

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2007-CP-07-3057

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S.C. Supreme Court

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 RepresentativeRespondent,

and

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

BRIEF OF THE PETITIONER, CAROLYN S. RIDER

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STATEMENT OF ISSUES ON APPEAL

- A. THE DECEDENT'S JUNE 17, 2005 WRITTEN INSTRUCTION TO WACHOVIA BANK, N.A. DIRECTING TRANSFER OF SPECIFIED SECURITIES AND CASH TO HIS WIFE CAROLYN S. RIDER CONSTITUTES A VALID ENTITLEMENT ORDER UNDER ARTICLE 8 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE ("UCC"), WHICH ENTITLEMENT ORDER WAS EFFECTIVE ON THE JUNE 17, 2005 DATE IT WAS MADE. THE \$304,082.46 ASSET AMOUNT AT ISSUE IN THIS APPEAL LEGALLY BECAME PROPERTY OF CAROLYN S. RIDER ON JUNE 17, 2005 BEFORE THE DECEDENT'S JULY 8, 2005 DEATH.
- B. THE DECEDENT'S JUNE 17, 2005 ENTITLEMENT ORDER AND WACHOVIA BANK'S COMPLIANCE WITH THAT ENTITLEMENT ORDER PRIOR TO THE DECEDENT'S DEATH CONSTITUTE "PRIOR ACTIONS" UNDER PARAGRAPH 13 OF THE 1993 INVESTMENT AGENCY AGREEMENT, THE VALIDITY AND ENFORCEABILITY OF WHICH "PRIOR ACTIONS" ARE NOT AFFECTED BY THE DECEDENT'S DEATH.
- C. THE OCTOBER 20, 2005, \$304,082.46 TRANSFER TO CAROLYN S. RIDER CONSTITUTES A COMPLETED LIFETIME, *INTER VIVOS* GIFT MADE AS OF JUNE 17, 2005, PRIOR TO THE DECEDENT'S JULY 8, 2005 DEATH. THEREFORE, THE \$304,082.46 AMOUNT AT ISSUE CONSTITUTES 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 (1) certain securities transferred to Mr. Rider's wife Carolyn S. Rider pursuant to Mr. Rider's June 17, 2005¹ written transfer instruction to Wachovia Bank, N.A. (Trust Department) 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 (2) whether the fact that certain securities transfers physically occurred after Mr. Rider's July 8, 2005 date of death made those assets estate property rather than property of Mrs. Rider. (App. pp. 38-53).

Trial of the matter occurred on July 10, 2007, the Honorable Kenneth E. Fulp, Jr. presiding. The Beaufort County Probate Court issued an October 12, 2007 Order finding, *inter alia*, that (1) a preponderance of the evidence showed Charles G. Rider intended to transfer \$2,000,000.00 in securities to his wife as a separate gift 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 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. Section 36-8-102, *et seq.*) applied to the issue along with and did not supplant the law of agency, (5) all asset transfers that 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

¹ The Estate's Petition contained an unintentional error in its references to a June 15, 2005 transfer instruction date (App. p. 40, paragraphs 10, 11, 12; App. p. 42 paragraph A); it is undisputed that the actual date of the Decedent's written transfer instruction letter to Wachovia Bank was June 17, 2005 (App. p. 71 paragraph 2; App. p. 248).

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 was terminated late on July 8, 2005, when it received notice of Mr. Rider's death, and (7) that \$304,082.46 is therefore part of the Decedent's probate estate rather than property of Mrs. Rider. (App. pp. 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. pp. 119-120; App. pp. 356-357). Mrs. Rider's Grounds of Appeal pleading was served on November 15, 2007, and filed with the Beaufort County Court of Common Pleas and Beaufort County Probate Court. (App. pp. 121-123; App. pp. 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. pp. 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. pp. 32-37).

Carolyn S. Rider's December 17, 2008, Notice of Appeal was served on December 18, 2008, and timely filed with the Beaufort County Court of Common Pleas and with the South Carolina Court of Appeals on December 22, 2008. (App. p. 124). No party except Carolyn S. Rider appealed as to any issue. 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).

Mrs. Rider served her Petition for a Writ of Certiorari on opposing counsel and filed the same with proof of service with the South Carolina Court of Appeals and the South Carolina Supreme Court on August 25, 2011. The McClure Respondents served a Return to Petition on September 26, 2011, and Mrs. Rider served her Reply to Return of McClure Respondents on October 6, 2011. By Order dated November 15, 2012, the Supreme Court granted Mrs. Rider's Petition for a Writ of Certiorari. By letter dated November 27, 2012, Mrs. Rider requested a thirty (30) day extension of time within

which to serve and file her Brief and copies of the Appendix. The Supreme Court's November 30, 2012 Order granted Mrs. Rider's requested extension of time until January 16, 2013.

STATEMENT OF MATERIAL 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. pp. 246-247; App. p. 71 paragraph 1). The Agreement authorized the bank (“Wachovia”) to open an account for Decedent and to hold cash, securities and other property, subject to Decedent’s instructions. Wachovia had power to buy, sell and exercise certain rights regarding these assets. Paragraph 13 of the Agreement governed its termination and provided that the Agreement 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).² Decedent never terminated, rescinded or modified the Agreement.

In June 2005, the Decedent knew that he had terminal cancer, and made an estate plan stating his final wishes and desire to provide for his wife, Carolyn S. Rider. On June 17, 2005, the Decedent sent his executed asset transfer instruction letter (hereinafter, “entitlement order”) to Wachovia. (App. p. 248; App. p. 71, paragraph 2). The entitlement order stated: “Please accept this letter as my authority and direction to

² The text of Paragraph 13 states as follows:

“This agreement may be terminated by either party by giving thirty (30) days notice in writing to the other party or by my death, provided that termination by reason of my death shall be effective only upon receipt of actual knowledge thereof by one of your responsible officials and *shall not affect the validity of any prior actions*. Your authority hereunder shall not terminate in the event of my disability. (App. p. 247).

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; App. 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 for his wife. (App. p. 249).

On June 22, 2005, five days after sending the entitlement order to Wachovia, the Decedent executed his Last Will and Testament and First Amendment of Revocable Trust Agreement. (App. pp. 253-263; App. pp. 264-285). On July 6, 2005, fourteen days after executing his Will, the Decedent executed his Second Amendment of Revocable Trust Agreement. (App. pp. 286-288). The Decedent died on July 8, 2005 at 2:45 p.m. Although he made multiple changes to his estate plan in the days prior to his death, the Decedent never rescinded or modified his June 17, 2005 entitlement order.

Prior to the Decedent’s death, 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. A final settlement of \$733,228.00 occurred on June 21, 2005, and a final settlement of \$39,672.00 occurred on July 8, 2005, both prior to the Decedent’s death. (App. p. 289; App. pp. 250-252; App. p. 173 line 2 to p. 175 line 22; App. p. 35 line 19 to p. 36 line 8). A final settlement of \$935,032.64 occurred on July 11, 2008, after the Decedent’s death but prior to Wachovia’s receipt of actual notice of the Decedent’s death. (App. p. 35 line

19 to p. 36 line 8; App. p. 173 line 2 to p. 175 line 22).³ A final settlement in the amount of \$304,082.46 occurred on October 20, 2005, and is the only transfer under review.⁴

³ Appreciation of the specific securities between the date of the Decedent's June 17, 2005 entitlement order and the last date of asset transfer accounts for the \$12,115.00 difference between the amount of assets transferred and the \$2,000,000.00 amount originally designated for transfer. (App. p. 73 lines 2-5).

⁴ No cross-appeal was filed by any other party in connection with the present appeal. When a party fails to cross-appeal, the unappealed portion of the judgment becomes the law of the case and is not reviewable by the appellate court. South Carolina Appellate Court Rule 203(c); 334 S.C. at 187, 512 S.E.2d at 129; 338 S.C. at 175, 525 S.E.2d at 871. Timely cross-appeal would have been required pursuant to South Carolina Appellate Court Rule 203(c) in order for any party to appeal the lower court Order(s) enforcing the June 21, 2005, July 8, 2005 and July 11, 2005 asset transfers to Carolyn S. Rider. Because no such cross-appeal was received, only the October 20, 2005, \$304,082.46 asset transfer is under appellate review.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for matters originating in the probate court is determined based upon whether the essential nature of the cause of action in the probate court was at law or in equity. Nationsbank of South Carolina v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996). A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 629-30, 658 S.E.2d 106, 109 (Ct. App. 2008).

In the case below, the matter before the Probate Court was a declaratory judgment action, in which action the Estate of Charles G. Rider asked the Probate Court to apply South Carolina's Uniform Commercial Code ("UCC") and law of agency to determine whether transfers made pursuant to an Investment Agency Agreement were valid. An action involving interpretation of a contract and statutes is an action at law. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 606-07, 663 S.E.2d 484, 487 (2008). Since the underlying cause of action involved construction of a contract and interpretation of a statute, it is an action at law.

In an action at law on appeal, the appellate court will review issues of law *de novo*, and will not disturb findings of fact if there is any evidence that reasonably supports the findings of the judge or jury. See, Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (issues of law); 321 S.C. at 392, 468 S.E.2d at 662 (questions of fact). Interpretation of a statute is an issue of law; therefore, this Court should review the lower court's interpretation of the UCC *de novo*. Summerville, 378 S.C. at 110, 662 S.E.2d at 41. Agency is generally a question of fact, unless the facts are admitted. McFaddin v. Bland, 147 S.C. 27, 144 S.E. 592 (1928).

Where, as here, the question of agency has been decided based upon the language of a contract and not upon disputed facts, it is a question of law. Because both the UCC and agency are issues of law in this case, review on appeal is *de novo*. In addition, this appeal involves stipulated and undisputed facts; therefore, the appellate court is free to review whether the trial court properly applied the law to those facts. WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

II. CONTESTED ISSUES

- A. THE DECEDENT'S JUNE 17, 2005 WRITTEN INSTRUCTION TO WACHOVIA BANK, N.A. DIRECTING TRANSFER OF SPECIFIED SECURITIES AND CASH TO HIS WIFE CAROLYN S. RIDER CONSTITUTES A VALID ENTITLEMENT ORDER UNDER ARTICLE 8 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE ("UCC"), WHICH ENTITLEMENT ORDER WAS EFFECTIVE ON THE JUNE 17, 2005 DATE IT WAS MADE. THE \$304,082.46 ASSET AMOUNT AT ISSUE IN THIS APPEAL LEGALLY BECAME PROPERTY OF CAROLYN S. RIDER ON JUNE 17, 2005 BEFORE THE DECEDENT'S JULY 8, 2005 DEATH.

The Decedent's June 17, 2005 letter instructing Wachovia to transfer \$2,000,000.00 in specified securities and cash to his wife Carolyn S. Rider constitutes a valid entitlement order under Article 8 of the South Carolina Uniform Commercial Code ("UCC"), which order was effective on June 17, 2005, the date it was made. The entire \$2,000,000.00 (including the \$304,082.46 October 20, 2005 asset at issue in this appeal) therefore became the property of Mrs. Rider on June 17, 2005.

1. Article 8 of the South Carolina Uniform Commercial Code Governs Asset Ownership.

S.C. Code Ann. Section 36-8-101 *et seq.* (“Article 8”) comprehensively addresses the subject matter at issue in this appeal.⁵ 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, 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)

As shown *infra*, S.C. Code Ann. Section 36-8-102 *et seq.*, addresses all aspects of the Decedent’s June 17, 2005 entitlement order to Wachovia and Mrs. Rider’s acquisition of securities entitlement/assets; therefore, Article 8 displaces common law (including the common law of agency). The Decedent was an entitlement holder under S.C. Code Ann. Section 36-8-102(a)(7), his June 17, 2005 letter was an effective entitlement order under S.C. Code Ann. Section 36-8-102(a)(8) and S.C. Code Ann. Section 36-8-107(b), Wachovia was Decedent’s securities intermediary under S.C. Code Ann. Section 36-8-

⁵ The McClure Respondents conceded at oral argument before the Court of Appeals that South Carolina law governs in this case. In re Estate of Charles Galen Rider, 394 S.C. 84, 90, 713 S.E.2d 743, 646 n.3 (Ct. App. 2011).

102(a)(14)(ii), and S.C. Code Ann. Sections 36-8-506 and 36-8-507 govern security intermediary compliance with the entitlement order.

2. Mrs. Rider Acquired the Securities on June 17, 2005 Under Article 8.

Under a plain reading of Article 8 of the UCC, Mrs. Rider acquired ownership of all of the Decedent's designated assets on June 17, 2005; none of the assets are property of the Decedent's estate. 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(a)(8). Because Decedent's June 17, 2005 letter to Wachovia directed the transfer of his assets to Carolyn Rider, the letter was an entitlement order under Section 36-8-102(a)(8). The Court of Appeals' Opinion 4842 states as the law of the case that Decedent's June 17, 2005 written instruction to Wachovia was an entitlement order. See Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue); Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869,871 (2000) (finding an unappealed ruling, right or wrong, is the law of the case).

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). Therefore, he was the "appropriate person" to make the entitlement order under S.C. Code Ann. Sections 36-8-107(a)(3) and (b)(1). Court of Appeals Opinion 4842 states as the law of the case that

Decedent was an entitlement holder.⁶ See 334 S.C. at 187, 512 S.E.2d at 129; 338 S.C. at 175, 525 S.E.2d at 871.

Wachovia maintained securities accounts for the Decedent and others in the normal course of its business and was therefore 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"). The Decedent's account falls under the definition of a "securities account" under S.C. Code Ann. Section 36-8-501(a).

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. 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). 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. This entitlement order gave her legal ownership of the assets prior to final settlement of their account transfer 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 S.C. Code Ann.

⁶ 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).

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 36-8-501(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 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). The Decedent’s June 17, 2005 entitlement order did not specify a time period or deadline within which the intermediary was required to transfer the securities from Decedent’s name to his widow’s name.

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. Since Mrs. Rider acquired ownership of the assets on June 17, 2005, she also received all of the appreciation in value of those assets.

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 ownership of the assets vested immediately. 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 S.C. Code Ann. Section 36-8-501 (emphasis added). Under this section, obtaining enforceable rights to compel book entry by the securities intermediary from the Decedent's name to his widow, the entitlement holder, 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 affected) those rights upon Decedent's July 8, 2005 death.

3. The Court of Appeals Misapplied S.C. Code Ann. Section 36-8-501(b).

The Court of Appeals misapplied Section 36-8-501(b) in restricting its analysis to 501(b)(1) and disregarding 501(b)(3). To determine whether/when Mrs. Rider acquired a security entitlement and therefore became an entitlement holder, the Court looked only at Wachovia's creation of book entries under 36-8-501(b)(1) to reflect her ownership of the securities, ignoring the rest of the statute. In fact, book entry is only one method by which someone can acquire a security entitlement under S.C. Code Ann. Section 36-8-501(b). The Court of Appeals failed to acknowledge and apply S.C. Code Ann. Section 36-8-501(b)(3), under which Mrs. Rider acquired a security entitlement in the assets

when Wachovia became obligated to credit the transferred financial assets to her account.

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

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.

Examination of S.C. Code Ann. Section 36-8-102(a)(7) and S.C. Code Ann. Section 104(a) makes clear that the Court of Appeals' focus on only Section 501(b)(1) was error. In Section 102(a)(7) an "entitlement holder" is defined 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 what it perceived to be "book entry" under 36-8-501(b)(1) using final asset transfer 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). S.C. Code Ann. Section 36-8-104(a) supports Mr. Rider's asset ownership on June 17, 2005 stating 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". Mrs. Rider acquired a security entitlement on the June 17, 2005 date of Decedent's entitlement order.

Court of Appeals Opinion 4842's footnote 4 incorrectly suggests that an entitlement holder's legal rights to assets vest only when a security is credited to the person's account. That suggestion is directly contrary to S.C. Code Ann. Section 36-8-

102(a)(7) and 36-8-102(a)(17). As noted above, under S.C. Code Ann. Section 36-8-501(b), book entry by the securities intermediary is *not* the exclusive means by which Mrs. Rider's enforceable legal rights in the assets could have vested. Instead, Mrs. Rider's rights could have (and in this case did) vest pursuant to Section 36-8-501(b)(3) when Wachovia became obligated under other law to credit the assets to Mrs. Rider's account. See S.C. Code Ann. Section 36-8-501(b)(3).

Because Wachovia was obligated to credit the transferred assets to Mrs. Rider's account on June 17, 2005 upon its receipt of the Decedent's entitlement order (See S.C. Code Ann. Section 36-8-506, S.C. Code Ann. Section 36-8-507(a)), Mrs. Rider acquired ownership of the assets on June 17, 2005 pursuant to S.C. Code Ann. Section 36-8-501(b)(3). The Court of Appeals erred in limiting its examination to the final settlement date(s) when assets were credited to Mrs. Rider by book entry under S.C. Code Ann. Section 36-8-501(b)(1), disregarding 36-8-501(b)(3), 102(a)(7), and 104(a), and disregarding the fact that Wachovia's pre-date of death instructions to implement asset transfer were book entry.

If unaltered, Court of Appeals Opinion 4842 will cause widespread systemic, commercial and legal uncertainty which could 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 36-8-501(b)(1)'s book entry requirement to non-written entitlement orders. Opinion 4842 will adversely affect financial institutions and estate planning counsel by serving as a source of confusion and uncertainty 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. As detailed in the Petition for a Writ of Certiorari, (section II, pages 12-14) financial institutions may have unwarranted risk exposure and may not be able to plan or predict outcomes, if random factors such as timing of multiple third party securities intermediary and entitlement holder actions, death, a lack of clarity concerning application of Article 8 and disregard of commercial realities 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.

4. The Decedent's Death as Entitlement Holder Did Not Constitute a Change of Circumstances Sufficient to Alter the Effect, Validity and Enforceability of His June 17, 2005 Entitlement Order.

S.C. Code Ann. Section 36-8-107(e) states that "effectiveness of an indorsement, instruction, or entitlement order *is determined as of the date of the indorsement, instruction, or entitlement order, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change in circumstances.*" S.C. Code Ann. Section 36-8-107(e). (emphasis added). The statute does not specify death of the entitlement holder or any other change in circumstances as sufficient to render an otherwise effective entitlement order ineffective.

As discussed above, the Decedent's entitlement order was effective as of June 17, 2005 because it met the relevant statutory requirements of S.C. Code Ann. Sections 36-8-102 and 107. Under S.C. Code Ann. Section 36-8-107 (e), the effectiveness of the Decedent's June 17, 2005 entitlement order did not become ineffective by reason of any later change in circumstances, including the Decedent's July 8, 2005 death. The

Decedent's entitlement order designated no particular deadline for asset transfer into Mrs. Rider's name. (App. pp. 248-249). S.C. Code Ann. Section 36-8-506 and S.C. Code Ann. Section 36-8-507 require a securities intermediary to implement the entitlement order. S.C. Code Ann. Section 36-8-506 and S.C. Code Ann. Section 36-8-507. Once the entitlement order became effective on June 17, 2005, its implementation was governed by the UCC. Trial testimony indicates that Wachovia began implementation of the entitlement order prior to the Decedent's death. (App. p. 173 line 4 to p. 175 line 22). Application of the common law of agency and the lower courts' "effectuation" analysis to find that the October 20, 2005 asset transfer was not valid, constitutes reversible error.⁷

5. Even if the Court of Appeals' Analysis was Correct, Mrs. Rider Prevails Because Book Entry Occurred Before the Decedent's Death.

Even if the Court of Appeals' statutory construction was correct, however, the \$304,082.46 at issue in this appeal is still Mrs. Rider's property because book entry occurred when Wachovia gave asset transfer instructions before Decedent's death. The UCC does not define the term "book entry." Instead, as explained by comment 2 to section 501, section 501(b)(1) "turns on the intermediary's conduct, reflecting a basic operating assumption of the indirect holding system that once a securities intermediary has acknowledged that it is carrying a position in a financial asset for its customer or participant, the intermediary is obligated to treat the customer or participant as entitled to the financial asset." S.C. Code Ann. Section 36-8-501, cmt. 2. As a result, section 501(b)(1) "does not attempt to specify exactly what accounting, record-keeping, or

⁷ The UCC does not contain any reference to so-called "effectuation," which term/analysis was apparently created by the associate probate judge who presided over the trial of this case, without citation to supporting South Carolina legal authority.

information transmission steps suffice to indicate that the intermediary has credited the account. That is left to agreement, trade practice, or rule in order to provide the flexibility necessary to accommodate varying or changing accounting and information processing systems.” Id. As the comment reinforces, “The point of [section 501(b)(1)] is that once an intermediary has acknowledged that it is carrying a position for the customer or participant, the customer or participant has a security entitlement.” Id. “The precise form in which the intermediary manifests that acknowledgment is left to private ordering.” Id.

At trial, Wachovia Bank, N.A. representative Lynn DiLella testified 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*.

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. p. 174 l. 19 to p 175 l. 22.

Wachovia presented evidence that ownership of the assets vested in Mrs. Rider prior to the Decedent's death. The form whereby Wachovia issued asset transfer instructions pursuant to the entitlement order is immaterial under Section 501(b)(1). Under Section 501(b)(1), Wachovia's asset transfer instructions issued before Decedent's death constitute book entry; there is no authority to support the Court of Appeals' position that record of only final settlement constitutes book entry. Because Wachovia's book entries were made prior to the Decedent's death, Mrs. Rider obtained ownership of the assets pursuant to S.C. Code Ann. Section 36-8-501(b)(1), prior to the Decedent's death. She maintains her ownership of those assets even if the Court of Appeals' book entry theory under Section 36-8-501(b) is correct, and even in the face of the Decedent's subsequent death. Opinion 4842 fails to explain why Wachovia's pre-date-of-death instructions for implementation of Decedent's June 17, 2005 entitlement order (referenced in bank testimony of record: App. p. 173 line 2 to p. 175 line 4; p. 182 line 17 to p. 183 line 8) do not constitute "book entry" under S.C. Code Ann. Section 36-8-501(b)(1). Indeed, Opinion 4842 neglects the issue entirely.

B. THE DECEDENT'S JUNE 17, 2005 ENTITLEMENT ORDER AND WACHOVIA BANK'S COMPLIANCE WITH THAT ORDER PRIOR TO THE DECEDENT'S DEATH CONSTITUTE "PRIOR ACTIONS" UNDER THE 1993 INVESTMENT AGENCY AGREEMENT, THE VALIDITY AND ENFORCEABILITY OF WHICH "PRIOR ACTIONS" ARE NOT AFFECTED BY THE DECEDENT'S DEATH.

Paragraph 10 of the 1993 Investment Agency Agreement gave Wachovia (as successor in interest to its predecessor bank) authority and discretion to "follow and rely on any instructions" believed to be genuine, with respect to the Decedent's assets in the bank's control. Specifically, Paragraph 10 states: "You may, in your discretion, *follow*

and rely on any instructions given orally, by telephone, telegraph, cable or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instruction.” (emphasis added). (App. p. 247, paragraph 10).

Paragraph 13 of the 1993 Investment Agency Agreement states, in pertinent part: “This agreement may be terminated by either party by giving thirty (30) days notice in writing to the other party or by my death, provided that termination by reason of my death shall be effective only upon the receipt of actual knowledge thereof by one of your responsible officials *and shall not affect the validity of any prior actions.*” (emphasis added). (App. p. 247, paragraph 13). The language “any prior actions” applies to the Decedent as well as to Wachovia, since there is no limiting reference contained in Paragraph 13. (App. p. 247, paragraph 13). The plain language of Investment Agency Agreement Paragraph 13 clearly indicates the Decedent’s (as well as the bank’s) express understanding that if the Agreement were terminated by reason of Charles G. Rider’s death, *any prior actions*, including the Decedent’s instructions to the bank prior to his death, would continue to be valid and enforceable, requiring the bank’s compliance and reliance. (App. p. 247, paragraph 13).

DiLella’s trial testimony indicates that the Decedent’s June 17, 2005 written instruction to transfer \$2,000,000.00 to Carolyn Sue Rider constitutes a “prior act” under Paragraph 13 of the 1993 Investment Agency Agreement, and that under Paragraph 13 Wachovia was obligated to fulfill the Decedent’s valid “prior actions.” (App. p. 171, lines 3-23). DiLella testified that *prior to the Decedent’s death*, Wachovia Bank’s Trust Department issued instructions to implement transfer of *all* assets to Carolyn S. Rider as specified in the Decedent’s June 17, 2005 letter. (App. p. 174, line 25 to p. 175, line 22).

In addition, DiLella testified that Wachovia made the asset transfers consistent with the Decedent's expectations as set forth in his June 17, 2005 instructions. (App. p. 176, lines 6-12). Since Wachovia issued asset transfer implementation instructions in compliance with the Decedent's June 17, 2005 entitlement order/instructions *prior to his death*, Wachovia's compliance with the Decedent's June 17, 2005 entitlement order/instructions *also* constitutes a "prior action" preceding the Decedent's death, which prior action is valid and enforceable and unaffected by the Decedent's death under Paragraphs 13 and 10 of the 1993 Investment Agency Agreement. The fact that a final settlement associated with those asset transfer instructions did not occur until after the Decedent's death has no legal significance in light of the clear language of the Investment Agency Agreement.

C. THE OCTOBER 20, 2005 \$304,082.46 TRANSFER TO CAROLYN S. RIDER CONSTITUTES A COMPLETED LIFETIME, *INTER VIVOS* GIFT, MADE AS OF JUNE 17, 2005, PRIOR TO THE DECEDENT'S JULY 8, 2005 DATE OF DEATH.

The Court of Appeals refused to consider the dispositive issue of whether a completed *inter vivos* gift occurred as between Decedent and Mrs. Rider. Its refusal was premised on the erroneous conclusion that this issue was not raised below by Mrs. Rider's prior trial counsel and, therefore, was not preserved for review. If UCC Article 8 does not apply, the October 20, 2005 transfer of \$304,082.46 to Mrs. Rider is governed by common law regarding completed *inter vivos* gifts. The Record clearly shows the existence of a completed *inter vivos* gift, and that the completed gift issue was raised below. Further, even if the issue had not been sufficiently raised below, United States Supreme Court authority counsels consideration of the completed *inter vivos* gift issue.

1. Mrs. Rider Preserved the *Inter vivos* Gift Issue for Appeal.

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 (in addition to raising the issue before the Court of Appeals) 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.

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 gifting designated assets to Carolyn S. Rider (App. pp. 248-249);
- The 1993 Investment Agency Agreement showing the bank's authority, custody and/or control of the assets at issue (App. pp. 246-247);
- Wachovia 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);
- Wachovia's issuance of instructions to comply with Decedent's June 17, 2005 letter before the Decedent's July 8, 2005 death. (App. pp. 248-249, App. p. 246; App. p. 173 line 4 to p. 175 line 22; App. 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
- Wachovia 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. pp. 418-419). The completed gift theory was preserved for review, and warrants the Court's consideration.

2. U.S. Supreme Court Authority Supports Consideration of the *Inter Vivos* Gift Issue, Even If It Was Not Preserved.

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). As the 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.

The United States Supreme Court has issued at least two lines of precedent which counsel in favor of considering the *inter vivos* gift issue even if Mrs. Rider did not preserve it. First, the 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.” Arcadia v. Ohio Power Co., 498 U.S. 73, 77, 111 S.Ct. 415, 418 112 L.Ed.2d 374, 382 (1990); see also, McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Second, the Court has also recognized that, “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.” See, e.g. Teague v. Lane, 489 U.S. 288, 300, 109 S. Ct. 1060, 1069-70, 100 L.Ed.2d 334, 349 (1989), superseded on other grounds by 28 U.S.C. § 2254.

Both of these lines of precedent are satisfied in this appeal. 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 application of agency law that would be in clear conflict with the Decedent's intent.

3. The Assets at Issue Were a June 17, 2005 *Inter Vivos* Gift From The Decedent to Mrs. Rider.

The \$304,082.46 at issue constitutes a completed *inter vivos* gift made to Carolyn Rider on 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; App. 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, 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 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. DiLella's trial testimony 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. p. 173 line 4 to p. 175 line 22). 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; App. p. 172 line 25 to p. 175 line 22; App. 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); see also Mirvish v. Mott, 942 N.Y.S.2d 404 (N.Y. 2012); In re Matter of Monks, 655 N.Y.S.2d 296 (N.Y. Sur. Ct. 1997).

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. (App. p. 248-248). 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 by virtue of the Decedent's June 17, 2005 written instruction to Wachovia.

CONCLUSION

Confronted with his own mortality, the Decedent, through a valid entitlement order, directed his long-time bank to transfer certain specified assets to his wife. By ignoring S.C. Code Ann. Section 36-8-501(b)(3) and holding that the Decedent's entitlement order was only "effectuated" with respect to transfers for which "book entries" had been made prior to the Decedent's death and then by defining the term "book entry" in an unduly narrow manner to mean only a formal settlement on the settlement date, Court of Appeals' Opinion 4842 directly frustrates the Decedent's clearly expressed intent that his wife obtain immediate ownership of the specified assets, regardless of the date of his death. Opinion 4842 flies in the face of the plain language of Section 36-8-501(b)(3) which allows for ownership immediately upon the receipt by a securities intermediary of an entitlement order, Section 36-8-501(b)(1) (which allows virtually any and every record of the transfer to constitute a "book entry") and the common law doctrine of *inter vivos* gifts. Opinion 4842 does not squarely address any of these issues.

Because final settlement of a securities transfer relies upon the acts of multiple third-party securities intermediaries, it is impossible for estate planning counsel and financial institutions to reliably predict when, or even if, an entitlement order will be "effectuated." If the "effectuation" analysis is allowed to stand, doubt and confusion will result. Decedents, their advisors and their financial institutions will not know whether decedent's wishes, stated in valid entitlement orders, will be carried out. Instead, random events, such as the timing of third-party actions, holidays, weekends and the date and hour of the decedent's death, will control. Personal representatives will be forced to expend estate funds to seek judicial guidance regarding asset ownership, and litigation

will abound. Such uncertainty and injustice cannot be the contemplated result of a Uniform Commercial Code.

Based on the grounds set forth herein, the Appellant respectfully contends that the October 20, 2005 \$304,082.46 asset transfer to Carolyn S. Rider was valid, enforceable, proper and consistent with the Decedent's intent, and that the Opinion 4842 of the South Carolina Court of Appeals should be reversed as to that October 20, 2005 \$304,082.46 transfer.

Respectfully submitted, this the 16th day of January, 2013.



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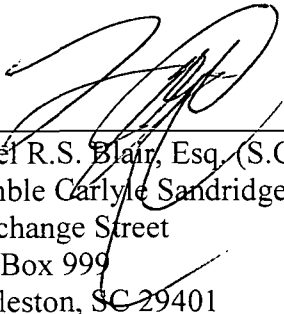
CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Appellant, Carolyn S. Rider, by depositing a copy of it in the United States Mail, postage prepaid, on January 16th, 2013, addressed to:

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Carolyn S. Rider

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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JAN 16 2013

Case No. 2007-CP-07-3057

S.C. Supreme Court

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.

CERTIFICATE OF SERVICE

PETITIONER

I certify that I have served a copy of the BRIEF OF APPELLANT, CAROLYN S. RIDER by depositing a copy of it in the United States Mail, postage prepaid, on January 16, 2013, addressed to:

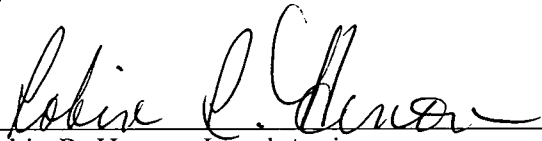
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McClure.....Respondents.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the APPENDIX (VOLUME I AND II) TO BRIEF OF APPELLANT CAROLYN S. RIDER depositing a copy of it in the United States Mail, postage prepaid, on January 16, 2013, addressed to:

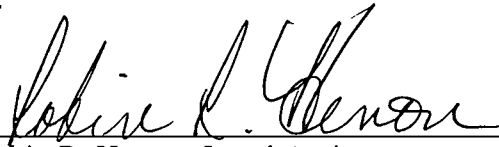
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January 16, 2013

The Honorable Daniel E. Shearhouse
Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina

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JAN 16 2013

S.C. Supreme Court

RE: In the Matter of Estate of Charles Galen Rider
Carolyn S. Rider (Appellant) v. Thomas M. Grady, Personal Representative et al
Trial Court Case No.: 2007-CP-07-03057
Supreme Court Tracking No.: 2011-197686

Dear Mr. Shearhouse:

Enclosed please find for filing the original and seventeen copies of the Appellant's Brief, and fifteen copies of the Appendix (with Certificates of Service) associated with the above-referenced matter. Please have your assistant return two file-stamped copies of the aforementioned documents to my courier. All counsel of record are served with the aforementioned documents by copy of this letter.

With kind personal regards, I am

Yours very truly,

WOMBLE CARLYLE SANDRIDGE & RICE LLP

Laurel R. S. Blair, Esq.

cc: Counsel of Record:
Terry A. Finger, Esq., Co-Counsel for the Appellant (w/encl.)
Douglas W. MacNeille, Esq., Counsel for Deborah Rider McClure et al (w/encl.)
Stephen E. Carter, Esq./Kelly McPherson Jolley, Esq., Counsel for the Estate of
Charles G. Rider and Personal Representative (w/encl.)
Daphne A. Burns, Esq., Counsel for Deborah Rider McClure, et al. (w/encl.)

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