

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.

PETITIONER'S REPLY TO RETURN OF MCCLURE RESPONDENTS

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The Petitioner, Carolyn S. Rider, respectfully asserts that multiple factors counsel issuance of a Writ of Certiorari with respect to Court of Appeals Opinion No. 4842.

ARGUMENT

I. CAROLYN RIDER ACQUIRED THE SUBJECT ASSETS UNDER S.C. CODE ANN. SECTION 36-8-501(b)(3) *BEFORE* THE DECEDENT'S DEATH. THEREFORE, *THE LAW OF AGENCY AND POST-DEATH FINAL TRANSACTION SETTLEMENT DATES DO NOT DETERMINE ASSET OWNERSHIP.*

S.C. Code Ann. Section 36-8-104(a) supports immediate vesting of interests, 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 asset. 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)* (emphasis added).

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), rather than correctly using the June 17, 2005 entitlement order date when Mrs. Rider acquired asset ownership under 36-8-501(b)(3). Opinion 4842 contains no explanation or justification for the Court’s disregard of 36-8-501(b)(3). Carolyn Rider’s asset ownership arose under 36-8-501(b)(3). Neither Opinion No. 4842 nor Respondents’ Return quote the entirety of 36-8-501, or address it to any extent.

S.C. Code Ann. Section 36-8-501(b) states:

(b) Except as otherwise provided in subsections (d) and (e), a person acquires a security entitlement if a securities intermediary:

(1) indicates by book entry that a financial asset has been credited to the person's securities account;

(2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) *becomes obligated* under other law, regulation or rule to credit a financial asset to the person's securities account.

(emphasis added).

Lynn DiLella testified at trial that Wachovia Bank, N.A. issued asset transfer instructions in compliance with Decedent's June 17, 2005 letter *before* his death. App. Vol. I, p. 174 l. 19 to p. 175 l. 22. Wachovia would not have been able to issue those pre-death instructions to comply with that June 17, 2005 entitlement order, if it had not already received said entitlement order.

Decedent's June 17, 2005 letter incorporates the attached asset page by reference, 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 para. 2. There is no evidence the Decedent did not intend his letter to reference the second page asset list; in fact, Decedent's banker Lynn DiLella testified that she discussed the matter with Decedent on June 8, 2005. App. p. 157 l. 16 to p. 159 l. 11. By virtue of the June 17, 2005 entitlement order and the Decedent's September 27, 1993 Investment Agency Agreement, Wachovia Bank became obligated to credit the Decedent's designated assets to Carolyn Rider's account.

For the reasons set forth in this Petitioner's Petition for Writ of Certiorari, Decedent's June 17, 2005 letter to Wachovia directing transfer of his designated assets to Carolyn Rider is an entitlement order, Decedent was an entitlement holder with respect to his assets before he issued his entitlement order, Decedent was an appropriate person to issue such entitlement order, and Wachovia Bank was Decedent's securities intermediary.

Once the Decedent's entitlement order was given to Wachovia, Wachovia was required to comply with it. S.C. Code Ann. Section 36-8-507(a) states, in pertinent part: "A securities intermediary *shall comply* with an entitlement order if the entitlement order is originated by the appropriate person..." (emphasis added). See also, S.C. Code Ann. Section 36-8-506. Decedent's issuance of his June 17, 2005 entitlement order obligated Wachovia as securities intermediary to credit financial assets to Carolyn Rider's securities account. By virtue of that obligation, Carolyn Rider acquired the assets pursuant to S.C. Code Ann. Section 36-8-501(b)(3), and became an entitlement holder having an interest in the property. See S.C. Code Ann. Section 36-8-102(a)(17), Comment 17; see Petition for Writ of Certiorari p. 10.

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 any later change of circumstance. S.C. Code Ann. Section 36-8-107(e).

The June 17, 2005 entitlement order immediately conferred upon Carolyn Rider 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). Carolyn Rider's June 17, 2005 status as entitlement holder of a securities entitlement made subsequent events (including Decedent's death and final transaction settlement dates) irrelevant because her legal interest in the assets was immediate and absolute. *Since Mrs. Rider acquired ownership rights to the assets on June 17, 2005, the law of agency did not subsequently revoke or affect those rights upon Decedent's July 8, 2005 death.*

Respondents' Return incorrectly states that "Wachovia chose the method by which Carolyn Rider acquired a securities entitlement to the fourth transfer." There is no factual or legal basis to support that statement. Carolyn Rider could have acquired the assets under any of the three Section 36-8-501(b) subsections, depending on the facts and circumstances surrounding the transaction.

Respondents fail to understand Petitioner's technical argument under Section 36-8-501, and make an unwarranted, false allegation (Return p. 14, para. 2) that Petitioner "misleads" the Court. Section 36-8-104(a) is cited as support for the existence of the entitlement order. Other cited statutes show that upon issuance of the entitlement order, the securities intermediary had a duty/obligation to comply, which triggered 36-8-501(b)(3).

II. TRIAL TESTIMONY INDICATES THAT *BEFORE* THE DECEDENT'S DEATH, WACHOVIA BANK, N.A. ISSUED ASSET TRANSFER INSTRUCTIONS IN COMPLIANCE WITH HIS JUNE 17, 2005 ENTITLEMENT ORDER. CAROLYN RIDER ACQUIRED THE ASSETS AT ISSUE PRIOR TO DECEDENT'S DEATH, AND POST-DEATH FINAL SETTLEMENT DATES DO NOT APPLY.

Respondents base their argument that the assets at issue did not become property of Carolyn Rider because the Record contains no evidence that assets transferred after

Decedent's death were in the process of being transferred before his death. Respondents misrepresent the Record, and disregard trial testimony of Wachovia Bank, N.A. officer Lynn DiLella. Ms. DiLella's trial testimony specifically indicates that Wachovia's Trust Department issued instructions in compliance with the Decedent's June 17, 2005 written asset transfer instructions *before the Decedent's death*. Ms. DiLella stated:

Q: So the only one that we're really talking about being done post-death, is the October one; is that correct?

A: Actually, depends on what you're talking about. If you're talking about settlement date, then that was done after his death. But if you're talking about the instruction to transfer being executed by our trust department, I believe that was done prior to his death.

Q: Okay. So say that again, if you would. Your trust department executed on his instructions prior to death?

A: They issued instructions for the transfer to take place of mutual funds prior to his death.

Q: Okay. Thank you. So everything reflected and transferred to Ms. Rider in Exhibit C, the bank put in motion and did the instructions to fulfill his June 17th letter prior to his death?

A: That's my belief.

Q: And your belief is based on your review of Wachovia records relative to this transaction?

A: And discussion with the trust officer who has the dates of the issuance of the instructions.

App. Vol. I, p. 174 l. 19 to p 175 l. 22.

Wachovia's asset transfer instructions established by the Record (issued *before Decedent's death*, according to Lynn DiLella's trial testimony) constitute book entries. Neither Court of Appeals Opinion 4842 nor Respondents can explain why Wachovia's pre-death asset transfer instructions for implementation of Decedent's June 17, 2005

entitlement order to Carolyn Rider's account do not constitute "book entries" under S.C. Code Ann. Section 36-8-501(b), rather than the final transaction settlement dates which they contend constitute "book entries."

Wachovia was not a named party in the litigation below. The Wachovia bankers who testified at trial were fact witnesses whose presence was required in Court under subpoena. Respondents complain that Wachovia or Carolyn Rider should have offered more detailed evidence at trial, yet Respondents fail to acknowledge that they had due opportunity in discovery before trial, and at trial, to request information from Wachovia sufficient to address issues such as what date Decedent's June 17, 2005 letter was received by the bank, and the type/timing of asset transfer instructions Wachovia issued prior to the Decedent's death. Respondents have no legitimate basis for their assertion that "Wachovia maintained its silence" (or that any admission is to be implied) when the Record shows that the Wachovia witnesses responded to questions presented to them at trial.

Respondents mischaracterizes the Record in asserting as the law of this case that Carolyn Rider became the entitlement holder of all asset transfers on the final transaction settlement dates (now called "book entry dates" by Respondents). On the contrary; the record simply reflects dates when final settlement dates occurred. App. pp. 59, 71-73. It is not the law of the case that "book entry dates determine when she became an entitlement holder," nor is there any legitimate basis to support Respondents' assertion that Mrs. Rider is precluded from addressing the Court of Appeals' error. Respondents' contention that final asset transfer settlement dates had any effect on Carolyn Rider's ownership interest in the assets, lacks merit. For the reasons stated above, Mrs. Rider

acquired all assets before Decedent's death. Opinion 4842 and Respondents fail to explain why the final transaction settlement dates constitute "book entries," rather than the bank's pre-death asset transfer instructions.

III. THIS CASE INVOLVES NOVEL ISSUES OF LAW WITH SIGNIFICANT IMPLICATIONS FOR FINANCIAL INSTITUTIONS AND THE LEGAL PROFESSION. OPINION 4842 WILL CAUSE SYSTEMIC UNCERTAINTY IF UNALTERED. THESE ISSUES WARRANT THE SUPREME COURT'S CONSIDERATION.

There is factual support for Petitioner's proposition that Opinion No. 4842 will adversely affect financial institutions and estate planning counsel. Decedent's June 17, 2005 entitlement order to Wachovia, Decedent's June 8, 2005 telephone conversation with Lynn DiLella, Decedent's conversation with his estate planning counsel (all of which are of record) all indicate the Decedent's express intent to transfer all designated assets to Carolyn Rider. However, the Court of Appeal's reading and application of UCC Article 8 as set forth above and reliance on agency law make implementation of Decedent's intent dependent on random outside factors and third parties outside the Decedent's control. In our case, Opinion 4842 unjustly deprives Carolyn Rider of assets which Decedent specifically designated for her, *not* for his estate. There is no evidence of record that Decedent desired that any assets listed in connection with his June 17, 2005 letter should be received by his estate.

There are no South Carolina authorities on point. Opinion 4842 if left unaltered will be a source of confusion for practitioners. Estate planning counsel will not be able to reliably predict for their clients whether their wishes will be implemented, and personal representatives (like the personal representative in this case) will be forced to expend funds to seek judicial guidance regarding asset ownership, if the Court's application of

Article 8 and agency law is not corrected and clarified. Financial institutions may have unnecessary risk exposure and may not be able to plan or predict outcomes, if factors such as timing of unrelated third party actions, death, and a lack of clarity concerning application of Article 8 determine estate plan implementation, rather than a Decedent's clearly expressed intent. Injustice will result from such frustration of decedents' intent, and by virtue of the resulting disinheritance of their designated beneficiaries, as in our case. Such injustice warrants redress, consistent with Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Respondents' assertion that people making their estate plans have "other options" (some of which take effect after death, rather than during life, and which may have vastly different tax consequences) does not cure the adverse effect of Opinion 4842.

As a practical matter, the implications of Opinion 4842's error in analysis and application of UCC Article 8 (including S.C. Code Ann. Section 36-8-501(b)(3)) and disregard of Decedent's clearly expressed intent could not be addressed (as they were, in the Petition for Rehearing and Petition for Writ of Certiorari) until the Court of Appeals issued that Opinion. Respondents' contention otherwise is unsubstantiated. The issue has not been waived. Petitioner has not waived the ability to address Opinion 4842. Petitioner's argument does cite to the Record and to authority. Respondent's assertion that certiorari should be denied based on their assessment of the frequency of such argument citation is ridiculous. In addition, there is no evidence of record to support Respondent's contention that any alleged delay or timing issue in final settlement of the fourth asset transfer was attributable to Wachovia Bank, N.A. rather than to some third party (nor does the Return cite to any portion of the Record in that regard).

IV. 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 not preserved for review. The Record shows the existence of a completed inter vivos gift, and indicates that the gift issue was 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). 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. See also, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

The fourth 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. As set forth in detail in the Petition for Writ of Certiorari (which

argument is incorporated herein by reference), 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. There was no requirement or need for the Petitioner to appeal the first three transfers, because those assets were previously held to be assets of Carolyn Rider. Contrary to Respondents' assertion, Carolyn Rider's after the fact opinion or statement(s) regarding Decedent's intent have no impact on the Decedent's actual intent regarding the gift.

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.

IV. CONCLUSION

As indicated above, the Court of Appeals erred; Opinion 4842 creates bad law in the UCC area, and disregards the Decedent's clearly expressed intent. Widespread, systemic commercial uncertainty may result if Opinion 4842 is not corrected. Further, the Court of Appeals' refusal to consider the well-established completed gift argument also frustrates the Decedent's intent. The Petitioner respectfully requests a Writ of Certiorari.

Respectfully submitted,



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October 6, 2011.

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CERTIFICATE OF SERVICE

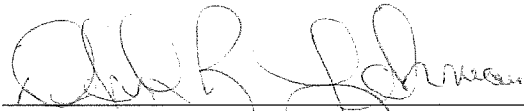
I certify that I have served a copy of the PETITIONER'S REPLY by depositing a copy of it in the United States Mail, postage prepaid, on October 12th, 2011, addressed to:

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