

2011-197686

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Opinion No. 4842 (S.C. Ct. App. filed June 15, 2011)

In the Matter of the Estate of Charles Galen Rider, a/k/a C.G. Rider

Carolyn S. Rider.....Petitioner,  
v.

Estate of Charles Galen Rider, Thomas M. Grady, Personal  
Representative.....Respondent,

and

Deborah Rider McClure, Ginger C. Rider, Christian James McClure and Austin Patrick  
McClure.....Respondents.

**PETITION FOR A WRIT OF CERTIORARI**

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made on June 30, 2011, and was finally ruled on by Order of the Court of Appeals filed on July 26, 2011.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Decedent's June 17, 2005 written entitlement order to Wachovia Bank, N.A. required book entry crediting her account under S.C. Code Ann. Section 36-8-501(b)(1) in order for Carolyn Rider to acquire the \$304,082.46 amount at issue, when her ownership rights vested under Section 36-8-501(b)(3).
2. Whether the novel UCC Article 8 issues of law presented by this case warrant alteration of Opinion No. 4842 in order to prevent systemic commercial and legal uncertainty.
3. Whether the Court of Appeals erred in refusing to consider the dispositive argument and evidence that the Decedent's June 17, 2005 gift letter to Wachovia requiring transfer of \$304,082.46 to Carolyn S. Rider was a completed inter vivos gift made as of June 17, 2005, prior to the Decedent's July 8, 2005 death, making the \$304,082.46 amount at issue property of Carolyn S. Rider rather than property of the Decedent's estate.

## STATEMENT OF THE CASE

The Estate of Charles G. Rider filed a July 5, 2006 Petition for Declaratory Judgment in Beaufort County Probate Court, requesting a determination as to whether certain securities transferred to Mr. Rider's wife Carolyn S. Rider pursuant to Mr. Rider's June 17, 2005 written transfer instruction to Wachovia Bank, N.A. were completed transfers to Mrs. Rider as of the June 17, 2005 transfer instruction date (making those assets property of Mrs. Rider rather than estate assets), and whether the fact that certain securities transfers concluded after Mr. Rider's July 8, 2005 date of death made those assets estate property rather than property of Mrs. Rider. (App. p. 38-53).

After a July 10, 2007 trial, the Beaufort County Probate Court issued an October 12, 2007 Order finding, *inter alia*:

(1) a preponderance of the evidence showed Charles G. Rider's intention to transfer \$2,000,000.00 in securities to his wife as a gift separate from those made for his wife in his Will and Trust (as amended);

(2) Mr. Rider never attempted to rescind or modify his June 17, 2005 asset transfer instruction to Wachovia Bank;

(3) Mr. Rider's Agency Agreement with Wachovia Bank was not terminated before his death;

(4) Article 8 of the South Carolina Uniform Commercial Code (S.C. Code Ann. Sections 36-8-102 *et seq.*) applied to the issue along with and did not supplant the law of agency; ,

(5) all asset transfers posted to Mrs. Rider's account on June 21, 2005 July 8, 2005 and July 11, 2005 (totaling \$1,707,932.64) pursuant to the Decedent's June 17,

2005 transfer instruction were effectuated before Mr. Rider's death and are therefore non-probate assets;

(6) the \$304,082.46 transfer posted to Mrs. Rider's account on October 20, 2005 pursuant to Mr. Rider's same June 17, 2005 transfer instruction was not effectuated before Wachovia Bank's authority under the Agency Agreement terminated late on July 8, 2005 when it received notice of Mr. Rider's death; and

(7) \$304,082.46 is therefore part of the Decedent's probate estate rather than property of Mrs. Rider. (App. p. 19-30).

Carolyn S. Rider's Notice of Appeal to the Beaufort County Court of Common Pleas dated October 19, 2007 was served on October 19, 2007 and filed on October 22, 2007. (App. p. 119-120; p. 356-357). Mrs. Rider's Grounds of Appeal were served on November 15, 2007, and were filed with the Beaufort County Court of Common Pleas and Beaufort County Probate Court (App. p. 121-123; App. p. 356-357; App. p. 36 lines 15-18). The Beaufort County Probate Clerk's Return was filed with the Beaufort County Court of Common Pleas on February 1, 2008. (App. p. 524-527). After an October 1, 2008 appellate hearing, the Beaufort County Court of Common Pleas issued its Order dated November 13, 2008 (filed November 17, 2008), affirming the Probate Court's Order, ruling, *inter alia*, that Appellant Carolyn S. Rider's appeal was timely perfected, that the Beaufort County Probate Court's Order was supported by the facts and law of the case, and there was no clear abuse of discretion. (App. p. 32-37).

Carolyn S. Rider's December 17, 2008 Notice of Appeal was served on December 18, 2008, and filed with the Beaufort County Court of Common Pleas and with the Court of Appeals on December 22, 2008. (App. p. 124). By February 24, 2009 and March 30,

2009 Orders, the Court of Appeals granted the Appellant extensions of time for filing/service of her Initial Brief and Designation of Matter to April 6, 2009 and May 6, 2009.

Mrs. Rider filed a May 6, 2009 Initial Brief and Designation of Matter to be Included in the Record on Appeal, and filed the Record on Appeal on November 6, 2009. Mrs. Rider filed a November 23, 2009 Final Brief (App. p. 531), the McClure Respondents filed a November 19, 2009 Final Brief (App. p. 562), and Mrs. Rider filed a November 23, 2009 Amended Reply Brief (App. p. 594). The Court issued a December 18, 2009 Order denying the McClure Respondents' Motion to Correct the Record.

Oral argument before the Court of Appeals occurred on May 5, 2011. On June 15, 2011, the Court of Appeals filed Opinion No. 4842, affirming the ruling below (App. p. 607). Carolyn S. Rider filed a June 30, 2011 Petition for Rehearing and Memorandum (App. p. 620), and the McClure Respondents filed a SCACR 240 Notice dated July 8, 2011 (App. p. 631). The Court of Appeals denied the Petition for Rehearing by Order filed July 26, 2011 (App. p. 635).

## STATEMENT OF RELEVANT FACTS

Charles Galen Rider (the “Decedent”) executed a valid and enforceable Investment Agency Agreement dated September 27, 1993 (the “Agreement”), with a corporate predecessor of Wachovia Bank, N.A. (App. p. 246-247; p. 71 paragraph 1). The Agreement authorized the bank (“Wachovia”) to open an account for Decedent, to hold cash, securities and other property, subject to Decedent’s instructions. Wachovia had power to buy, sell and exercise certain rights regarding those assets. Paragraph 13 of the Agreement also provided that it could be terminated by either party by giving thirty (30) days notice in writing to the other party or by death, provided that termination by reason of death would be effective only upon receipt of actual knowledge thereof by the bank’s responsible officials, and would not affect the validity of any prior actions. (App. p. 247). Decedent did not terminate, rescind or modify the Agreement prior to his death on July 8, 2005.

On June 17, 2005, the Decedent sent his executed asset transfer instruction letter (hereinafter “entitlement order”) to Wachovia, stating: “Please accept this letter as my authority and direction to transfer the assets listed on the following page to a new agency account to be opened for my wife, Carolyn Sue Rider.” (App. p. 248; p. 71 paragraph 2). The page attached to and incorporated by reference into the Decedent’s June 17, 2005 letter was entitled “Assets to Transfer to Agency Account for Carolyn Sue Rider,” and designated a specific list of itemized assets totaling \$2,000,000.00. (App. p. 249). The Decedent never rescinded or modified his June 17, 2005 entitlement order prior to his death on July 8, 2005.

Prior to the Decedent's death on July 8, 2005, Wachovia issued instructions for implementation of all asset transfers contemplated by the Decedent's June 17, 2005 entitlement order. (App. p. 173 line 16 to p. 175 line 22).

Final settlement of asset transfers made pursuant to the entitlement order occurred before and after the Decedent's death on July 8, 2005 at 2:45 p.m.: \$733,228.00 on June 21, 2005, \$39,672.00 on July 8, 2005, \$935,032.64 on July 11, 2008, and \$304,082.46 on October 20, 2005. (App. p. 71-72, paragraphs 3, 5, 7 and 8; p. 173 line 2 to p. 175 line 22). Final settlement of the June 21, 2005 and July 8, 2005 asset transfers preceded the death of Decedent. (App. p. 289; p. 250-252; p. 173 line 2 to p. 175 line 22; p. 35 line 22 to p. 36 line 8). The July 11, 2005 asset transfer was initiated before Wachovia's responsible official received actual notice of the Decedent's death. (App. p. 35 line 19 to p. 36 line 8; R. p. 173 line 2 to p. 175 line 22). The \$304,082.46 October 20, 2005 asset transfer is the only asset transfer under review.

## ARGUMENT

- I. THE COURT OF APPEALS ERRED IN ANALYSIS AND APPLICATION OF UCC ARTICLE 8 AND AGENCY LAW IN DETERMINING ASSET OWNERSHIP, DISREGARDING FACTS OF RECORD AND THE LEGAL EFFECT OF DECEDENT'S CLEAR PRE-MORTEM ENTITLEMENT ORDER GIVING OWNERSHIP IN SPECIFIED ASSETS TO HIS WIFE CAROLYN S. RIDER.

This is a novel issue of law which has significant commercial and legal implications requiring review. There are no South Carolina case authorities on point which address application of Article 8 of the South Carolina Uniform Commercial Code under identical circumstances. Opinion No. 4842 misapplies S.C. Code Ann. Section 36-8-501(b) and fails to recognize commercial realities associated with timing, mechanics and multiple entities involved in the asset transfer/entitlement order process.

If unaltered, Opinion No. 4842 will cause widespread commercial, systemic uncertainty in financial and estate planning/estate administration areas, a result not intended by the UCC's drafters. It will also undermine decedents' clearly expressed directions and intent, based on random factors such as dates of death and the timing of unrelated third party actions. This is the type of exceptional circumstance which has in the past caused the U.S. Supreme Court on review to consider issues not passed upon by the court below, where injustice might otherwise result. *See, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

S.C. Code Ann. Section 36-8-101 *et seq.* ("Article 8") comprehensively addresses the subject matter at issue in this appeal. Displacement of the common law occurs when one or more particular provisions of the Uniform Commercial Code ("UCC") comprehensively address a particular subject. Hitachi Electronic Devices (USA) v. Platinum Technologies, Inc., 366 S.C. 163, 621 S.E.2d 38 (2005); Flavor-Inn, Inc. v.

NCNB Nat'l Bank of S.C., 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992).

Only where the UCC is incomplete does the common law provide applicable rules.

Hitachi Electronic Devices (USA) v. Platinum Technologies, Inc., 366 S.C. 163 at 170,

621 S.E.2d 38 at 41. S.C. Code Ann. Section 36-1-103 states, in pertinent part:

*Unless displaced by the particular provisions of this act, the principles of law and equity, including...the law relative to...capacity to contract, principal and agent,...or other validating or invalidating cause shall supplement its provisions.*  
(emphasis added)

All aspects of the Decedent's June 17, 2005 entitlement order to Wachovia and Mrs. Rider's acquisition of securities entitlement/assets are governed by S.C. Code Ann. Section 36-8-102 *et seq.*, which displaces common law (including the common law of agency).

Under the UCC, an entitlement order is "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement." S.C. Code Ann. Section 36-8-102(8). Decedent's June 17, 2005 letter to Wachovia directing transfer of his assets to Carolyn Rider was an entitlement order under Section 36-8-102(a)(8). Opinion 4842 states as the law of the case that Decedent's June 17, 2005 written instruction to Wachovia was an entitlement order.

Decedent was an entitlement holder under S.C. Code Ann. Section 36-8-102 (a)(7) (i.e., a person identified in the records of a securities intermediary as the person having a securities entitlement against a securities intermediary), and he was the "appropriate person" to make the entitlement order under S.C. Code Ann. Sections 36-8-107(a)(3) and (b)(1). Opinion No. 4842 states as the law of the case that Decedent was

an entitlement holder.<sup>1</sup> Wachovia Bank was the Decedent's securities intermediary under S.C. Code Ann. Section 36-8-102(a)(14)(ii) (i.e., "a...bank...that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity"). A security entitlement is "the rights and property interest of an entitlement holder with respect to a financial asset defined as a security in Part 5." S.C. Code Ann. Section 36-8-102(17).

Once the Decedent's entitlement order was given to Wachovia, Wachovia was required to comply with it. "A securities intermediary *shall* comply with an entitlement order if the entitlement order is originated by the appropriate person..." S.C. Code Ann. Section 36-8-507(a) (emphasis added). See also, S.C. Code Ann. Section 36-8-506. By virtue of issuing an effective June 17, 2005 entitlement order with which Wachovia was legally required to comply, the Decedent immediately created in his wife Carolyn S. Rider a security entitlement on June 17, 2005, giving her a legal ownership interest in the assets even prior to the actual transfer of the securities to her name. "A person *acquires a security or an interest therein*, under this chapter, if ... (2) the person acquires a security entitlement to the security pursuant to Section 36-8-501." S.C. Code Ann. Section 36-8-104 (emphasis added). In addition, "[a] person acquires a security entitlement if a securities intermediary:... (3) becomes obligated under other law, regulation or rule to credit a financial asset to the person's securities account." S.C. Code Ann. Section 36-8-501(b)(3). Neither the Decedent's June 17, 2005 entitlement order nor Section 36-8-

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<sup>1</sup> An "appropriate person" means, with respect to an entitlement order, the entitlement holder. S.C. Code Ann. Section 36-8-107(a)(3). An entitlement order is effective if (1) it is made by the appropriate person; 2) it is made by a person who has power under the law of agency to transfer a security or other asset on behalf of the appropriate person. S.C. Code Ann. Section 36-8-107(b).

501(b)(3) required Wachovia or a third party to credit the account that same date (or before Decedent's death) in order for legal ownership rights to vest in Mrs. Rider on June 17, 2005.

Once given, an entitlement order is effective and is in itself a completed act; questions of agency are irrelevant. Effectiveness of an...entitlement order is determined as of the date the...entitlement order is made, and an...entitlement order does not become ineffective by reason of any later change of circumstances. S.C. Code Ann. Section 36-8-107(e).

Issuance of the June 17, 2005 entitlement order immediately conferred upon Mrs. Rider as intended beneficiary a security entitlement, i.e., "the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5." S.C. Code Ann. Section 36-8-102(a)(17). "A security entitlement is both a package of personal rights against the securities intermediary and *an interest in the property* held by the securities intermediary." S.C. Code Ann. Section 36-8-102(a)(17), Comment 17 (emphasis added). Mrs. Rider was an entitlement holder under S.C. Code Ann. Section 36-8-102(a)(7); she was a person identified in the records (including but not limited to the June 17, 2005 entitlement order Wachovia received from the Decedent) of a securities intermediary as the person having a security entitlement against the securities intermediary.

Carolyn S. Rider's status as entitlement holder of a security entitlement on June 17, 2005 made subsequent events (including the Decedent's death) irrelevant because Mrs. Rider's legal interest in the assets was immediate and absolute. S.C. Code Ann. Section 36-8-104(a) supports immediate vesting, providing that "a person *acquires a*

*security or an interest therein*, under this chapter, if... (2) the person acquires a security entitlement to the security pursuant to Section 36-8-501 (emphasis added). Under this section, obtaining enforceable rights to compel book entry is equivalent to ownership of the security itself. Since Ms. Rider acquired legal ownership rights to the assets on June 17, 2005, the law of agency could not have subsequently revoked (or otherwise impacted) those rights upon Decedent's July 8, 2005 death.

S.C. Code Ann. Section 36-8-102(7) essentially defines an entitlement holder as a person identified in the records of a securities intermediary who acquires a security entitlement *by virtue of any of the categories specified in S.C. Code Ann. Section 36-8-501(b)*. The Court of Appeals erred in restricting its analysis to post-date-of-death timing of what it perceived to be "book entry" under 36-8-501(b)(1) (i.e., final transaction settlement dates), rather than correctly using the June 17, 2005 entitlement order date when Mrs. Rider acquired ownership of the assets under S.C. Code Ann. Section 36-8-501(b)(3) (which allows as person to "acquire a security entitlement if a securities intermediary...becomes obligated under other law, regulation or rule to credit a financial asset to the person's securities account...") and S.C. Code Ann. Section 36-8-104(a) ("a person acquires a security or an interest therein under this chapter if: (2) the person acquires a security entitlement to the security pursuant to Section 36-8-501"). Mrs. Rider acquired a security entitlement on the June 17, 2005 date of Decedent's entitlement order.

The Court's Opinion footnote 4 incorrectly suggests that an entitlement holder's legal rights to assets vest when a security is credited to the person's account. That is *not* what S.C. Code Ann. Sections 36-8-102(a)(7) or 36-8-102(a)(17) state. Under S.C. Code Ann. Section 36-8-501(b), book entry by the securities intermediary is *not* the exclusive

means by which Ms. Rider's enforceable legal rights in the assets could have vested. There is no explanation in Opinion No. 4842 as to why Wachovia's instructions for implementation of the entitlement order shown in bank testimony of record as issued prior to Decedent's death (App. p. 173 line 4 to p. 175 line 2; p. 182 line 17 to p. 183 line 8) do not constitute "book entry" under Section 36-8-501(b)(1).

The Court of Appeals' application of Article 8 disregards and frustrates the Decedent's clear intent to give his wife legal ownership of assets designated for her in his June 17, 2005 entitlement order. The UCC drafters did not intend such a result, particularly where the Decedent's intent was so clearly expressed. The Court's use of book entry to determine asset acquisition allows third party commercial intermediaries to foil the Decedent's intent simply by virtue of the time required to complete processing of transfers in the normal course of business. Nor is book entry required by S.C. Code Ann. Section 36-8-501(b) in this instance. In fact, that statute provides two other options for determination of ownership in order to accommodate varying commercial circumstances.

II. ANALYSIS AND APPLICATION OF UCC ARTICLE 8 UNDER THE CIRCUMSTANCES OF THIS CASE IS A NOVEL ISSUE OF LAW WITH SIGNIFICANT IMPLICATIONS FOR FINANCIAL INSTITUTIONS AND THE LEGAL PROFESSION IN ESTATE PLANNING/ESTATE ADMINISTRATION AREAS. IF OPINION NO. 4842 STANDS UNALTERED, ITS FAILURE TO ADDRESS COMMERCIAL REALITIES WILL CAUSE SYSTEMIC UNCERTAINTY WHICH COULD BE AVOIDED.

The Court of Appeals' Opinion if unchanged will cause widespread commercial, systemic uncertainty which can be easily prevented by reading and applying S.C. Code Ann. Section 36-8-501(b)(3) to give immediate entitlement holder status to the designated beneficiary/recipient when the entitlement order is received by the securities

intermediary and to confine the book entry requirement of Section 36-8-501(b)(1) to non-written entitlement orders.

The transfer of rights from entitlement holder to entitlement holder is a routine, repetitive, high-volume, commercial activity; daily trading of interests in securities is enormous. There are often multiple layers of securities intermediaries and entitlement holders involved in a single securities transaction, some serving simultaneously as entitlement holder and securities intermediary in the same assets. Each time they issue instructions changing ownership interests in the underlying securities, they are issuing entitlement orders. Because many accounts involve assets such as certificated shares in publicly traded companies, shares which are not actually in the bank's possession but are reflected in the account, the entitlement holder can only be given enforceable rights to the assets. The South Carolina Reporter's Comment to the 2000 Revision of S.C. Code Ann. Section 36-8-102 ("Entitlement holder") recognizes this, stating, in pertinent part: "As used in Article 8 the term reflects the market reality that most 'owners' of securities own not the security, but a derivative interest, or bundle of rights, in a fungible mass of securities legally owned by another. More than one layer of entitlement holders may exist between the legal owner of securities and the ultimate entitlement holder. Recognition of such derivative ownership is the core idea of the indirect holding system described in Part 5." Commercial reality is that timing of book entry can be a factor outside a financial institution's control, since asset transfer may depend on subsequent actions by several other entities. In recognition of this fact, the drafters of S.C. Code Ann. Section 36-8-501 state three different ways in which an asset may be acquired: book entry, receipt of financial asset, or legal obligation of the securities intermediary. The Court of Appeals'

application of only the “book entry” option rather than Wachovia’s legal obligation to transfer under the entitlement order makes implementation of the Decedent’s intent dependent on random timing factors outside Wachovia’s control and outside the Decedent’s control. There is no evidence that such a result was desired by the Decedent or by the UCC drafters. Bank witness testimony indicated that final settlement after issuance of transfer instructions could take days, weeks or months, depending on the type of asset involved. (App. p. 165 line 23 to p.166 line 24; p. 183 lines 13-16). Book entry poses limitations in addition to unpredictable timing. For example, certain types of documentation may not be deemed to constitute “book entry,” causing a result contrary to a decedent’s clearly expressed intent. Estate planning counsel cannot reliably predict for their clients whether their wishes will be implemented, and personal representatives will be forced to expend estate funds to seek judicial guidance regarding asset ownership, unless Article 8 is properly applied.

Securities transactions generally, and estate planning/estate administration in particular, should not be subject to disruption by random factors such as the death of individuals who issued entitlement orders and the unpredictable period of time a third party entity in a chain of entitlement holders may take to complete a transaction. The application of Article 8 urged herein would prevent this uncertainty and promote clarity, as intended by its drafters.

III. APPELLATE AUTHORITIES AND THE RECORD BELOW COUNSEL THE SUPREME COURT'S CONSIDERATION OF THE DISPOSITIVE, COMPLETED INTER VIVOS GIFT ARGUMENT TO DETERMINE ASSET OWNERSHIP IN FAVOR OF CAROLYN S. RIDER.

The Court of Appeals refused to consider the dispositive completed inter vivos gift issue, on grounds that it was not raised below by Mrs. Rider's prior trial counsel and therefore no preserved for review. The Record shows the existence of a completed inter vivos gift, and indicates that the gift issue was raised below. The common law inter vivos gift argument is controlling as to the key issue in dispute: whether the \$304,082.46 amount legally became property of Mrs. Rider before Decedent's death, regardless of the UCC's application. Even if the issue had not been sufficiently raised below, U.S. Supreme Court authority counsels consideration of the completed inter vivos gift issue.

The United States Supreme Court has stated, "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719 (1941). The Supreme Court further noted, "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the fundamental justice." Id.

In addition, the United States Supreme Court has considered issues and decided cases on grounds not argued below or in the briefs, because "the decided question was antecedent to these [issues presented] and ultimately dispositive of the present dispute."

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991). *See also*, McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Arcadia v. Ohio Power Co., 498 U.S. 73, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990).

The United States Supreme Court has also stated, “On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered “fairly subsumed” by the actual questions presented.” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

The \$304,082.36 asset transfer at issue constitutes a completed lifetime, inter vivos gift from the Decedent to Carolyn S. Rider made as of June 17, 2005, prior to the Decedent’s July 8, 2005 death, and it is therefore property of Ms. Rider rather than property of the Decedent’s estate. The Record reflects that the Appellant asserted the existence of a completed inter vivos gift before the Probate Court and Circuit Court, preserving that argument for review on appeal. The Appellant placed into the trial record for the Probate Court’s, Circuit Court’s and Court of Appeals’ consideration evidence sufficient to prove her completed inter vivos gift argument:

- Decedent’s valid June 17, 2005 letter to Wachovia Bank gifting designated assets to Carolyn S. Rider (App. p. 248-249);
- the 1993 Investment Agency Agreement showing the bank’s authority, custody and/or control of the assets at issue (App. p. 246-247);
- Wachovia Bank testimony regarding its communications with the Decedent concerning his June 8, 2005 verbal directive and intention to

give assets to Carolyn S. Rider and its receipt of his June 17, 2005 gift letter (App. p. 157 line 16 to p. 161 line 16);,

- the bank's issuance of instructions to comply with said letter before the Decedent's July 8, 2005 death. (App. pp. 248-249, p. 246; p. 173 line 4 to p. 175 line 22; p. 157 line 16 to p. 161 line 16);
- attorney Tom Grady's testimony establishing the Decedent's intent to give his wife the assets at issue in addition to the Will's bequests (App. p. 193 line 19 to p. 196 line 13); and
- offered Wachovia Bank testimony establishing the absence of any revocation of the gift or reservation of rights, and confirming that the Decedent could take no further action to deliver the gift beyond sending the letter, given the bank's custody and/or control of the assets. (App. pp. 246-249, 71-79, 152-186, 192 line 3 to p. 195 line 13).

Paragraphs 12 and 13 of the initial Petition for Declaratory Judgment specifically raise the issue of a completed lifetime gift. Paragraph 12 states:

“If the securities were effectively transferred to the Decedent's wife as of June 17, 2005 pursuant to the entitlement order, the fact that Wachovia did not actually transfer securities to Carolyn Rider until after the Decedent's death does not render the actual transfer of the assets an incomplete gift.” (App. p. 40, paragraph 12).

Paragraph 13 states:

“If, pursuant to South Carolina Code of Laws, Wachovia was instructed by the Decedent to transfer securities to Carolyn Rider before the date of Decedent's death, the transfers shall be considered a completed lifetime gift by the Decedent to his wife and therefore not included in the Decedent's estate for probate purposes and estate tax purposes.” (App. p. 40, paragraph 13).

Paragraphs 13 and 14 of Carolyn Rider's Answer to the initial Petition for Declaratory Judgment specifically admit the allegations contained in Paragraphs 12 and 13 of the Petition, asserting the existence of a completed lifetime gift. (App. p. 60, paragraphs 13 and 14).

Appellant's oral argument before the Probate Court included the following assertions:

"Mr. Rider told everybody who was involved with this...he told his banker and he told his lawyer, I'm giving my wife \$2 million. Bank how do I do it? Bank says, Sign this. Give it back to us and it's done. That's what he did....Everybody knows, everybody has testified that Mr. Rider intended to give \$2 million to Mrs. Rider. And if the court takes the money back away from her, then his entire intent, he followed the bank's instructions, he did what he was told to do, then his intent is entirely frustrated." (App. p. 208 line 19 to p. 209 line 13). "All transfers pursuant to the June 17, 2005 letter signed by Mr. Rider were done and put in place prior to his death." (App. p. 203 lines 14-21). Under the common law, my client is entitled to retain all of the funds that were transferred to her. Certainly, she's entitled to anything that was transferred prior to death." And the only testimony is that all of the transfers were done prior to the death." (App. p. 206 lines 13-18).

The Appellant's Grounds of Appeal reference a gift. (App. p. 122 paragraphs 3 and 4). Appellant raised the completed gift argument for the Circuit Court's consideration at the appellate hearing, noting Tom Grady's trial testimony "that this two million dollars was a specific gift separate and apart from his estate plan" (App. p. 227 lines 11-14), and noting the Probate Court's finding that the amount at issue is "a separate gift, separate and apart from his will and trust." (App. p. 223 line 22 to p. 224 line 1). Appellant's July 30, 2007 post-hearing supplement to the Rider Trial Brief suggests that the effect of the Decedent's June 17, 2005 letter was not impacted by his death, and Mrs.

Rider is therefore entitled to all assets given thereunder. (App. p. 418-419). The completed gift theory was preserved for review, and warrants the Court's consideration.

In addition, a completed gift argument is implicit in the Appellant's Article 8 argument already before the Court, and provides support for a consistent, similar analysis of the facts outside the Article 8 context. Interpretation and application of Article 8 to provide for immediate vesting of legal ownership rights in Mrs. Rider under the June 17, 2005 entitlement order, and a completed inter vivos gift occurring on June 17, 2005 by virtue of the Decedent's same June 17, 2005 letter are consistent, and remove any necessity for later in time application of agency law at the Decedent's July 8, 2005 death.

The \$304,082.46 transfer to Carolyn S. Rider constitutes a completed inter vivos gift made as of the June 17, 2005 date of the Decedent's written instruction to Wachovia Bank, well prior to the Decedent's death on July 8, 2005. Since the \$304,082.46 gift became the property of Carolyn S. Rider on June 17, 2005, those assets do not constitute assets of the Decedent's estate.

An inter vivos gift requires the absolute transfer of possession and title, *so far as the donor can make it so* by intent and delivery. See, Baptist Foundation for Christian Education v. Baptist College at Charleston, 282 S.C. 53, 317 S.E.2d 453 (1984) (emphasis added). The evidence clearly indicates the Decedent's intention to make a \$2,000,000.00 inter vivos gift to Carolyn S. Rider. Trial testimony of the Decedent's Personal Representative and estate planning counsel Thomas M. Grady, Esq. indicates that the Decedent intended to convey during his lifetime \$2,000,000.00 to his wife, Carolyn S. Rider, in order to make sure his wife had adequate funds to maintain her standard of living between the time of his death and during the time of his estate's

probate administration. (App. p. 193 line 9 to p. 194 line 6; p. 195 line 17 to p. 196 line 13). The Personal Representative's trial testimony further indicates that the Decedent's \$2,000,000.00 transfer to Carolyn S. Rider was *not* an advance related to the Decedent's \$1,000,000.00 bequest to his wife under his Will. (App. p. 195 line 21 to p. 196 line 13). In addition, trial testimony of Wachovia representative Lynn DiLella indicated that she received a June 8, 2005 telephone call from the Decedent, who informed her of his desire to move \$2,000,000.00 in stocks and bonds into an account for Carolyn Sue Rider. (App. p. 157 lines 13-24).

Wachovia already had control of the Decedent's securities and cash assets on June 17, 2005, under the 1993 Investment Agency Agreement. (App. pp. 76-77 ). All that was required in order to implement complete and unconditional delivery of the securities and cash to Carolyn S. Rider's Wachovia account was the Decedent's instruction to Wachovia directing such asset transfer to Mrs. Rider's Wachovia account, given the circumstances and nature of the property. By virtue of his June 17, 2005 written directive to Wachovia, the Decedent relinquished control over his designated assets and took all action within his power to immediately transfer designated assets to Carolyn S. Rider. (App. pp. 78-79). The Decedent did not physically hold the assets at issue due to the nature of those assets, so he was not in a position to physically hand them to Mrs. Rider. The Decedent's written instruction to Wachovia was the extent of the action he could take in order to deliver those assets to Carolyn S. Rider. (App. pp. 171 lines 3 to 23; p. 172 line 25 to p. 175 line 22; p. 182 line 5 to p. 183 line 8). This type of constructive delivery has been ruled an effective inter vivos gift, in circumstances where

physical delivery by the donor was not practical. See, e.g., In Re Cohn's Will, 187 AD. 392, 176 N.Y.S.225 (N.Y. 1919).

The Decedent's June 17, 2005 instruction indicates his clear intention for the bank to execute immediate transfer of absolute asset ownership to Carolyn S. Rider, and does not indicate any Decedent right or intention to reserve any interest in the assets, or delay asset transfer. (R. p. 246-247). Given the nature of the assets and the fact that they were under management by a third party, Carolyn S. Rider was not in a position to affirmatively act in order to accept or take possession of the property. The Decedent's inter vivos gift was therefore made and completed at the time of the Decedent's June 17, 2005 written instruction to Wachovia.

The Decedent never gave any other instruction to Wachovia during the time period between his June 17, 2005 written asset transfer directive and his death on July 8, 2005, nor is there any evidence that the Decedent or Carolyn S. Rider had any reason to know of any alleged delay in execution of the Decedent's June 17, 2005 instructions. The Decedent made no attempt from June 17, 2005 until his death on July 8, 2005 to revoke, rescind or modify his written June 17, 2005 directive for asset transfer to Carolyn S. Rider. Trial testimony of Wachovia representative Lynn DiLella indicates that Wachovia's Trust Department issued instructions to comply with Decedent's June 17, 2005 asset transfer instructions *before the Decedent's death*, although final settlement of the \$304,082.46 did not occur until October 20, 2005. (App. 173 line 4 to p. 175 line 22). The record does not indicate on precisely what date Wachovia complied with the Decedent's June 17, 2005 instructions prior to his death; however, on that date, the Decedent could not have revoked the gift. There is no evidence of record to indicate

why final settlement of the \$304,082.46 asset transfer did not occur until October 20, 2005; the timing may have been caused by a third party other than Wachovia.

The Decedent's June 17, 2005 instruction constitutes actual (or at a minimum, constructive or symbolic) delivery of the gift to Mrs. Rider. Under a completed inter vivos gift theory, the \$304,082.46 amount at issue became property of Carolyn S. Rider on June 17, 2005. In the alternative, the Decedent's inter vivos gift of \$304,082.46 was completed prior to the Decedent's death when Wachovia complied with his June 17, 2005 directive by issuing instructions for implementation of asset transfer.

#### CONCLUSION

The Court of Appeals has misconstrued both the language of Article 8 of the UCC and the intent of its drafters, and its opinion has created a nightmare for securities intermediaries and trust and estate counsel which must be corrected. More fundamentally, the Court of Appeals' refusal to consider the completed gift argument long recognized at common law, and which provides a clear alternative ground for decision, has permitted the intent of the Decedent to provide for his wife after his death, clearly expressed in writing, to be substantially frustrated. For both reasons, Petitioner asks the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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