnson's trial testimony concerning whether pre-Trust lifetime gifts should be included in the Equalizing provision, Petitioners cite to a string of cases from other jurisdictions emphasizing the significance of the drafting attorney's testimony regarding intent. (Petrs.' Br. at 16-17). However, these cases are not germane to the weight that should have been afforded to portions of Mr. Johnson's trial testimony in 2019. None of the cases cited by Petitioners involve a scenario like

[11] Not surprisingly, Mr. Reynolds' testimony concerning Settlor's intent, mirrors that of his law partner, Mr. Johnson. Mr. Reynolds testified at trial that his discussions with Mr. Johnson about the Equalizing Provision did not include mention of retroactive gifts. (App. 487:22-24). 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. (App. 486:10-20; 489:19-20; 568). The probate court was entitled to consider his testimony in light of his limited involvement, his relationship with Mr. Johnson, and the impact adoption of Julia's construction could have on his firm's exposure to being sued. That Petitioners do not agree with the weight afforded to his testimony, nor that of Mr. Johnson, does not warrant reversal of the Appellate Court Order.

the present case in which the record contained testimony and documents, some generated by or at the direction of Mr. Johnson, calling into question the accuracy of the drafting attorney's trial testimony before the lower court.

For example, at trial in February 2019, 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." (App. 470:11-16). However, in deposition 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. (App. 471:2-472:7). That Mr. Johnson somehow developed this specific recollection during the year between his deposition (January 2018) and the trial before the probate court (February 2019) is probative as to the weight the probate court should assign to his trial testimony.

Importantly, Mr. Johnson also testified that in his discussion with Settlor about ensuring Julia was not disadvantaged because of never marrying or having children, he was unaware that Settlor had made approximately $1 Million in lifetime gifts to the Spouses and Grandchildren prior to the date of Trust. (App. 473:7-13). Moreover, Mr. Johnson admits that Settlor never instructed him to specifically exclude lifetime gifts made prior to the Trust. (App. 465:23-466:1). Additionally, and as discussed below, notes made by Mr. Johnson during his meeting with Settlor and the Children on September 25, 2007 (App. 578-579) reference a codicil, which he admits he had his paralegal draft the following this meeting. As discussed below, the codicil, based on instructions from Mr. Johnson to his paralegal concerning the Equalizing Provision contemplated in the meeting, includes pre-Trust lifetime gifts. That the paralegal produced a document that Mr. Johnson admits was made following his meeting with her the day after the family meeting about

the Equalization Provision, is also probative as the weight the probate court should assign his 2019 trial testimony.

In short, when examining the entire record, there is more than ample evidence supporting the probate court's construction. Additionally, the probate court was in the best position to evaluate witness credibility and the weight that should be afforded the same. Specifically, the demeanor, personality, composure, and nonverbal conduct of each witness, and the impact the same may have on the lower court's assessment of potential bias or motive impacting the testimony before it cannot be discerned by merely reading the record. *See generally*, *In re Est. of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-45 (2018); *see also In re Matter of Pozarny*, 177 Misc. 2d 752, 758, 677 N.Y.S.2d 714, 718 (Sur. 1998) (recognizing that when construing an estate document years after it was drafted "many factors, including the draftsman's imperfect memory, his concern for his professional reputation, or his fear of legal action over perceived errors, may influence his testimony") (citing Matter of Campbell, 171 Misc.2d 892, 655 N.Y.S.2d 913 (Sur Ct. Erie County 1997). Accordingly, that the Appellate Court Order affirmed the probate court's construction of the Equalizing Provision requiring the inclusion of pre-Trust lifetime gifts – a construction refuted by Mr. Johnson's testimony – does not constitute an error warranting reversal.

B. Codicil and Paralegal's Notes

The codicil referenced in Mr. Johnson's notes during the family meeting on September 25, 2007 (App. 578-579) corroborates Julia's testimony that the Equalization Provision was to include lifetime gifts made by Mother prior to execution of the Trust. Again, 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. (App.

466:2-468:3). 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." (App. 580-581).

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 she was given the impression from Mr. Johnson that "lifetime gifts" as used in the Equalizing Provision included those gifts made prior to execution of the Trust. (App. 466:2-13). Additionally, per the time records of Mr. Johnson's firm, the codicil was drafted in its entirety on October 1, 2007. (App. 571). There is no evidence in the record that he reviewed the codicil when it ready on October 1 and promptly rejected the same. Thus, any 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. (App. 636). These notes, made after Settlor's death in 2015 and based on a meeting with Mr. Johnson and the Children, are independent evidence that corroborate Julia's testimony that following her mother's death she was again told by Mr. Johnson in a meeting with him that lifetime gifts included those made before the execution of the Trust. (App. 508:20-509:1; 510:13-20). Moreover, the paralegal's notes contemplate going back to May 1997 – the month in which Mother established generation skipping family trusts for each of her Children. (App. 422:3-7; 445:4-7). 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.

Finally, contrary to the argument of Petitioners, consideration of these documents is not precluded by the doctrine of merger. As an initial matter, the cases relied on in support of this argument do not concern construction of a trust but rather involve deeds and real property instruments. (Petrs.' Return to Writ for Cert. at 10-11). Next, at no point has Respondent argued that the codicil was ever executed by Settlor, and thus this case does not involve a contest between two executed documents. Lastly, to adopt Petitioners' argument in the present case would establish a precedent that documentary evidence germane to the inquiry of a settlor's intent must be excluded. This result is neither sensible nor consistent with the precedent in this State that parol evidence, absent statutory prohibitions, may be considered when construing an ambiguous document. Accordingly, this argument should be rejected.

C. Julia Brooker

At trial Julia 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. (App. 508:15-509:1; 510:13-511:4). 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."[12] (App. at 508:23-509:1). Following this testimony, Julia again confirmed that her understanding was based on what "Steve said." (App. 509:3-4). Finally, she testified that Settlor treated everyone evenly when it came to giving Respondent, the Petitioners, the Spouses, and the Grandchildren trips. (App. 518:23-519:23;

520:4-21). While it is true that this evidence is duplicative of other evidence in the record, it is noteworthy that the same is corroborated by documents created around the time the trust was executed and subsequently when Mr. Johnson's firm began gathering information necessary to compute the lifetime gift amount following Settlor's death.

Given the historically equal treatment of the Children by Settlor (App. 422:16-423:5, 500:14-25; 520:4-17), the construction of the Equalization Provision affirmed by the Court of Appeals ensures that the intent of Mother with regard to the distribution of her Trust was carried out following her death. A preponderance of the evidence supports this conclusion. To wit: Mr. Johnson's testimony mirrored Julia's- that it was Mother's intent to catch Julia up at the end because Janet did not want Julia to be disadvantaged for having not married or had children. (App. 423:6-14). Beacham testified that Settlor always treated them equally when making gifts (App. 474:21-25). Work product from two paralegals at Mr. Johnson's firm, acting on his behalf and instruction, indicate a working understanding that the Equalization Provision was to account for pre-Trust lifetime gifts. (App. 321-322; 377). 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 testimonial and documentary evidence that Settlor treated the Children equally during her lifetime is all evidence which the probate court properly relied on when construing the Trust. Accordingly, the Appellate Court Order should be affirmed.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE PROBATE COURT'S AWARD OF ATTORNEYS' AND PROFESSIONALS' 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. The Court of Appeals correctly affirmed the Fee Order awarding Respondent's attorneys' and professionals' 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 of out of the corpus of the Trust, but 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, unsupported, equalizing distribution calculation of $300,000 to over $500,000. (App. 512:3-513:8). 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 trial 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.,* (App. 637) (illustrating she still had not been provided with all account statements).

It was not until Julia retained present counsel and filed the petition for declaratory relief that she was able to obtain much of the information she requested.[13] Once she had the information, she then retained Mr. DuRant, a CPA, to review the records to identify all lifetime gifts made by

[13] The attorney's fees sought by Respondent did not include those she incurred with Attorney Siddons.

Settlor. This exercise, for which Julia incurred over $60,000 in fees, was necessary for Julia to evaluate Beacham's calculations. As aptly 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." (App. 504:14-505:2).

Moreover, despite Mr. DuRant providing his initial report and the underlying documents supporting the same to 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. (App. 534). 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 fulfill his fiduciary responsibility to Julia as Trustee.

Petitioners argue the Court of Appeals affirmance of the Fee Order is error because the Probate Court did not adopt Respondent's construction *in toto.* (Petrs.' Br. at 20). However, this argument is without merit. As noted by the Court of Appeals, the lower court ruled in favor of Respondent. Almost all 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 Petitioners in this matter. (App. 31). [14]

[14] Following a hearing on the Motion for Attorney's and Professional's fees, in which 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.

Additionally, permitting the Estate to pay for Petitioners' fees and costs, "but not Julia's, would amount to unequal treatment among the siblings." (App. 747). Even though Appellants 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 professionals' fees to Julia was proper and the Appellate Court Order should be affirmed.

CONCLUSION

Based on the preponderance of the evidence presented at trial and in conjunction with the plain language of the Trust, the Court of Appeals correctly affirmed the probate court's construction of the Equalization Provision. Additionally, given the inequity that would result from requiring Respondent to pay the fees she incurred when 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, the Court should affirm the Appellate Court Order.

s/*James M. Griffin*
James M. Griffin, SC Bar # 9995
Margaret N. Fox, SC Bar # 76228
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com

Attorneys for Respondent Julia B. Brooker

November 22, 2024