The Supreme Court of South Carolina

In the Matter of Theodore L. Hostetter, Deceased.

Appellate Case No. 2013-000940

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), the Office of Disciplinary Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Christopher B. Staubes, III, Esquire, is hereby appointed to assume responsibility for Mr. Hostetter's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Hostetter maintained. Mr. Staubes shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Hostetter's clients. Mr. Staubes may make disbursements from Mr. Hostetter's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Hostetter maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Hostetter shall serve as notice to the bank or other financial institution that Christopher B. Staubes, III, Esquire, has been duly appointed by this Court.

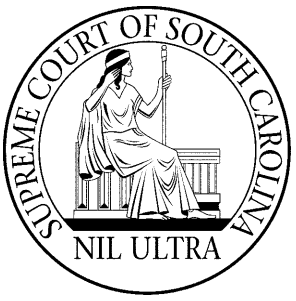
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Christopher B. Staubes, III, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Hostetter's mail and the authority to direct that Mr. Hostetter's mail be delivered to Mr. Staubes' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.

Columbia, South Carolina

May 6, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 8, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Harriet Arnold Wilburn, Respondent,

v.

Paul Elijah Wilburn, Appellant.

Appellate Case No. 2011-191628

ORDER

The Petition for Rehearing filed by appellant in the above matter is denied. The Petition for Rehearing filed by respondent in the above matter is granted and the attached opinion is substituted for the opinion previously filed on February 20, 2013.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

s/James E. Moore A.J.

Columbia, South Carolina
May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harriet Arnold Wilburn, Respondent,

v.

Paul Elijah Wilburn, Appellant.

Appellate Case No. 2011-191628

Appeal from Greenville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 27222
Heard December 4, 2012 – Refiled May 8, 2013

AFFIRMED IN PART AND REVERSED IN PART

David A. Wilson, and Kenneth C. Porter, of Porter & Rosenfeld, both of Greenville, for Appellant.

Timothy E. Madden, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent.

JUSTICE HEARN: These parties lived together as husband and wife for thirty years, enjoying a comfortable standard of living and raising two sons. Following the onset of serious health problems for both parties, they ultimately

separated, and it became the task of the family court judge to identify and divide their rather substantial estate and dissolve their marriage in an equitable fashion. Among other issues, this case presents the novel question of whether trust distributions can be marital property, and we hold they can in certain limited circumstances. Additionally, while we affirm the majority of the family court's equitable division, we reverse the inclusion of one tract of timber as marital property. We also reverse the reservation of alimony to the wife and modify that portion of the order which required the husband to pay $156,182 for the wife's attorney's fees and costs.

FACTUAL/PROCEDURAL BACKGROUND

Harriet Wilburn (Wife) and Paul Wilburn (Husband) were married in 1978, when Wife was twenty-five years old and Husband was twenty-nine years old. At that time, Wife, a college graduate, was employed. Husband had graduated from law school and was employed in private practice.

The parties' first son was born in 1982. After his birth and by mutual agreement of the parties, Wife ceased working. Their second son was born in 1984. Although Wife never returned to work, she made significant expenditures of time and effort throughout the marriage caring for the children and running the household. Around the time their second son was born, Husband became an assistant United States attorney, a position he held until 1994.

After his father's death in 1990, Husband inherited some shares of stock. When his mother died in 1991, he inherited additional stock and several parcels of real property. Thereafter, Husband's health began to deteriorate, and he experienced ulcers and depression. In 1994, he suffered a serious and debilitating stroke. Ultimately, he was paralyzed on the left side of his body. He also suffered significant mental impairment with only a quarter of his brain still functioning, resulting in spatial dyslexia and the inability to process chronologies or numbers. Upon being discharged from the hospital, Husband returned home where he was cared for by Wife and paid caretakers. He was never able to return to work and began receiving a monthly annuity payment from the federal government. Also, the parties' home was not conducive to Husband's disability, so several years after his stroke the parties moved to a new home designed specifically for handicap accessibility.

Prior to his stroke, Husband had opened account 9443 with Smith Barney. The account was titled in his name only and managed by the parties' financial advisor, Geddings Crawford. Shortly after the stroke, Wife and Crawford went to a bank lockbox to remove stock certificates in Husband's name. At Husband's direction, they placed the stocks from the lockbox and other securities in account 9443. Husband then gave Wife power of attorney, and thereafter, she exercised control over that account, writing checks from it as necessary to cover household expenses. Additionally, other assets were placed in the account over the course of their marriage. For example, distributions from a charitable remainder trust and funds from the parties' joint checking account were transferred into the account.

After Husband's stroke, the parties created the Wilburn Family Limited Partnership to which they both contributed assets. Husband and Wife each have a one percent interest in the partnership and their sons have the remaining ninety-eight percent. Husband is the general partner and can pay himself management fees at his discretion.

Additionally, the parties created the Paul E. Wilburn III Charitable Remainder Unitrust, an irrevocable trust, in order to provide them with money during their lifetimes. Under the terms of the trust, Husband receives an annual distribution in the amount of 7% of the value of the trust until his death, and then Wife is to receive an identical distribution until her death, at which time the remainder goes to Presbyterian College.

In 2002, Wife was diagnosed with breast cancer. According to Wife, Husband's response to her illness was primarily concern as to who would care for him. She underwent chemotherapy, a double mastectomy, as well as a hysterectomy. Eventually, the cancer went into remission, and in 2004 she finally began to feel she had recovered.

As Wife was coping with her own illness, she perceived Husband as having become paranoid, irritable, and obsessed with finding a cure for his paralysis. Eventually, the marital relationship became unbearable for her. In 2008, she rented an apartment nearby, but remained in the marital home for five months thereafter to ensure Husband would be cared for when she left. In October of 2008, Wife left the marital home, moved into her apartment, and filed a complaint for separate support and maintenance. Husband then revoked Wife's power of attorney. He also opened two bank accounts—Palmetto Bank accounts 0109 and 8819—and transferred the majority of the assets in account 9443 into those accounts.

Shortly after filing her initial complaint, Wife filed a motion to appoint a guardian *ad litem* for Husband and a motion to supplement the complaint to seek a divorce and to bifurcate the issue of divorce from the other issues. The family court granted both motions and subsequently granted Wife a divorce based on one year's separation. Following a trial on the remaining issues, the family court entered an order classifying the parties' assets as marital or nonmarital, dividing the marital estate, reserving jurisdiction on the issue of alimony, and ordering Husband to pay Wife's attorney's fees and costs. Husband appealed, raising numerous issues related to the family court's identification of marital property, equitable division of the marital estate, reservation of alimony to Wife, and award of attorney's fees and costs.

STANDARD OF REVIEW

This Court exercises de novo review over appeals in family court cases. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). However, we recognize this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses. *Id.* Additionally, the de novo standard does not relieve the appellant of the burden of identifying error in the family court's findings. *Id.* Accordingly, the decision of the family court will be upheld unless the Court finds that a preponderance of the evidence weighs against the family court's decision. *Id.*

LAW/ANALYSIS

I. EQUITABLE DIVISION

A. Husband's Federal Annuity Payments

Husband contends the family court erred in classifying the monthly annuity payments he receives from the United States as marital property. We disagree.

Subject to certain exceptions, marital property is defined as "all real and personal property which has been acquired by the parties during marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code § 20-3-630(A) (Supp. 2011). When confronted with benefits, such as Husband's annuity, that are not specifically addressed by the statute, we look to their nature and purpose to determine if they are marital property. *See, e.g.*, *Tiffault v. Tiffault*, 303 S.C. 391, 392-93, 401 S.E.2d 157, 158 (1991) (considering

vested military retirement benefits); *Hardwick v. Hardwick*, 303 S.C. 256, 259-60, 399 S.E.2d 791, 793 (Ct. App. 1990) (considering a vested retirement fund).

We have consistently held that a retirement benefit earned during the marriage, whether vested or nonvested, is deferred compensation, and thus, is marital property. *See, e.g.*, *Ball v. Ball*, 314 S.C. 445, 447, 445 S.E.2d 449, 450 (1994). A retirement benefit is marital property because spouses contribute to one another's careers and both spouses defer assets they otherwise would have received during the marriage in exchange for the benefit. *Id.* However, disability benefits are treated as income rather than marital property. *Tinsley v. Tinsley*, 326 S.C. 374, 381-82, 483 S.E.2d 198, 202 (Ct. App. 1997). A disability benefit replaces the income a spouse would earn were he or she not disabled, and thus, functions as income, rather than as an asset earned during the course of the marriage. *Id.*

Here, the family court described the benefit as a pension Husband earned through his employment during the marriage. It found the pension was a disability benefit following Husband's stroke, but converted to a pension when Husband reached the retirement age of sixty-two, which occurred shortly before the trial. Accordingly, the court held the annuity was a vested retirement benefit and thus, marital property subject to equitable division; it ordered Husband to pay Wife fifty percent of all monies he received from the pension.

While Husband did begin receiving the annuity payments when he became disabled following his stroke, the record establishes by a preponderance of the evidence that the benefit was and always has been a retirement benefit. Wife testified she understood the benefit to be a pension and that Husband was able to access the money earlier than the normal retirement date because of his disability. In other words, she believed he received the benefits because he became eligible for and took early retirement due to his disability. Wife also testified that she understood the benefit as converting to a retirement benefit when Husband reached age sixty-two. Husband offered no evidence as to the nature of the annuity payments.

More importantly, the records produced by the United States Office of Personnel Management which administers Husband's annuity indicate it was a retirement benefit. Those records, which were introduced by Wife, contain an "Application for Immediate Retirement" completed by Husband shortly after his stroke. The application asked "Is this an application for disability retirement?" and Husband indicated it was. The records also repeatedly refer to the annuity as a

"disability retirement" and state that "disability retirement is a lifetime benefit." The records make clear that the benefit comes from Husband's participation in the Civil Service Retirement System. Also, contrary to the family court's finding, the records contain no indication that the benefit converted to another form when Husband reached age sixty-two.

Therefore, while we disagree with the family court judge that the character of the annuity Husband began receiving upon his disability changed when he turned sixty-two, we conclude the preponderance of the evidence establishes it was a retirement benefit which he received early because of his disability. Thus, we hold the benefit was properly classified as marital property, and affirm the family court as modified.

B. Smith Barney Account 9443 and Palmetto Bank Accounts 0109 and 8819

Husband contends the family court erred in finding that Smith Barney account 9443 and Palmetto Bank accounts 0109 and 8819 were marital property. He asserts the accounts were nonmarital from inception because they only contain his nonmarital property, specifically stocks he inherited, and because the accounts did not undergo transmutation. We find the record does not support Husband's contentions and accordingly affirm the classification of the accounts as marital property.

A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital. *Miller v. Miller*, 293 S.C. 69, 71 n.2, 358 S.E.2d 710, 711 n.2 (1987). If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character. *Johnson v. Johnson*, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988).

The family court found there was no evidence of which specific securities were used to create account 9443, and while there was evidence that some of the securities in the account were inherited, there was also evidence that other securities in the account were purchased during the marriage and in exchange for marital assets, thus rendering them marital property. Additionally, the court found the account became marital property through transmutation because of how the account was used and controlled.

We find Wife satisfied her burden of proving account 9443 was marital. She testified the account was funded not only with stocks Husband inherited but also with stocks he purchased during the marriage, distributions from the charitable remainder trust, and funds from a joint checking account. Additionally, their financial advisor, Crawford, testified that when he started working for the parties, account 9443 was a longstanding account with his firm that contained between a quarter and a half million dollars in assets, and he and Wife collected the stock certificates from the lockbox and placed them in the account after Husband's stroke. He testified that the stock certificates were all in Husband's name, but otherwise he did not provide any details as to their origins.

The burden thus shifted to Husband to establish the nonmarital character of the account. Husband asserts the only assets placed in account 9443 were stocks he inherited, and property a party acquires through inheritance is not marital property. S.C. Code § 20-3-630(A)(1). However, Husband testified that account 9443 could also contain stocks his mother gave to Wife, Wife's nonmarital stocks, and stocks he purchased using income earned from his employment during the marriage. Thus, Husband's own testimony was contradictory as to the character of the assets in account 9443, and he did not carry his burden of establishing it contained only his nonmarital property. Therefore, we agree with the family court that Smith Barney account 9443 was marital property. Because the two Palmetto Bank accounts were funded solely from account 9443, those accounts were also marital property. Having found account 9443 was marital property from its inception, we need not consider the family court's alternate holding that the account underwent transmutation. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

C. The McDonald Tract

Husband argues the family court erred in finding the McDonald Tract, a timber farm he inherited from his mother and valued at $740,710, had become marital property through transmutation. We agree.

Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property. *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 871 (1986).

The family court found the McDonald Tract became marital property through transmutation due to Wife's contributions to the management of the property and the use of proceeds from the property in support of the marriage. While Wife testified that she devoted considerable time to managing the tract, Husband disputed the extent to which she did so. He testified he made all of the decisions in consultation with the forester, Charles Sibley. Sibley testified that both parties managed the property. Proceeds from timber sales from the property were deposited into the parties' joint checking account. When the value of the joint checking account exceeded $100,000, Wife took money from the account and deposited it into Smith Barney account 9443.

First, Wife's contributions to the management of the property are not sufficient to establish transmutation. While the expenditure of time and labor on property may be some evidence of the intent of the parties to treat property as marital, it alone is not enough to establish intent. *See Pruitt v. Pruitt*, 389 S.C. 250, 263, 697 S.E.2d 702, 709 (Ct. App. 2010) (holding the wife's labor in finishing the construction of the marital home did not show the husband's intent to treat the home as marital property); *Murray v. Murray*, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (holding the wife's labor in improving the marital home over seventeen years did not establish transmutation because "contributions of time and labor do not necessarily prove transmutation").

Also, the use of income from the property in support of the marriage does not establish transmutation. This issue was addressed in *Peterkin v. Peterkin*, 293 S.C. 311, 360 S.E.2d 311 (1987), where the husband inherited and received as gifts certain real estate, and the wife claimed the properties underwent transmutation in part because income from the properties was placed in the parties' joint account and used for family expenses. *Id.* at 313, 360 S.E.2d at 312. This Court held that while the use of property in support of a marriage is relevant to transmutation, the mere use of income from nonmarital assets does not transmute those assets into marital property and is not relevant to transmutation. *Id.* at 313, 360 S.E.2d at 313.

Accordingly, we find Wife's contributions to the management of the property and the use of income from the property in support of the marriage do not establish transmutation. Therefore, the McDonald Tract was Husband's nonmarital property, and the family court erred in identifying it as marital property.

D. Wife's Nonmarital Assets

Husband argues the family court erred in classifying three accounts, Smith Barney account 9515, Bank of America money market account 9902, and Bank of America certificate of deposit 5004, as Wife's nonmarital assets.[1] He asserts Wife failed to produce sufficient evidence to establish the source of the funds in the accounts and that the court improperly placed the burden on him to establish the marital nature of the assets. We disagree.

Wife presented testimony that the funds in each of the three disputed accounts were nonmarital property because they were inherited, gifted, or acquired before the marriage. *See* S.C. Code § 20-3-630(A) (excepting these properties from marital property). Husband adduced no evidence to contradict this testimony. Instead, Husband argues her testimony was insufficient because she failed to present any documentary evidence. However, Wife's testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts.

Husband also argues the family court erred by accepting Wife's testimony concerning the source of the funds in her accounts when it did not accept his testimony concerning the source of the funds in Smith Barney account 9443. Thus, according to Husband, the family court unfairly manipulated the burden of proof against him. Husband's argument overlooks the evidence presented as to those assets. As noted, Husband did not contest Wife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting Wife's testimony is sufficient justification to affirm the family court. *See Honea v. Honea*, 292 S.C. 456, 357 S.E.2d 191 (Ct. App. 1987) ("[A] party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings."). Regarding account 9443, Wife testified that it was funded in part by marital assets, and Husband conceded that could well be the case. Husband's concession as to the character of some of the assets used to fund this account together with Wife's testimony are enough to support affirming the family court on this issue. Accordingly, we find no error in the classification of these accounts, respectively, as marital and nonmarital property.

[1] The total value of these three accounts at the time of trial was $379,529.

E. Trust Distributions

Husband also claims the family court erred in treating his distributions from the irrevocable Paul Wilburn III Charitable Remainder Unitrust as marital property and ordering him to pay Wife half of all distributions he receives. He asserts that the trust cannot be marital property because neither party owns the trust.[2] While we agree that the trust was not marital property, we find the trust distributions are a marital asset subject to equitable division and accordingly affirm the family court.

While this is an issue of first impression in South Carolina, courts in other jurisdictions have held that trust distributions were marital property. For example, the New Hampshire Supreme Court considered an order holding that the corpus of a trust was not marital property but the right to receive distributions from the trust was marital property. *In re Chamberlin*, 918 A.2d 1 (N.H. 2007). Compared to South Carolina's statutory definition of marital property, the New Hampshire court employed the more expansive definition contained in that state's statute under which any property belonging to either spouse, regardless of title, is marital property.[3] *Id.* at 4. The court held that a trust creates separate legal interests, one in the trust corpus and another in the distributions. *Id.* at 5. The court also held that once the parties placed property in the trust, they no longer owned that property, and therefore, the corpus was not marital property. *Id.* at 4. However, it

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[2] Husband also contends the family court erred because the spendthrift provision of the trust prohibits the allocation of distributions to Wife and the marital property statute excludes from marital property any property excluded by written contract. Husband did not present that argument to the family court, and therefore, it is not preserved for our review. *See State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (holding an appellant cannot argue one ground at trial and then another ground on appeal).

[3] The South Carolina Code defines marital property as "all real and personal property which has been acquired by the parties during marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code § 20-3-630. The statute then excludes from marital property all property acquired by "inheritance, devise, bequest, or gift from a party other than the spouse," acquired before or after the marriage, property acquired in exchange for such property, excluded by written contract of the parties, and any increase in value of such property. *Id.*

held that the right to receive distributions from the trust was marital property. *Id.* at 5.

The Vermont Supreme Court, applying a definition of marital property similar to New Hampshire's, as any property owned by a spouse, held that the right to receive distributions from a trust was marital property. *Chilkott v. Chilkott*, 607 A.2d 883 (Vt. 1992). The trust there was similar to the trust at issue here, in that upon the death of his mother, the husband was entitled to receive distributions from the trust, and upon his death, the wife was to receive distributions from the trust. *Id.* at 883-84. The husband argued his interest in the trust was not marital property because he did not own the trust. *Id.* at 884. The court concluded the parties owned an interest in the trust distributions and that interest was marital property. *Id.* at 883.

The parties did not direct us to any cases holding that trust distributions were not marital property, and we have found none. Therefore, while we hold the trust corpus is not the property of either spouse and thus cannot be marital property, we hold that trust distributions can be marital property depending on how and when the interest was acquired or if the interest has undergone transmutation.[4]

While the family court here was not explicit, we conclude it found the trust distributions had undergone transmutation because it based its holding on findings that the intent behind the creation of the trust was to provide the parties with income during their lifetimes and that distributions from the trust were deposited into Smith Barney account 9443. The family court found, and Wife's testimony established, that the trust was created with the intent to provide for Husband and Wife for the remainder of their lives. That intent was also evidenced by the terms of the trust that provided distributions to Husband for life and then to Wife for life following Husband's death. The distributions were deposited into Smith Barney account 9443, and the funds in that account were used in support of the marriage. Additionally, Husband was clearly aware that the distributions were being used in support of the marriage because he attended yearly meetings discussing the performance of that account and the parties' anticipated future needs. Taking these

[4] Due to the expansive definition of marital property in New Hampshire and Vermont as any property owned by a spouse, once those courts found a spouse had a legal interest in trust distributions, the distributions were also deemed to be marital property. Our State's narrower definition of marital property causes our holding to also be narrower.

facts together, we find the parties intended, from the time the trust was created, to treat the right to receive distributions as marital property; therefore, transmutation was established. Accordingly, we affirm the family court's finding that the right to receive distributions was marital property.

F. The Marital Home

Husband contends the family court erred in arbitrarily dividing the marital home. Specifically, Husband asserts the court awarded him the home but then effectively rescinded that award by requiring him to pay Wife almost the entire value of the home.

Husband also contends the court erred because the apportionment deprived him of his $60,958 in nonmarital equity in the home. In apportioning the marital property, the family court awarded the home to Husband and ordered him to pay Wife $500,000 at the earlier of the sale of the home or thirty days after the entry of the final order. The family court also assigned Husband $60,958 as his nonmarital property for the reduction in the mortgage balance which resulted from payments Husband made after the date of filing and before trial. Husband asserts that the home was worth $512,814 at the time of trial, and thus by apportioning $512,814 to the parties as marital property, the court deprived him of the $60,958 in nonmarital equity because the entire value of the home had already been apportioned.

We find no error in the apportionment of the marital home. Initially, we note that the family court's award of the home to Husband combined with the order to pay Wife was not in error. In order to make an in-kind distribution of the home to Husband and effect the equitable division deemed appropriate, the family court required him to pay a sum of money to Wife. Although the order stated the lump sum payment could be satisfied through the sale of the home, it also gave Husband the option of paying Wife within ninety days presumably from other funds or the liquidation of another asset. It was Husband's choice as to how to satisfy the obligation. Accordingly, we reject Husband's argument that the family court awarded him the marital home and then effectively rescinded that award by requiring him to make a payment to Wife in an amount close to the total value of the home.

Husband introduced a schedule of marital assets listing the value of the home both on the date of filing and date of trial as $512,814. However, he

presented no evidence in support of that value. Wife also presented a schedule of assets, which stated the fair market value of the home was $810,000 on the date of filing, but subject to a mortgage balance of $297,186, for a value to the parties of $512,814. Her schedule listed the value of the home on the date of trial as $573,772, and stated the change in value was due to payments made against the mortgage during the pendency of action. In support, Wife introduced an appraisal of the home completed near the date of filing, listing the value as $810,000. She also introduced a mortgage loan statement contemporaneous with the date of filing stating the principal balance was $297,185.83, and a statement contemporaneous with the date of trial stating the principal balance was $236,227.61. The parties agree and the court found that Husband paid down the mortgage balance on the home by $60,958 during the action. Thus, accepting the only evidence presented, the family court must have concluded the value of the home was $573,772 at the time of trial. The family court therefore did not deprive Husband of any of his nonmarital asset of increased equity in the home by apportioning $573,772 as marital and nonmarital assets to the parties. Accordingly, we affirm the family court's apportionment of the marital home.

G. Overall Equitable Division of the Marital Estate

Husband contends the family court erred in apportioning the marital estate because he contributed the majority of the property to the marriage through his inheritances. He asserts he should have received more than approximately one-half of the marital estate and proposes that he receive sixty percent of the estate. We disagree.

Upon divorce, the family court is required to make a final equitable apportionment of the marital estate, and in making the apportionment the court is required to consider fifteen statutory factors. S.C. Code § 20-3-620 (Supp. 2011). On appeal, we must review the fairness of the overall apportionment, and if equitable, we will uphold it regardless of whether we would have weighed specific factors differently. *Roberson v. Roberson*, 359 S.C. 384, 389, 597 S.E.2d 840, 842 (Ct. App. 2004). In short, the family court's apportionment will not be overturned on appeal absent an abuse of discretion. *Murphy v. Murphy*, 319 S.C. 324, 329, 461 S.E.2d 39, 41-42 (1995).

Here, after resolving the parties' disputes as to the marital versus nonmarital nature of their property, the family court set out "Schedule 4" which apportioned the marital assets. Of the $3,888,758 in assets and debts for which the family court

identified a value, the court awarded Wife $1,744,765.50 or 45% and awarded Husband $2,143,992.50 or 55%.[5]

The family court made extensive factual findings and generally considered all fifteen statutory factors. In particular, the family court found Wife was able to obtain employment but faced great difficulty in doing so due to her lack of skills and long absence from the workforce. Husband neither was employed, nor could he gain employment due to his disability. However, the family court also found Husband had an income of $9,250 per month, or $111,000 per year, from various assets and could increase his income by paying himself a management fee for serving as general partner of the Wilburn Limited Partnership or by cutting timber he owned. The family court found Wife had income of approximately $1,000 per month from a family partnership held by her family and she was capable of earning approximately $1,300 per month through employment. Related to their ability to earn income was the parties' health. Wife's cancer was in remission at the time of trial and she was otherwise in good health. Husband was permanently disabled from his stroke and suffered from a long history of depression. Additionally, after the family court's equitable apportionment, the parties would each receive approximately $1,532.52 per month from the federal annuity and $1,975.08 per month from the Paul E. Wilburn III Charitable Remainder Trust.

The value of the marital property was $3,888,758, and the majority of those assets were acquired through Husband's inheritances. The family court found Husband had $614,344 and Wife had $346,297 in nonmarital assets. The parties also had minimal debts in relation to their assets. While the family court did not

[5] Schedule 4 stated that Wife was to receive $1,744,768 and Husband was to receive $2,143,995, but those totals reflect a slight addition error. Also, we note the family court gave each party half of four marital assets without stating a value for those assets: the parties' one percent interest in the Wilburn Limited Partnership, the distributions from the federal annuity, the distributions from the Paul E. Wilburn III Charitable Remainder Trust, and the Smith Barney #607-18926 Paul E. Wilburn III TTEE FBO I. Remainder Trust. While those assets are relevant under the statutory factors for apportionment and to the extent possible we consider them, they were not included in the family court's consideration of the total amount of marital property awarded to each party either because no evidence as to their value was presented at trial or they are assets that provide recurring payments subject to fluctuation.

state its reasons for doing so, it awarded the marital home to Husband. However, as previously discussed, the court gave Husband the option of keeping the home or selling it, and thus, Husband cannot complain about the court's consideration of this factor. Neither party was awarded separate maintenance or alimony.

Additionally, in light of our holding with respect to the McDonald Tract, the marital estate will now be significantly smaller and Husband's nonmarital assets will be significantly larger. Thus, following this appeal, Wife has an even greater need for a large portion of the marital estate.

In conclusion, we find no abuse of discretion in the family court's apportionment. Unquestionably, Husband contributed the majority of the assets and has serious medical expenses, however, this was a thirty year marriage and Wife spent many years contributing to the marriage as well as caring for Husband in addition to the parties' children. While Wife was not awarded alimony due to the size and apportionment of the marital estate as well as husband's disability, there is no question she otherwise would have been a candidate for permanent alimony. Because of all these circumstances, we affirm the family court's equitable division of the marital estate of 45% to Wife and 55% to Husband.

II. RESERVATION OF JURISDICTION ON ALIMONY

Husband contends the family court erred in reserving jurisdiction to award Wife alimony because there were no exigent circumstances present to justify the reservation. We agree.

Alimony may be reserved where the family court identifies circumstances that are likely to create a need for alimony in the reasonably near future. *Donahue v. Donahue*, 299 S.C. 353, 363, 384 S.E.2d 741, 747 (1989). Where a spouse does not need alimony at the time of trial and there is no evidence the spouse has an illness, the spouse's needs will foreseeably change in the near future, or some other extenuating circumstance, it is error to reserve jurisdiction on alimony. *Id.*

At trial, Wife testified that if she received her requested apportionment of the marital estate, she did not want alimony, but that if the requested division was not awarded, she would need alimony. Additionally, Wife's counsel stated to the family court that alimony would only be appropriate if the family court or an appellate court did not agree with Wife's proposed apportionment of the marital estate. Wife presented no evidence of physical or mental illness, foreseeable future

need, or other extenuating circumstances. While she testified she had suffered from breast cancer in the past, she did not assert the cancer as a reason to reserve alimony. She also testified the cancer was in remission and she had been healthy for several years prior to the trial.

The family court held that due to the equitable apportionment of the marital property, the parties would each have sufficient assets to provide for them and alimony was not necessary. However, the court reserved the issue of alimony if, on appeal, the equitable apportionment was not upheld as provided in the final order. Thus, the family court reserved the issue of alimony solely on the basis that its equitable division might be altered on appeal.

While we appreciate the dilemma in which Wife could find herself if her equitable division award was drastically altered on appeal, we decline to hold that possible changes in equitable apportionment on appeal constitute a sufficient justification for the reservation of alimony. Were we to hold otherwise, the reservation of alimony would be appropriate in every case and our prior case law on the reservation of alimony would be superfluous. Accordingly, we hold the family court erred in reserving jurisdiction on alimony.

III. ATTORNEY'S FEES AND COSTS

Finally, Husband contends the family court erred in ordering Husband to pay all $156,182 of Wife's attorney's fees and costs because the court did not consider the required factors, and even to the extent the court did properly consider the factors, it reached an erroneous result. In light of our holdings herein, the beneficial results obtained by Wife and the parties' respective financial conditions have markedly changed. *See E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (listing the factors to be considered in determining whether to make an award); *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (listing the factors to be considered in determining the amount of an award). Therefore, we conclude the attorney's fee award should be reduced and Husband shall pay only half of Wife's attorney's fees and costs.

CONCLUSION

For the reasons set forth, we affirm in part and reverse in part the family court order. We affirm the classification of Husband's annuity payments, account 9443, the Palmetto Bank accounts, and the trust distributions as marital property,

the classification of Wife's three accounts as her nonmarital property, the apportionment of the marital home, and the ratio used to divide the marital estate. However, we conclude the family court erred in finding the McDonald Tract was marital property and in reserving jurisdiction on the issue of alimony. Also, we reduce the award of attorney's fees and costs to $78,091.

We modify the family court's equitable apportionment by removing the McDonald Tract, valued at $740,710, from the marital estate and deeming it Husband's nonmarital property. That modification reduces the marital estate from $3,888,763 to $3,148,053. In order to effect the 45%/55% equitable division ordered by the family court, we reduce the $500,000 payment Husband was ordered to make to Wife to $171,856.10. In total, in addition to the approximately $3,507.60 per month Wife will receive from Husband's federal annuity and trust distributions, Wife shall receive $1,416,621.60 of the marital assets identified on Schedule 4, and Husband shall receive $1,731,426.40.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore concur.

The Supreme Court of South Carolina

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L. and Carrington L.; Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of The Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust, Defendants,

of whom Robert L. Buchanan, Jr. and Adele J. Pope, as Personal Representatives of The Estate of James Brown and Trustees of The James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of The James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee

for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are, Respondents.
In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000.

Appellate Case No. 2009-142286

ORDER

The Petitions for Rehearing and the Motions to Supplement the Record are denied. The majority and concurring opinions, however, have been revised. Accordingly, the attached opinions are substituted for those previously filed in this matter.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ James E. Moore A.J.

Columbia, South Carolina

May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L. and Carrington L.; Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of The Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust, Defendants,

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and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of The

James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are, Respondents.
In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000.

Appellate Case No. 2009-142286

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27227
Heard November 1, 2011 – Refiled May 8, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James B. Richardson, Jr., of Columbia, and Tressa T. H. Hayes, of Asheville, NC, for Appellants.

Attorney General Alan Wilson, Senior Assistant Attorney General C. Havird Jones, Assistant Deputy Attorney General Robert D. Cook, Assistant Attorney General J.C. Nicholson, III, Assistant Attorney General Mary Frances Jowers, all of Columbia; Louis Levenson, of Atlanta; Matthew Day Bodman, of Columbia; Robert N. Rosen, of Charleston; David L. Michel, of Charleston; S. Alan Medlin, of Columbia; T. Heyward Carter, Jr., of Evans Carter Kunes & Bennett, of Charleston; William W. Wilkins, of Nexsen Pruet, of Greenville; and J. David

Black and Fred L. Kingsmore, Jr., both of Nexsen Pruet, of Columbia, for Respondents.

Albert P. Shahid, Jr., of Charleston, for the Guardian ad Litem.

JUSTICE BEATTY: Robert L. Buchanan, Jr. and Adele J. Pope ("Appellants"), formerly personal representatives for The Estate of James Brown and trustees of The James Brown 2000 Irrevocable Trust, appeal from circuit court orders that (1) approved a settlement agreement pursuant to S.C. Code Ann. § 62-3-1102 (2009) of pending litigation concerning the estate; and (2) removed Appellants from their fiduciary positions and appointed Russell L. Bauknight as personal representative and trustee. We affirm in part, reverse in part, and remand.

I. FACTS

James Brown ("Brown"), a singer and entertainer known as "The Hardest-Working Man in Show Business" and "The Godfather of Soul," died in Atlanta, Georgia on December 25, 2006. Brown left an estate widely estimated to be worth anywhere from $5 million to over $100 million that is at the heart of this dispute among numerous parties.

By will dated August 1, 2000, Brown devised all of his personal and household effects to six adult named children: Deanna J. Brown Thomas, Yamma N. Brown, Vanisha Brown, Daryl J. Brown, Larry Brown, and Terry Brown. Brown left the remainder of his estate to The James Brown 2000 Irrevocable Trust via a pour-over provision in his will.

Brown created the 2000 Irrevocable Trust under a separate agreement, also dated August 1, 2000, as part of his estate plan to provide financial assistance for the education of his grandchildren and disadvantaged youths. The agreement creating the 2000 Irrevocable Trust includes Schedule A, which indicates Brown placed his long-time residence at Beech Island, Aiken County, and other assets in the trust as part of its initial funding, although the record contains some discrepancies as to the timing of the transfers.

Albert H. Dallas, Alfred[1] A. Bradley, and David G. Cannon were named as the co-personal representatives of Brown's estate and as the co-trustees of the 2000 Irrevocable Trust. In the trust document, Brown created an Advisory Board, initially to be comprised of three members, who were to confer with and advise the trustees in a manner consistent with Brown's objectives for the trust. There were also provisions regarding trustee succession, which required three trustees to serve at all times.

Upon Brown's death, the principal and income contained in the 2000 Irrevocable Trust, as augmented by Brown's general estate, was to be divided, by its terms, into two "shares" or subtrusts: (1) The Brown Family Education Trust ("Family Trust"), which was capped in the amount of $2 million for tax purposes and designated for the education of Brown's grandchildren; and (2) The James Brown "I Feel Good" Trust ("Charitable Trust"), which Brown declared "shall be used solely for the tuition, educational expenses, and financial assistance of . . . poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions available in the States of South Carolina and Georgia." Thus, Brown's estate planning documents indicate Brown intended the bulk of his wealth to be used to support the Charitable Trust.

Brown's will and trust each contained a no-contest clause, which provided that any beneficiary who challenged the will or the 2000 Irrevocable Trust "shall forfeit his or her entire interest thereunder." Brown noted in both documents that the persons described therein, i.e., the six named children and their legitimate issue, comprised "the entire class . . . acknowledge[d] to be [his] heirs and issue." Brown expressly disavowed any other potential beneficiaries, stating, "I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not." Brown stated any person not provided for in his will or trust "whether or not claiming to be a beneficiary, party in interest, or otherwise shall not have standing or be qualified to contest, claim an

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[1] Bradley's first name also appears as "Alford" in various documents in the record, including Brown's will and trust. We further note variations exist in the record regarding the spelling of the names of Vanisha Brown (also "Venisha") and Tommie Rae Hynie Brown (also "Tomi Rae Hynie" and "Tommie Rae Hyne"). The names herein are as they appear in the case caption presented to this Court.

interest in or otherwise dispute the disposition of [his] estate as he herewith disclaims and disinherits any such person." Brown stated that any challenge by such persons to the disposition of his estate or the validity of the documents would "be considered an affront to [his] wishes," and "shall be vigorously challenged as such by his fiduciaries." In the trust agreement, Brown declared that he was not then married and that he did not want the trust estate to ever go to a spouse: "It is the Grantor's [Brown's] intention that the trust estate be available only to the beneficiaries and not . . . the Grantor's past or future spouse. The Trustee(s) are directed to enforce this provision."

Thereafter, on November 27, 2001, Brown and Tommie Rae Hynie ("Tommie Rae") executed a Prenuptial Agreement in which Tommie Rae acknowledged that she was entering the agreement knowingly and voluntarily and that she had the opportunity to receive the advice of counsel of her own choosing. Tommie Rae waived any right to Brown's property or the receipt of alimony in the event of a separation or divorce from Brown, and she agreed to waive any claim for an interest in his estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse.

On December 14, 2001, Brown and Tommie Rae participated in a marriage ceremony in Aiken County. In 2004, Brown brought annulment proceedings against Tommie Rae after discovering that she had participated in a marriage ceremony in Texas in 1997 with another individual, Javed Ahmed. Brown attached documents to his pleadings showing Tommie Rae had not been granted an annulment of the prior marriage until April 15, 2004. Tommie Rae counterclaimed for a divorce from Brown on the ground of physical cruelty, and in his reply, Brown sought genetic testing of a son, respondent "James B.," born to Tommie Rae on June 11, 2001. The parties dismissed their respective suits in a consent order filed August 16, 2004, in which Tommie Rae agreed to "forever waive any claim of a common law marriage to [Brown], both now and in the future." The parties thereafter had an on-and-off-again relationship up until Brown's death on December 25, 2006.

In 2007, five of the six adult children Brown named in his will as well as Tommie Rae, all Respondents herein, brought actions to set aside Brown's will and the 2000 Irrevocable Trust based on undue influence. They alleged Brown's estate should, instead, pass by the laws of intestate succession. Tommie Rae claimed that she was entitled to an elective share or an omitted spouse's share of Brown's estate

and that her son, James B. (via a guardian ad litem), was entitled to a share of the estate as an omitted child. The probate court transferred these claims and all filings thereafter to the circuit court.

Appellants were initially appointed by the circuit court in March 2007 as Special Administrators with limited duties to oversee the handling of Brown's estate after petitions were filed by some of Brown's family members seeking the removal of Dallas, Bradley, and Cannon as personal representatives. The court made the selection after the parties could not agree on who should be appointed. Ultimately, the three original fiduciaries either resigned or were removed from their positions as personal representatives and trustees.[2]

In November 2007, the circuit court appointed Appellants as the personal representatives for Brown's estate and as trustees of the 2000 Irrevocable Trust, with full authority as if they had been appointed in the original placement order. The South Carolina Attorney General ("AG"), who had recently intervened in the case on the ground the claims involved a charitable trust, unsuccessfully opposed the appointment of Appellants as fiduciaries.[3]

After ongoing negotiations directed by the AG, the parties entered into a compromise agreement at an informal mediation session on August 10, 2008. The settling parties named in the agreement were Tommie Rae, the children and grandchildren of Brown, and the AG. Appellants contend they did not participate in the discussions or in the agreement as they received no notice of them. The agreement was thereafter submitted to the circuit court for its approval pursuant to

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[2] The three left amid allegations that Cannon had misappropriated funds belonging to Brown. Bradley is now deceased. In 2011, Cannon entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to charges of taking money from Brown, for which he was sentenced to house arrest. The prosecuting authority did not seek restitution from Cannon although Cannon reportedly retained a million-dollar mansion in Honduras as well as an interest in Brown's publishing companies.

[3] Although references herein are to the "AG" generally, the current AG's predecessor handled most of the filings in this matter, including the motion to intervene, which the circuit court granted, without objection, on October 11, 2007. The court also granted the Georgia AG's motion to intervene, but the Georgia AG is no longer participating in the action, as it was later determined South Carolina's AG was the appropriate and necessary party.

S.C. Code Ann. § 62-3-1102 (2009). Appellants were given notice of the agreement and participated in all proceedings related to the court's consideration of the compromise.

In January 2009, the circuit court appointed Russell L. Bauknight, a certified public accountant, as Special Administrator for Brown's estate and Special Trustee of the 2000 Irrevocable Trust. Bauknight was appointed, at the Respondents' suggestion, for the limited purpose of providing input and recommendations to the court regarding the compromise agreement. The circuit court ordered Appellants to continue in their fiduciary capacities at that time, except for the limited duties assigned to Bauknight.

A hearing was conducted over seven days from January to April 2009. At the first hearing date on January 30th, the parties advised the circuit court that Respondent Terry Brown, one of the six children Brown named in his will, had joined in the compromise, so that the agreement now included an addendum. In exchange for his participation, Terry Brown was given "an absolute and superior Right of First Refusal to purchase any and all of the James Brown Assets (whether on an asset or stock basis) to be sold in any Proposed Transfer" for a period of ten years.

The circuit court approved the compromise agreement by order of May 26, 2009, over the objections of Appellants.[4] The circuit court found the agreement was executed by all persons having beneficial interests that were affected by the compromise, the will and trust controversy was pursued in good faith, and the agreement was fair, equitable, and reasonable.

Under the terms of the agreement brokered by the AG, the parties would jointly seek the removal of Appellants as the personal representatives of Brown's estate and as trustees of the 2000 Irrevocable Trust. All challenges to the will were to be dismissed, and the settling parties agreed that such contests were brought in good faith and with probable cause. Tommie Rae was recognized as the surviving spouse of Brown, and all children and grandchildren who were parties to the

[4] The compromise agreement contained in the record is actually a series of documents signed by some of the parties at different times, rather than one agreement, and an addendum signed by all parties.

agreement were acknowledged to be Brown's legitimate issue and heirs without the need for DNA testing to verify their status.

The settling parties agreed to create a new trust called the James Brown Legacy Trust ("Settlement Entity"), which will "receive, hold, manage and be authorized to sell the James Brown Assets." The trustee and any successor trustee for the Settlement Entity was to be selected solely by the AG. The settling parties who had any intellectual property rights to Brown's music or persona created under federal copyright laws or laws for heirs agreed to surrender those rights to the Settlement Entity. Tommie Rae waived any spousal rights that she might have and the children waived any rights to Brown's assets that they might otherwise have beyond any share to be received in the compromise.

A (New) Charitable Trust, similar to the existing Charitable Trust formed from the 2000 Irrevocable Trust, was to be created by the AG with the advice and counsel of the parties. The AG was to have the sole authority to select the managing trustee as well as any successor trustee. An Advisory Board was to be established, whose members would "serve at the pleasure of and on such terms as the [AG] shall decide." The number of members on the Advisory Board was to be determined by the AG, but would include a member selected by Tommie Rae and one selected by each of Brown's adult children, and the roles of all members of the board were expressly stated to "be solely advisory." The (New) Charitable Trust would also have Honorary Family Trustees in a number to be decided by the AG and who would serve under the same terms and conditions as the Advisory Board. A trust similar to the Brown Family Education Trust was to be established for the education of the grandchildren and their issue, to be funded with $2 million.

The parties were to divide their distributional interest in the Settlement Entity as follows: a net 47.5% to the (New) Charitable Trust; a net 23.75% to Tommie Rae, which includes any share attributable to her son; and a net 4.79% to each of Brown's adult children who are settling parties. For voting purposes, however, the (New) Charitable Trust was to retain a 50% voting and control interest in the Settlement Entity, the named adult children were to retain a 25% voting and control interest, and Tommie Rae was to retain a 25% voting and control interest. The parties indicated in their agreement that they intended this to be a binding private agreement, but they also desired court approval of the agreement.

The circuit court approved the compromise agreement and directed Appellants to execute the agreement. At the request of the settling parties, the circuit court appointed Bauknight to have full authority as the personal representative for Brown's estate and as trustee, and Appellants were removed from those positions.

Appellants appealed these rulings as well as additional, related orders, and the Court of Appeals consolidated the appeals. This Court granted a request for certification by the Court of Appeals pursuant to Rule 204(b), SCACR, and the case was transferred to the Supreme Court.

II. LAW/ANALYSIS

A. Standing

As an initial matter, Respondents assert Appellants do not have standing to pursue this appeal because they have no interest in the subject matter of the litigation, i.e., the will and trust; therefore, the appeal should be dismissed. Specifically, Respondents argue Appellants lack standing to appeal the circuit court's approval of the settlement agreement and the AG's involvement since they had no vote or veto power over the settlement at the trial level. Respondents further argue Appellants lack standing to appeal their removal as personal representatives and trustees because (1) their failure to adequately brief this point operates as a waiver of the issue; and (2) once the order was issued removing them as fiduciaries, its effect was immediate and their only interest in this matter became a peripheral one pertaining to their claim for fees for the time they acted as fiduciaries.

"Before any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 491 n.2, 489 S.E.2d 915, 917 n.2 (1997) (citation omitted). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Id.* at 415-16, 684 S.E.2d at 215.

As noted by Appellants, there was no specific ruling discussing Appellants' standing in the circuit court's order of May 2009, and the matter was not raised in a Rule 59 motion. Although the circuit court did refer to standing, it was in the context of discussing authority from another jurisdiction when the circuit court reviewed the facts of that case. This Court has previously declined to consider standing where the matter was not both raised to and ruled upon by the trial court, and it is questionable whether the issue was properly preserved here, although it was briefed. *See, e.g., James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) (observing this Court has the inherent authority to consider justiciability, but when a party raises the issue, our courts have applied error preservation principles and have held the issue was not preserved where the trial court did not first rule on the issue).

Assuming, *arguendo*, that the circuit court impliedly ruled on the issue, we conclude Appellants have standing. Appellants were properly made parties to the action and were allowed to set forth specific challenges to the proposed compromise agreement for the circuit court's consideration under S.C. Code Ann. § 62-3-1102 (2009). We agree with Appellants that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (including the authority to mediate or compromise claims), and based on their official fiduciary capacities pursuant to state law.[5] *See* S.C. Code Ann. § 62-7-405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); P.H. Vartanian, Annotation, *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147, 152 (1949 & Later Case Service 1997) (stating where an order threatens the existence of a trust, prevents a trustee from performing his duties, or depletes the trust fund with unreasonable claims, the trustee may, in his fiduciary or representative capacity, appeal therefrom as an aggrieved party); *see also Columbia Union Nat'l Bank & Trust Co. v. Bundschu*, 641 S.W.2d 864, 879 n.10 (Mo. Ct. App. 1982) (stating "where a trustee is affected by a judgment in his official capacity, he is aggrieved and may appeal"); *In Re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (holding "that the Attorney General and the

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[5] We need not reach Appellants' alternative arguments that they have constitutional standing or standing under the public importance exception.

trustee had standing" because "[t]he trustee has a legal obligation to defend the trust . . . [and] [t]he Attorney General, likewise, has a duty to represent the beneficiaries where there are dispositions for religious and charitable purposes"); *In re Crawford's Estate*, 16 A.2d 521 (Pa. 1940) (involving an appeal from an order removing the appellant as a co-trustee).

B. Court's Approval of Compromise Agreement

In their appeal, Appellants contend the compromise agreement was not eligible for court consideration under section 62-3-1102 because the trust did not agree to it and the AG had no authority to speak for the trust. Appellants assert a compromise can be considered under the statute only if all holders of beneficial interests agree to it, and the 2000 Irrevocable Trust, which was entitled to the residue of Brown's estate, was the chief holder of a beneficial interest in the estate. The trust, however, was not represented in the settlement and did not agree to reducing its share of Brown's estate by half, so there was no compromise agreement for the circuit court to consider.

Appellants argue the AG's authority to enforce a charitable trust does not give him the authority to direct the settlement of an estate dispute, remove existing trustees, and administer a new trust with the AG at the helm. Appellants argue the AG effectively placed himself in control of most of Brown's assets by securing sole authority to select a managing trustee of the new entity, and then proceeded to give away over half of the estate to disinherited family members and purported family members, all in contravention of Brown's express wishes that the bulk of his wealth be used for the charitable purpose of educating disadvantaged youths.

Appellants further assert that, even if the agreement were eligible for court consideration, the agreement did not meet the statutory standard necessary to nullify Brown's estate plan because (1) it was not a compromise of a bona fide (good faith) challenge to Brown's will, and (2) it was unjust and unreasonable.

Upon appeal, "[t]he question [for an appellate court] is did the [ruling] court abuse its discretion in approving the compromise?" *In re Estate of Horton*, 90 Cal. Rptr. 66, 68-69 (Ct. App. 1970). An abuse of discretion occurs when a court's order is controlled by an error of law or there is no evidentiary support for the court's factual conclusions. *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012); *see also Univ. of S. Cal. v. Moran*, 365 S.C. 270, 617 S.E.2d

135 (Ct. App. 2005) (stating the interpretation of a statute approving a compromise agreement presents a question of law); *Perreault v. The Free Lance-Star*, 666 S.E.2d 352 (Va. 2008) (same). For the reasons to be discussed, we hold the circuit court erred in approving the compromise agreement in the current matter.

(1) Eligibility for Court Consideration

We first consider Appellants' contention that the proposed compromise agreement was ineligible for court consideration.

"A compromise agreement is void unless executed in compliance with the governing statute." *In re Estate of Riley*, 266 P.3d 1078, 1080 (Ariz. Ct. App. 2011). Section 62-3-1102 of the South Carolina Code establishes the following procedure for securing court approval of a compromise agreement resolving an estate controversy:

> (1) The terms of the compromise shall be set forth in an agreement in writing which *shall be executed by all competent persons* and parents acting for any minor child *having beneficial interests or having claims which will or may be affected by the compromise*. . . .
>
> (2) *Any interested person*, including the personal representative or a trustee, then may submit the agreement to the court for its approval *and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives*.
>
> (3) *After notice to all interested persons or their representatives,* including the personal representative of the estate and all affected trustees of trusts, *the court,* if it finds that the contest or controversy is *in good faith* and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is *just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement.*

S.C. Code Ann. § 62-3-1102 (2009) (emphasis added).[6] "Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement." *Id.* § 62-3-1102(3).[7]

Citing *University of Southern California v. Moran*, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005), Appellants contend "where a trust is beneficiary of a devise, it is the trust, acting through its trustee, which alone has statutory authority to participate in a Section 1102 settlement agreement."[8] Appellants contend the circuit court could not approve the compromise agreement without their consent as trustees. Appellants assert they were not given notice of the parties' negotiations, so the beneficiaries were unrepresented. They also contend the circuit court erred in finding the AG has the authority to direct or enter into a compromise on behalf of the charitable beneficiaries.

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[6] The first sentence of subsection (3) was amended in 2010, but the change does not impact this appeal. Act No. 244, 2010 S.C. Acts 1764.

[7] *See Columbia Union Nat'l Bank & Trust Co.*, 641 S.W.2d at 874 (stating once a compromise agreement is approved, the property devolves under the terms of the agreement, not the testamentary instrument, so the judgment on appeal adjudicates a contract, not a will contest, and the efficacy of the agreement depends only on the written agreement among all persons with a beneficial interest or claim affected by the compromise and the determination of the ruling court that the controversy is in good faith and that the agreement affects fairly the interests of persons represented by fiduciaries or their representatives).

[8] In *Moran*, the Court of Appeals held that a trust, created by a pour-over provision in the decedent's will, was the entity with a "beneficial interest" in the decedent's *estate*, whereas the appellant University, which was a beneficiary of the *trust*, was merely an "interested person" in the estate. 365 S.C. at 282-83, 617 S.E.2d at 141-42. Therefore, the trustee had the authority to compromise a claim on behalf of the trust and the trustee was required to execute a compromise agreement to settle a dispute over the estate. *Id.* The court held the University was entitled to notice and to an opportunity to voice its objection to the compromise, but its signature was not required for court approval of the agreement. *Id.* The *Moran* case did not involve the AG's representation of charitable beneficiaries, however, so there is no discussion in this regard.

Respondents, in contrast, contend Appellants are improperly attempting to broaden *Moran* to give a trustee absolute and sole control over settlements, and this is antithetical to the purpose of section 62-3-1102. They state that under Appellants' theory, the beneficiaries of a trust could *never* reach a compromise because a trustee could always single-handedly veto the process.

Respondents argue that under the statutory framework, the important question is whether all beneficial interests were represented *at the hearing* in this matter. The AG asserts he represents the beneficial interests of a charitable trust, but even if he does not, the charitable beneficiaries would have been represented by Appellants at the hearing, since they contended they represented the "trust" and were present to voice their objections to the proposed compromise. Consequently, the charitable beneficiaries were represented at the hearing, either by the AG or by Appellants as trustees. Moreover, trustees do not have a statutory right to unilaterally prevent a compromise.

Under the statute, any "interested person"[9] may submit the proposed agreement to the court after notice has been given to all interested persons and their representatives, and the agreement must be executed by all persons having "beneficial interests" in the estate[10] as well as fiduciaries. Thus, Appellants

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[9] An "interested person" under our Probate Code "includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons." S.C. Code Ann. § 62-1-201(20) (2009).

[10] The Reporter's Comments to section 62-3-1102 state, "The agreement must be signed by all persons having a beneficial interest in or claim against *the estate*, whose interest or claim is affected by the agreement." Reporter's Comments to S.C. Code Ann. § 62-3-1102 (2009) (emphasis added). What constitutes a "beneficial interest in an estate" is not specifically defined in the Probate Code. *See Milner v. Milner*, 361 S.W.3d 615, 620 (Tex. 2012) (defining a "beneficial interest" as "[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing" (alteration in original) (quoting *Black's Law Dictionary* 885 (9th ed. 2009)); *accord In re Estate of Sullivan*, 724 N.W.2d 532

unquestionably were entitled to notice (and a corresponding opportunity to be heard) and they were necessary signatories based on the express terms of the statute. Appellants dispute, however, whether they were properly noticed and whether their signatures could be compelled by the court, and they contend the agreement was not eligible for the court's consideration.

Although Appellants were not given notice of the *negotiations* engaged in by the other parties *prior* to reaching the settlement, Appellants admittedly were given notice of the proposed compromise ultimately reached, and they fully participated in the extensive hearings held over a four-month period in the circuit court, at which time they were given the opportunity to voice their objections. It is notice of the proposed compromise and any hearings that is statutorily required, as it is the final proposal that is subject to the court's scrutiny under section 62-3-1102. The method by which the proposal was reached, including how many of the parties actively participated in any preliminary discussions, is not a determinative factor in whether the agreement is *eligible* to be presented to the circuit court for consideration.[11]

In addition, section 62-3-1102(3) specifically states that if the court "finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, [it] *shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement*." S.C. Code Ann. § 62-3-1102(3). Thus, while Appellants were necessary signatories to the compromise, it is clear from the plain language of the statute that the circuit court had the authority to direct their execution of the document if it found the two preceding conditions for approval were met.

(Minn. Ct. App. 2006) (also applying the definition in *Black's Law Dictionary*). The Probate Code does define a "beneficiary" in S.C. Code Ann. § 62-1-201(2), but only as it relates to trusts.

[11] Any alleged overreaching by the AG in the actual terms of the settlement and any resulting unfairness in the compromise ultimately reached are more appropriately considered in evaluating if the compromise was just and reasonable.

The Reporter's Comments to section 62-3-1102 reiterate that a personal representative or testamentary trustee may be *directed* by the court to sign the agreement:

> Subsection (2) requires submission of the agreement to the probate court for approval. The application for approval may be made by an interested party or by the personal representative. The application would request approval of the agreement and would request an order *directing or permitting* the personal representative and the trustee of an affected testamentary trust to execute the agreement.

Reporter's Comments to S.C. Code Ann. § 62-3-1102 (2009) (emphasis added).

The official Comment to section 3-1102 of the Uniform Probate Code, on which our South Carolina statute is based, states the provision for obtaining court approval of compromise agreements was specifically intended to *prevent* executors and testamentary trustees from single-handedly vetoing such agreements:

> The thrust of the procedure [for approving settlement agreements] is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, *and to prevent executors and testamentary trustees from vetoing any such proposal*. . . . Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out the testator's intention, *the judgment of the court is substituted for that of such fiduciaries* in appropriate cases.[12]

Unif. Probate Code, Comment to § 3-1102 (amended 1993), 8 U.L.A. 305 (1998) (emphasis added).

As the Comment to section 3-1102 of the Uniform Act unequivocally states, the purpose of this provision is to prevent trustees from unilaterally vetoing settlement agreements based on a desire to earn fees or based on some other

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[12] The AG argues Appellants have sought $5 million in fees for their service, so this case would be an appropriate one for the court to substitute its judgment for that of the fiduciaries.

motive. *See In re Estate of Riley*, 266 P.3d 1078, 1083 (Ariz. Ct. App. 2011) (observing the purpose of the statute regarding compromise agreements, which is based on the Uniform Probate Code, is to keep the power to make compromises involving the estate in the hands of the estate's beneficiaries and to prevent executors and testamentary trustees from vetoing such proposals); *In re Estate of Smith*, 355 N.Y.S.2d 994, 995 (App. Div. 1974) (stating "Appellant, as executor and trustee under the will, does not have such an interest as would prevent any compromise made among all the parties beneficially interested in the estate"; "the interests sought to be protected under a compromise agreement are those of named and unnamed beneficiaries"); *In re Estate of Smith*, 349 N.Y.S.2d 281 (Surrog. Ct. 1973) (holding the objections of the preliminary executor and nominated executor and trustee to the proposed settlement should be overruled and that the attorney general has the right and power to enter into a compromise on behalf of the ultimate, unspecified, and indefinite charitable beneficiaries mentioned in the decedent's will); *see also In re Will of Seabrook*, 218 A.2d 648, 652 (N.J. Super. Ct. Ch. Div. 1966) (holding the beneficiaries of a will could compromise a challenge to a will without the consent of the executors and trustee named in the will and codicil and noting the interests of the charitable beneficiaries were represented by the attorney general; the court stated, "'In a proper case the court has power to compel a trustee to execute a compromise agreement.'" (citation omitted)); Mary F. Radford, George Gleason Bogert, & George Taylor Bogert, *The Law of Trusts & Trustees* § 1009, at 450 n.3 (3d ed. 2006) ("Under UPC §§ 3-1101 and 3-1102 a compromise of a will contest will bind a testamentary trustee.").

In general, we agree with Appellants that, as the trustees of the 2000 Irrevocable Trust, they were conferred the authority under the trust documents and under South Carolina law to compromise claims involving the trust. However, where the trust involves charitable entities, the trustee has a duty to defend the trust, and the AG has the duty to represent the unspecified charitable beneficiaries. *See In Re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (stating "[t]he trustee has a legal obligation to defend the trust . . . [and] [t]he Attorney General, likewise, has a duty to represent the beneficiaries where there are dispositions for religious and charitable purposes"); *see also* S.C. Code Ann. § 1-7-130 (2005) (providing the AG shall enforce the due application of funds given or appropriated to public charities within the state); S.C. Code Ann. § 62-7-405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) (stating the AG is the proper party to

protect the interests of the public at large in administering or enforcing charitable trusts). The AG was allowed to intervene in this action, without objection, and there is no challenge on appeal as to the propriety of the intervention.[13]

Contrary to Appellants' assertion, it was the circuit court, not the AG, which gave final approval to the compromise agreement submitted by the parties, and the circuit court repeatedly noted its duty was to review the compromise to determine if it satisfied the two statutory factors (a good faith controversy, a fair and just effect), and it set forth its findings in this regard. In contrast, the requirements to seek court approval of an agreement under section 62-3-1102 are distinguishable, i.e., the agreement must be in writing and executed by all parties with beneficial interests in the estate, it must be submitted to the court by an interested party, notice must be given to all interested parties, and there must be an opportunity to be heard. We find these requirements were met and the compromise was eligible for the court's consideration.

(2) Section 62-3-1102's Two-Part Test for Court Approval

Having found the circuit court may approve a compromise agreement after notice to, but over the objection of, Appellants, our next consideration is the propriety of the circuit court's approval of the agreement itself. In this regard, a two-part test is employed under section 62-3-1102: (1) whether the compromise settles a good-faith controversy between the parties, and (2) whether the compromise is just and reasonable.

In this case, actions were brought by some of Brown's adult children and Tommie Rae to set aside Brown's will and the 2000 Irrevocable Trust on the ground of undue influence. Tommie Rae also claimed she was entitled to an elective share or an omitted spouse's share of Brown's estate as his surviving legal spouse, and that her child, James B., was entitled to a share of the estate as an omitted child. In approving the compromise, the circuit court found the settling parties had initiated their contests to Brown's will and trust in good faith, and that the settlement was just and reasonable. We question whether the parties

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[13] The order authorized the AG "to intervene in this matter to represent and protect the interests of the beneficiaries of any charitable trust created by [Brown's 2000 will] and the [2000 Irrevocable Trust] or any other assets of the Estate of James Brown that may be impressed with a charitable trust . . . ."

established the existence of a good faith controversy, but conclude the compromise was not just and reasonable, in any event.

(a) Requirement of a Good Faith Controversy

The first part of the two-part statutory mandate of section 62-3-1101(3) requires that the court "finds that the contest or controversy is in good faith[.]"

The circuit court found that there was a good faith basis for each of the claims asserted by Respondents. As to the claim of undue influence, the circuit court found the credibility of the four principal witnesses to the validity of the will and the 2000 Irrevocable Trust was questionable because the attorney who drafted the will, H. Dewain Herring, is now in jail for a crime of violence, and the testimony of the three original trustees, Dallas, Bradley, and Cannon, who had been removed from their fiduciary positions, was suspect and contradictory in prior proceedings. For example, the court noted Dallas had testified that he had knowingly allowed his attorney to agree to a stipulation containing false information because he did not want to lose his position as a fiduciary. The court found the questionable credibility of these four individuals supported the good faith basis of the contestants' claims. Further, the circuit court found there were several examples of undue influence in the record, including the fact that the trust authorized the trustees to spend up to 50% of gross income for management purposes, and there was a blank deed signed by James Brown and witnessed in Herring's client file. The court also noted there was a controversy regarding what assets were actually transferred to the trust during Brown's lifetime.

The circuit court further found a good faith controversy existed regarding the assertion of Tommie Rae for either an elective share[14] or an omitted spouse's share[15] of the estate. The court stated that, although Tommie Rae had undergone a

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[14] A "surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate." S.C. Code Ann. 62-2-201(a) (2009). "[P]robate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims." *Id.* § 62-2-202. The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance and exempt property can be waived by a written agreement. *Id.* § 62-2-204.

purported marriage ceremony in 1997 with another man before she had a marriage ceremony with Brown in 2001, Tommie Rae had obtained an annulment of her marriage to Ahmed on April 15, 2004 on the basis Ahmed did not have the capacity to marry. Thus, there was no impediment to her marriage to Brown.[16] The circuit court also found that an agreement that Tommie Rae had executed in which she agreed never to assert a common law marriage with Brown had no bearing on Tommie Rae's claim as a surviving legal spouse. Moreover, after that agreement was executed, Brown published an autobiography in which he referred to Tommie Rae as his "wife" and to James B. as his "son," so the circuit court found Tommie Rae's legal status was muddled by the actions of the parties.

Even if Tommie Rae did not prevail on a claim for a spousal share, the circuit court found significant arguments existed to warrant recognizing a claim for

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[15] The omitted spouse statute provides that, "[i]f a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate [s]he would have received if the decedent left no will unless: (1) it appears from the will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence." *Id.* § 62-2-301(a).

[16] Tommie Rae had claimed her marriage to Ahmed had been procured by fraud because she had discovered that Ahmed already had three or more wives in Pakistan and was merely seeking U.S. citizenship, and that he had refused to live with her as husband and wife. Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her. The circuit court noted the decision of the Court of Appeals in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage. The circuit court distinguished Brown's situation, opining that the rule in *Lukich* did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed *Lukich*, in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

an omitted child's share for James B. under S.C. Code Ann. § 62-2-302 (2009), which would allow the child an intestate share of the probate estate. The court did note that such a claim is not conclusive, however, because if Brown had made transfers to the child that were in lieu of a provision by will, then those transfers could be deemed to satisfy the child's share.[17] The circuit court stated it was not only the presence of each of these individual, primary claims, but also their cumulative effect, that supported its finding of a good faith controversy between the parties.

In general, a threat to contest a will must be made in good faith in order for the surrender of the right to constitute consideration for a family settlement, and if it is made in bad faith to extort a settlement, or if the claim is known to be frivolous and without foundation, then it is not in good faith. M.L. Cross, Annotation, *Family Settlement of Testator's Estate*, 29 A.L.R.3d 8, at § 27 (1970 & Supp. 2011).

The "good faith" requirement has been variously interpreted, with jurisdictions applying definitions that can be categorized along a continuum from a subjective to an objective standard,[18] and they have afforded the claims a level of

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[17] The statute provides, "If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless: (1) it appears from the will that the omission was intentional; or (2) when the will was executed the testator had one or more children and devised substantially all of his estate to his spouse; or (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . ." S.C. Code Ann. § 62-2-302(a) (2009).

[18] *Compare* 80 Am. Jur. 2d *Wills* § 982 (2002) (stating "it need not appear that a ground of opposition in fact would have defeated the will; rather, it is enough if the parties consider it so far doubtful as to be the subject of a compromise" (footnote omitted)), *with Holt v. Holt*, 282 S.E.2d 784, 787 (N.C. 1981) ("The mere relinquishment of a right to contest a will is not sufficient consideration to support a reciprocal promise to modify the will unless there is a *bona fide* dispute as to the will's validity."), *and id.* at 789 ("Whether there is a *bona fide* dispute depends, furthermore, not on what any particular party to the alleged compromise may

scrutiny that is less than that given to ordinary contracts, up to what has been described as "close scrutiny."[19]

However, it is universally acknowledged that full proof of the asserted claims is not required because the *raison d'etre* for the statute is to dispense with the necessity of litigating the merits of the claims. The circuit court's duty was not to decide the ultimate question of the merits of the undue influence and other claims; rather, the statutory standard is whether the proposed compromise agreement resolves a good faith controversy and whether the agreement is just and reasonable. *See generally* M.L. Cross, *supra*, 29 A.L.R.3d 8 (family settlements)*; see also Warner v. Warner*, 1 A.2d 911, 914-15 (Conn. 1938) (stating forbearance in pursuing a claim known to be frivolous or without foundation is not in good faith; however, the question is not whether there was in fact undue influence, but whether the parties could in good faith reasonably believe so, and the test is not whether the claim would have succeeded in the litigation, as that would involve a trial of the issue that was compromised, and the purpose of the law in encouraging compromises would thus be defeated; a compromise does not import finality as to the sufficiency of the grounds for opposition to a will, as the compromise in effect includes a discontinuance of the investigation of the claim); *In re Estate of Yeley*, 959 N.E.2d 888, 893 (Ind. Ct. App. 2011) ("A court order approving a settlement

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subjectively believe about it, but whether the *bona fides* of the disagreement may, under all the facts and circumstances of the case, be reasonably found to exist by the trier of fact. This principle inheres in our decisions; and cases from other jurisdictions with near uniformity hold that absent any basis in fact and law upon which to challenge the validity of a will, a compromise promise to distribute the property differently from the manner contemplated by the will is unenforceable due to lack of consideration if the reciprocal promise is merely not to contest the will.").

[19] *Compare Skaggs v. Cullipher*, 941 S.W.2d 443, 447 (Ark. Ct. App. 1997) (stating family agreements resolving estate and will matters "are afforded a legal status distinct from typical contracts, and will be enforced without closely scrutinizing the consideration of the transaction or the strict legal rights of the parties"), *with Fleisch v. First Am. Bank*, 710 N.E.2d 1281, 1283-84 (Ill. App. Ct. 1999) (stating "family settlements are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor's intent" (citation omitted)).

agreement is not an adjudication of the issues of the litigation, but rather is an avoidance of adjudication.").

That being said, we have substantial concerns about the circuit court's findings in this regard. Although proof of a claim is not required, we believe something more than a subjective belief or a mere allegation is necessary to avoid the potential for collusion among disinherited or disgruntled family members who wish to dispose of the testator's estate plan and substitute it with one more to their liking.

As to the claim of undue influence, it has been frequently stated that, "[i]n order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 393 (Ct. App. 1999). The influence necessary to void a will must amount to force and coercion. *Id.* "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Id.* "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 671-72, 511 S.E.2d at 394 (citation omitted). Although there is a presumption of undue influence in the making of a will involving fiduciaries, the ultimate burden always remains with the proponent. *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012). "[T]he circumstances must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so the will is that of the latter and not of the former." *Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983). In addition, "even if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after the operation of undue influence destroys this conclusion." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196-97, 428 S.E.2d 3, 5 (Ct. App. 1993).

The circuit court's scant references to alleged improprieties in the handling of Brown's will, while troubling, do not bear directly on the issue of whether Brown's desires for the disposition of his estate were overborne to such an extent that the resulting distribution was not the product of his own free will. In particular, although the circuit court focused on the later imprisonment of the attorney who drafted the will, the imprisonment was for a crime totally unrelated to his services as an estate planner. This fact has no bearing on the execution of

Brown's testamentary documents and sheds no light on whether Brown's will was somehow overcome at the time he signed the documents finalizing his estate plan. *See Russell v. Wachovia Bank*, 353 S.C. 208, 219, 578 S.E.2d 329, 335 (2003) ("In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear *upon the testamentary act*." (alteration in original) (emphasis added) (quoting *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976)).

Similarly, the fact that one provision regarding management fees in the trust could be deemed "generous" would support at most reformation of the document, but would not justify the complete destruction of Brown's estate plan.[20] *See generally In re Estate of Schroeder*, 441 N.W.2d 527 (Minn. Ct. App. 1989) (stating to constitute a good faith will contest, the objections must have legal merit; the appellate court found that even if the testimony were true, at most it would have supported reformation of the will, not the overthrow of the decedent's entire testamentary plan); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (stating "a showing of general influence is not tantamount to undue influence" and "a contestant must show that the undue influence was brought directly to bear upon the" challenged transaction such that it prevented the grantor's exercise of judgment and free choice).

All indications in the record are that Brown was of sound mind and strong physical constitution until the time of his death, as he had only recently returned from touring and was making preparations for future performances when he suddenly became ill and passed away. *Cf. Russell*, 353 S.C. at 219, 578 S.E.2d at 335 (finding no undue influence where it was "undisputed that [the] [t]estator was independent, and physically mobile until a few days before his death," and that the "[t]estator, while elderly, was not infirm, mentally or physically, and was not prevented from seeing relatives, friends or business associates").

It appears Brown painstakingly developed his estate plan over the course of several years, and in various drafts, including the will in dispute here, Brown made it clear that he intended the bulk of his estate to be used for the education of

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[20] Both Brown's will and trust contained severability clauses that stated if any part thereof should be found invalid, illegal, or inoperative for any reason, it was his intention that the remaining parts be fully effective as far as possible and reasonable.

disadvantaged youths, as he had provided for his family members during his lifetime. His estate documents explicitly state that he had named all of those he wished to be the beneficiaries of his estate, and that any further claimants, including future spouses or those purporting to be heirs, were purposefully excluded. Another strong indicator of Brown's intent is his inclusion of no-contest clauses in both his will and trust.

The record contains numerous references to the fact that Brown repeatedly made his intentions known during his lifetime to his family, friends, and business associates, and he had even met with family members not too long before his unexpected death and had reaffirmed his intentions in this regard. Brown had a reputation as a strong-willed individual who did not take orders from others, and he made his desires abundantly clear during his lifetime. We find there is no reasonable basis for the undue influence claim asserted here other than as a means to dismantle Brown's estate plan. The result is to enable those who were disinherited to obtain Brown's assets to the detriment of the charitable entity that Brown so fervently desired. Because he knew that it would be a source of dispute, Brown went to remarkable lengths to protect his right to designate the appropriate legacy for his life's work, including having numerous provisions in his estate documents and informing family members of his intentions in advance. We see no reasonable or substantial basis to support a good faith finding here.[21] *See Anderson v. Anderson*, 44 N.E.2d 43, 47 (Ill. 1942) ("[T]here must be some reasonable or substantial basis for the claims advanced by the parties which are surrendered by the agreement."); *Russell*, 353 S.C. at 220, 578 S.E.2d at 335 (finding evidence of the testator's "unhampered opportunity" to change his will negated any undue influence that the appellants put forth); *cf., e.g., Estate of Cumbee*, 333 S.C. at 672-73, 511 S.E.2d at 394-95 (holding the determination that the testator's will was the product of undue influence was supported by the evidence, which showed the testator's conversations were overheard using a baby monitor, the testator developed hand signals to communicate with her visitors, the beneficiary had the testator's power of attorney and managed all of her finances, and that same beneficiary controlled the execution of the will).

[21] Knowing of the potential for an attack on his estate plan after his death, Brown had admonished all potential challengers to his will and trust that such actions would "be considered an affront to [his] wishes."

The AG acknowledged during oral arguments in this matter that he undertook no inquiry into the undue influence claims of the Respondents and the circumstances surrounding Brown's execution of his will. While we do not believe a full-blown, formal investigation is required before a compromise may be reached, we believe something more than a mere accusation and the subjective opinion of the Respondents is necessary to justify court approval of a compromise that seeks to vitiate the decedent's entire estate plan on the basis of a vague allegation of undue influence. *Cf. Russell*, 353 S.C. at 220, 578 S.E.2d at 335 (noting "the circumstances surrounding the execution of the Will . . . is the critical issue when evaluating an undue influence case"); *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 810-11 (1985) (stating a witness's testimony that the will was the result of undue influence was a conclusion "obviously drawn out of thin air" as the witness "knew absolutely nothing about the circumstances under which the Will was executed"; the court noted "one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects").

As to the spousal claims, even if Tommie Rae were able to establish a claim as Brown's surviving spouse, she executed a prenuptial agreement, in which she indicated that she had the opportunity to consult with counsel of her own choosing and waived all rights to Brown's property or any statutory claims against his estate. A valid prenuptial agreement would normally preclude any right to an elective share. *See* S.C. Code Ann. § 62-2-204 (2009) ("The right of election of a surviving spouse . . . may be waived . . . by a written contract . . . signed by the party waiving after fair disclosure."). She also executed an agreement waiving any claim to status as a common-law spouse.[22] Although the circuit court correctly noted the agreement to waive any claim as a common-law spouse would not be dispositive of Tommie Rae's claim that she was a surviving spouse, the circuit court did not acknowledge the sizeable bar posed by a prenuptial agreement.

Beyond this, Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after

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[22] Tommie Rae's waiver of any claim for status as a common-law wife begs the question of the necessity to do so if she was, in fact, the legal spouse of Brown. Moreover, the timing of the waiver raises additional questions because it arose from Brown's filing of an annulment action.

providing for the education of his grandchildren. *See* S.C. Code Ann. § 62-2-301(a) (2009) (providing an omitted spouse is not entitled to a statutory share where "(1) it appears from the will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence").

As for the claim of the pretermitted child, we note it was not supported by a properly-authenticated DNA test, even though one had been offered to Tommie Rae for her child, and Brown himself had previously requested a DNA test during his relationship with Tommie Rae.[23] The child was not born of the marriage, which is certainly not required for a pretermission claim, but this fact does mean that he does not enjoy a presumptive status as Brown's child, which would have been a significant factor supporting the finding of a good faith claim.

Moreover, as recognized by the circuit court, an omitted child is not entitled to a statutory share if "it appears from the will that the omission was intentional" or "the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . ." S.C. Code Ann. § 62-2-302(a)(1), (3) (2009). In light of the strong language in Brown's will that his failure to provide for any other person "claiming, *or to claim*, to be an heir" was "intentional and not occasioned by accident of mistake," we think this claim has some weakness, although it presents a closer question. (Emphasis added.) We do not believe, however, that this claim involving only one party can single-handedly validate the tenuous and unrelated claims of all of the remaining parties so as to justify the finding of a good faith controversy.

In sum, we question whether the claims were asserted in good faith since the primary claim asserted by the parties as a basis for discarding Brown's testamentary documents, undue influence, was of dubious validity. There was also a major impediment to Tommie Rae's spousal claim that undermines confidence in

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[23] There was a test performed, but the testing lab stated in its report that it could not verify the accuracy of the results because the samples were not submitted in accordance with established protocol ("The samples were not collected according to AABB guidelines and the laboratory cannot verify the origin of the DNA samples.").

the court's finding of a good faith controversy. We further find the circuit court's statement that the totality of the claims supported a good faith finding is unpersuasive, as it is based on the assumption that each claim met some threshold level of viability. To the contrary, we do not believe the cobbling together of tenuous claims can be the basis for a good faith finding that would justify the drastic results sanctioned here. *See* 80 Am. Jur. 2d *Wills* § 982 (2002) (stating "a court may decline to approve or enforce a settlement agreement which does not settle a 'good faith contest or controversy,' as where an agreement seeks only to set aside an otherwise valid will. In other words, a family settlement agreement may fail for lack of adequate consideration when there is lack of a reasonable or substantial basis for any claims surrendered by it." (footnotes omitted)).

(b) Requirement of a Just and Reasonable Agreement

Appellants further argue that, even if the compromise was of a bona fide challenge to the will, it was not just and reasonable, which would preclude court approval under the statutory standard.

In addition to the presence of a good faith controversy between the parties, the ruling court must find "the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable[.]" S.C. Code Ann. § 62-3-1102(3). Both parts of the two-part test must be satisfied to warrant approval of a compromise agreement. *In re Estate of Schroeder*, 441 N.W.2d 527 (Minn. Ct. App. 1989); *see also In re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (stating where a necessary requirement for a compromise agreement is lacking, the agreement may not be approved). Even assuming a good faith controversy existed among the parties, we agree that the compromise should not have been approved because the record does not indicate that the second element of the two-part test has been met.

Our state statute does not explicitly provide a standard for determining whether a compromise is "just and reasonable," nor does the Uniform Probate Code. A similar observation was made by the Minnesota Court of Appeals, which ultimately "conclude[d] that to be just and reasonable, an estate plan in a settlement agreement must defer to the testator's intent unless a departure from that intent is reasonably necessary to protect the interests of the beneficiaries." *Schroeder*, 441 N.W.2d at 533 (citing Fratcher, IV *Scott on Trust*s § 337.6 (4th ed. 1989)). The Minnesota court noted this is consistent with the statutory scheme and it is also implied by a comment to the Uniform Probate Code, which states, "The only

reason for approving a scheme of devolution which differs from that named by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation." *Id.* (quoting Comment, Uniform Probate Code, 8 U.L.A. § 3-1102 (1983)). The court observed an estate plan in a settlement agreement may affect a trust; "[h]owever, an estate plan which differs from the testator's intent can be approved only in limited circumstances." *Id.* [24]

In *Schroeder*, the court found the decedent had clearly expressed her intent in a will executed with the requisite formalities and that the respondents had brought a frivolous will contest in a collusive move to destroy a trust created by the decedent. *Id.* at 534 (citing Bogert, *Trusts* § 152 (6th ed. 1987)). The appellate court found "[t]o approve such a settlement agreement threatens to unravel two fundamental principles of probate law: (1) the paramount importance of carrying out the intention of the testator, and (2) the requirement that a testator express his intention with the requisite formalities." *Id.*

In determining that the settlement in the current appeal was just and reasonable, the circuit court observed there could be a potential beneficial effect if a marital deduction was obtained and further stated that, in addition to dropping their claims, the settling parties had, as part of the compromise, signed over their federal copyright termination rights. The circuit court found these rights could be a significant benefit for the charitable beneficiaries because they might form a substantial portion of the future value of the estate. There was, however, no evidence presented as to the potential value of these rights that could be compared to the potential value the Respondents would obtain by having Brown's testamentary plan voided.[25] The court also opined that the settlement was necessary to protect the charitable trust from the threat of litigation.

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[24] A compromise approved by the court "is binding even though it may affect a trust or an inalienable interest." S.C. Code Ann. § 62-3-1101 (2009).

[25] The parties submitted a legal article indicating the copyright termination rights, or recapture rights, could be valuable, but the majority of the article focused on the inherent difficulties in obtaining these rights. As the author observed: "So complicated and borderline byzantine are these requirements that leading copyright commentators have characterized a successful termination of a copyright grant as a feat 'accomplished against all odds.'" Peter Afraslabi, *Superman's Latest Episode: The Rights of Authors and their Families to Terminate a Copyright Grant and Recapture the Copyright*, Orange County Lawyer, Sept. 2008, at 37 (quoting *Patry*

In our view, the evidence does not support the finding that the compromise was just and reasonable. The compromise orchestrated by the AG in this case destroys the estate plan Brown had established in favor of an arrangement overseen virtually exclusively by the AG. The result is to take a large portion of Brown's estate that Brown had designated for charity and to turn over these amounts to the family members and purported family members who were, under the plain terms of Brown's will, given either limited devises or excluded.

Even if a good faith controversy had existed, the remedy more appropriately would have been the reformation of the documents to provide for any monies payable, not the total dismemberment of Brown's carefully-crafted estate plan and its resurrection in a form that grossly distorts his intent. We find the compromise proposed here is fundamentally flawed because the entire proposal is based on an unprecedented misdirection of the AG's authority in estate cases. We also believe that a departure from the testator's intent is not reasonably necessary to protect the beneficiaries' interests because any alleged advantage to them occasioned by the avoidance of further litigation, as propounded by the settling parties, is illusory at best.

"A will is an expression of a testator's intent to dispose of the testator's property after death." *In re Estate of Pallister*, 363 S.C. 437, 448, 611 S.E.2d 250, 256 (2005). The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make it according to the testator's pleasure and in his absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed. *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985) (citation omitted); *see also Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773,

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on Copyright § 752 (2007)). This consideration, together with the fact that it could take decades for some of these recapture rights to become available, makes their potential value as compared to any settlement amounts unclear. Moreover, the record also contains a proposal from an Atlanta firm regarding Brown's estate in June 2007, in which it stated the value of Brown's estate had three major components: (1) likeness/publicity, (2) property, and (3) Brown's music catalogue, of which it indicated Brown's publicity rights, not the music rights, were the most valuable.

775 (1976) ("It is elementary that the statutory right of a competent person to dispose of [his] property as [he] wishes may not be thwarted by disappointed relatives or by one who thinks the [testator] used bad judgment or was misled.").

The law generally favors an agreement of compromise among family members to avoid a will contest or to promote the settlement and distribution of an estate. *Duncan v. Alewine*, 273 S.C. 275, 255 S.E.2d 841 (1979); *Dibble v. Dibble*, 248 S.C. 165, 149 S.E.2d 355 (1966); *see also In re Estate of Yeley*, 959 N.E.2d 888, 894 (Ind. Ct. App. 2011) ("[T]he settlement agreement is a contractual agreement to transfer and distribute property among the parties so as to avoid litigation."). However, "[a] settlement agreement must defer to the testator's intent unless departing from his intent is reasonably necessary to protect the beneficiaries' interests." *In re Estate of Sullivan*, 724 N.W.2d 532, 535 (Minn. Ct. App. 2006).

In granting the AG's Motion to Intervene, to which no objections were interposed, the circuit court ruled the AG was authorized to intervene pursuant to his *parens patriae*, statutory, and common law authority. The AG undoubtedly has the authority to intervene to protect the public interest of a charitable trust. However, the AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the AG has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofor been recognized in our jurisprudence.

"The role of the Attorney General is as an overseer of charities representing the public, the ultimate beneficiary of the charitable trust." *In re Estate of Horton*, 90 Cal. Rptr. 66, 68 (Ct. App. 1970) (citation omitted). "His duty is to remedy abuses in trust management." *Id.* (citation omitted). However, the AG is not "in the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities." *Id.*

In discussing the duties of the attorney general as the protector, supervisor, and enforcer of charitable trusts, one treatise observes: "As an adjunct to his enforcement powers, the Attorney General is frequently granted powers of supervision and investigation regarding the administration of charities. However, .

. . in the absence of a statute, this power does not extend to the continuous oversight of a charity's administration when the settlor's intent is clear and there is no allegation of actual or threatened breach [of trust by a charitable trustee]." Ronald Chester, George Gleason Bogert, George Taylor Bogert, *The Law of Trusts and Trustees* § 411, at 25-26 (3d ed. 2005).

"[I]t is axiomatic that a trustee is always under the direction and guidance of the court . . . ." *Kingdom v. Saxbe*, 161 N.E.2d 461, 466 (Ohio, Ashtabula County Prob. Ct. 1958). Although the AG certainly has duties in regards to charitable trusts, if he believed Appellants, as trustees, were not good stewards, the remedy would be to seek their removal and replacement. Brown's 2000 Irrevocable Trust contained a detailed procedure for the succession of trustees that was gutted and replaced with provisions allowing the AG the sole authority to select the managing trustee and to serve at his pleasure.[26] *Cf. In re Estate of Ward*, 23 P.3d 108, 112 (Ariz. Ct. App. 2001) ("The remedy for bona fide problems with the trustee is not rewriting a will or trust but replacing the trustee with a new trustee . . . .").

Although the stated justification for the compromise was to avoid the potential of a substantial threat to the charitable beneficiaries occasioned by Respondents' claims, the compromise condoned by the AG here results in an outright gift of half of the estate to the family members and purported family members who challenged Brown's will and trust based on tenuous claims. As the enforcer of charitable trusts, we believe the AG's efforts would have been better served in attempting to make a cursory evaluation of the claims rather than directing a compromise which ultimately resulted in the AG obtaining virtual control over Brown's estate. Based on all the circumstances, we do not believe the effect of the compromise is just and reasonable, and we cannot condone its approval.

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[26] Brown's trust agreement provided that, upon notice a trustee would no longer serve, the remaining trustees were to select a successor, and if they did not timely do so, the obligation fell to the advisory board. If that also failed, then the selection was to be made by the court with jurisdiction over the trust.

C. Removal of Appellants as Personal Representatives and Trustees

Appellants next argue the circuit court erred in removing them from their fiduciary positions.[27]

Appellants assert the circuit court removed them without complying with the procedures outlined in sections 62-3-611 (removal of personal representative), 62-3-614 (appointment of special administrator), or 62-3-616 (powers and duties of special administrator) of the South Carolina Code, and no statutory ground was claimed or found justifying the removal of Appellants as trustees as required by section 62-7-706 (removal of trustees).

Section 62-3-611 governs removal of a personal representative. Subsection (a) provides "[a] person interested in the estate may petition for removal of a personal representative for cause at any time" and requires a hearing to be held after notice. S.C. Code Ann. § 62-3-611(a) (2009).[28] Subsection (b) provides "[c]ause for removal exists when removal would be in the best interests of the estate . . . ." *Id.* § 62-3-611(b).

Respondents contend the circuit court took up the issues related to Appellants' removal at the hearing to consider whether it should approve the settlement agreement; thus, a hearing and the opportunity to be heard was afforded to Appellants. Further, all of the settling parties petitioned the circuit court for Appellants' removal well in advance of the hearing, thus providing adequate notice. In addition, the circuit court found an irreconcilable conflict existed between Appellants and the settling parties because Appellants had expressed continuing

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[27] Appellants further argue the circuit court erred in ordering them to sign the compromise agreement, since their removal was effective "immediately." Appellants' argument in this regard is now moot based on our holding the circuit court erred in approving the compromise agreement in the first instance, as their signatures are effectively nullified by our ruling. As a general matter, however, we find no error in a court directing fiduciaries to sign a compromise while ordering their removal, as it is understood the acts are to proceed in logical sequence.

[28] Section 62-3-611(a) was subsequently amended, but the change is not relevant to these proceedings. Act No. 244, 2010 S.C. Acts 1764.

opposition to their actions. Thus, the circuit court had cause to remove them and replace them with a professional fiduciary.

We find the circuit court did not violate the statutory provisions regarding the removal of personal representatives. Notice and a hearing were provided, and the court had cause to remove them as it was in the best interests of the estate. While we ultimately agree with Appellants in the specific conflict over the compromise agreement, we note the parties remained at odds over the handling of Brown's estate matters.

We are also aware that Appellants have sought $5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Appellants sought and obtained permission from the circuit court to sell iconic assets from Brown's estate in order to raise funds, and a large portion of the amount raised went first to pay Appellants' own attorneys' fees. Appellants also unsuccessfully attempted to sell Brown's GRAMMY award at auction; the process was halted only because officials from the National Academy of Recording Arts and Sciences reclaimed the award after informing Appellants that it was a long-standing policy that the award could not be sold by recipients or anyone acting on their behalf. These actions and the extreme discord between the parties convince us that Appellants' continued service as fiduciaries is not in the best interests of the estate.

As to section 62-7-706, regarding the removal of trustees, this provision is cited once by Appellants, but it is not otherwise discussed. *See* S.C. Code Ann. § 62-7-706 (2009). Thus, Appellants have set forth no issue in this regard for the Court's consideration. *See Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005) (observing an argument is effectively abandoned if the appellant's brief treats it in a conclusory manner). The other provisions cited by Appellants concerning the appointment and duties of a special administrator likewise afford no basis for relief here. *See* S.C. Code Ann. §§ 62-3-614, -616 (2009).

We hold Appellants have shown no error in the circuit court's ruling removing them from their fiduciary positions. However, in light of our decision invalidating the compromise agreement, we likewise void Bauknight's appointment, which was made in conjunction with the settlement agreement, and

under which he was to serve at the pleasure of the AG.[29] The circuit court should, upon proper application, appoint fiduciaries to oversee these matters in accordance with the provisions for succession outlined in Brown's trust and estate documents. The circuit court may consider at that time whether Bauknight should be appointed to fill a fiduciary position.[30] In addition, the circuit court shall also review the propriety of all fees, including attorneys' fees and trustees' fees, paid in relation to this action, and shall order all unearned fees or unapproved fees to be disgorged and returned to Brown's estate.

III. CONCLUSION

The circuit court did a commendable job in attempting to sort out this difficult situation, but after considering the record and evaluating the positions of the numerous parties who seek a share of Brown's estate, we conclude the settlement reached in this case was not a fair and just resolution of a good faith controversy and that court approval is not appropriate.

The agreement served to transfer a large portion of the estate assets to persons who had been specifically excluded from Brown's will, in contravention of his stated desires. Throughout the record, it is clear that Brown's oft-repeated intent was to leave the bulk of his estate to charity for the education of needy children, as well as to provide up to $2 million for the education of his own family

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[29] The probate court appointed Bauknight to serve as a Special Administrator, but only until the "various orders related to the removal of the former Personal Representatives and the appointment of Russell Bauknight as Personal Representative have been finally concluded."

[30] We note the AG and/or Bauknight have allegedly entered into contingency-fee agreements with outside counsel, Kenneth Wingate, for Wingate to sue Appellants on behalf of the State, Bauknight, and others while also representing private plaintiffs in the suit. We are aware that a suit has been filed in Richland County seeking damages to Brown's estate allegedly arising during Appellants' service as fiduciaries. Despite FOIA requests, the AG had refused to publicly release all of the documents pertaining to this reported arrangement. However, the AG has recently informed this Court, in petitions filed after this Court's initial opinion, that he is now withdrawing as a party in that lawsuit and his office will maintain a monitoring role.

members. The settlement plan subverts that stated desire. The settlement provisions allowing the AG to select the trustee, and his continued influence over the trust overreaches his statutory authority, as there is no provision allowing an AG to become involved in the day-to-day operations of a trust. Moreover, the AG's primary job is the enforcement of charitable trusts, and in this case, the compromise dismantles the existing charitable trusts, to great ill effect on Brown's estate plan, rather than enforces it. These facts all demonstrate that the agreement should not be condoned by this Court, and we reverse the circuit court's finding to the contrary.

We affirm the circuit court's removal of Appellants from their fiduciary positions, and, in light of our decision invalidating the circuit court's approval of the compromise agreement, we likewise void the appointment of Bauknight. We direct the circuit court, upon proper application, to appoint fiduciaries to oversee these matters in accordance with the provisions of Brown's estate and trust documents, and to evaluate the propriety of all fees, as specified above, that are related to this case.

Based on the foregoing, the order of the circuit court is affirmed in part and reversed in part, and the matter is remanded to the circuit court for further proceedings in accordance with this decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KITTREDGE and HEARN, JJ., and Acting Justice James E. Moore, concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I concur in nearly all of the majority's excellently researched and learned opinion, with the exception of the finding regarding the removal of the court-appointed fiduciaries. I continue to hold the opinion that the court ordered fiduciaries Pope and Buchanan should have been retained. However, in light of the fact that the rest of the Court sees this issue differently, I agree with all of the directives and holdings contained in the majority opinion with respect to the further handling of these matters on remand. My agreement includes concurrence in our ruling that, on remand, the circuit court should decide who to appoint as fiduciary and should review all attorney and other fees and order all unearned or unapproved fees to be disgorged and returned to Mr. Brown's estate. I also write separately to comment on what I view as the government's unprecedented encroachment into estate administration, which had we accepted it, would be the end of estate administration as we know it in this State.

As an initial note, I concur wholeheartedly in the portions of the majority opinion finding that the contestants had no good faith basis upon which to bring their claims against the estate and that the terms of the settlement were not just and reasonable. The effect of the circuit court's order is to allow a group of "beneficiaries" with highly questionable or completely invalid claims to agree with each other to receive benefits the testator chose to deny them without even having to take any steps toward substantiating the validity of their claims or verifying the testator's incapacity. Had any steps been taken to verify their claims, I am of the opinion that the circuit court would have found all completely lacking in merit, which in turn would have lead to the disinheritance of every contestant of the will under the no-contest clauses contained in the estate documents. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (finding no-contest clause was valid and enforceable where claims of undue influence lacked probable cause in that they did not represent a bona fide inquiry into the testators carefully drafted estate plans).[31]

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[31] We upheld Judge Russell's estate plan, including the no-contest clause because it could not be shown that Judge Russell lacked testamentary capacity or that his ability to make decisions of this nature had been overborn by others. Mr. Brown is entitled to the same treatment. Mr. Brown's estate plan, including its no-contest provisions, must be enforced because there has been no showing that he lacked testamentary capacity or that his will was overborn by others. If we will uphold a no-contest clause in Judge Russell's case, where the issue of capacity was actually contested, it is only just to uphold Mr. Brown's estate plan, including the no-

While I agree with the majority that the purpose of a settlement agreement is not to litigate the merits of the claims against the estate, accusations in a complaint and inferences made from other fragmented facts in the Record cannot form the basis of a good faith controversy to invalidate an otherwise carefully drafted estate plan. Instead, courts must require the settling parties to put forward some "forecast of evidence indicating that at trial [they] would be able to show that a *bona fide* dispute existed as to the validity of the [estate provisions] in question." *Holt v. Holt*, 282 S.E.2d 784, 785 (N.C. 1981); *see also O'Neil v. O'Neil*, 155 S.E.2d 495, 501 (N.C. 1967) ("The record discloses no information as to the circumstances under which the 'Will' was drafted. Nor does the record indicate what inquiries, if any, have been made to determine what testimony the draftsman and the witnesses would give relevant to what occurred prior to and at the time of the execution of the 'Will.'"). Otherwise, it is impossible to say to that the claims were brought in good faith. Further inquiry is especially important, where, as here, it appears the contestants' chance of success on the merits was highly unlikely. Furthermore, any agreement sanctioning a windfall to these contestants which also simultaneously defeats Mr. Brown's express desire that one hundred percent of that money go to fund the educational pursuits of needy children cannot be just or reasonable.

The fact that the AG has agreed to the settlement is of no consequence, as the court is the ultimate arbiter of the merits of any settlement agreement devolving from a testator's express intent.

The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust. Along the way, a seemingly carefully executed testamentary devise was completely disregarded without any sworn testimony that the document, itself, is somehow defective. In asking this Court to give our imprimatur to the settlement agreement, Respondents effectively asked us to dispense with the cardinal rule of trusts and estates law that the intent of the testator must prevail wherever possible. *See Johnson v. Thornton*, 264 S.C. 252,

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contest provisions, where there was no real evidence-based challenge to Mr. Brown's capacity.

257, 214 S.E.2d 124, 127 (1975) ("In determining this question we are guided by the rule that in construing the provisions of a will the intention of the testator is the primary inquiry of the court."); *Limehouse v. Limehouse*, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) ("The court's aim in construing a Will is to discover and effectuate the expressed intention of the testator."). Were we to accept the new estate plan, we would undermine any confidence citizens may have in their ability to do with their personal assets as they wish, leading to a chilling effect on future testators in South Carolina wishing to make charitable testamentary devises, as the result sought by the AG would permit him to become the effective "super member" of the boards of directors or trustees of these future testators' foundations whenever he chose to intervene in the administration of their estates. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L. J. 937, 1034 (2004).

As outlined by the majority, four months after intervening in the action,[32] the AG convened a mediation in Augusta, Georgia, and intentionally excluded Appellants, the court-appointed fiduciaries of Mr. Brown's estate. During the ensuing negotiations, the AG purported to "settle" the claims against the estate by creating a new estate plan, under which nearly fifty percent of the residuary estate, which Mr. Brown left entirely to the Charitable Trust for the education of needy children, was now divided between some of Mr. Brown's adult children and his purported spouse. In settlement of these parties' claims against the estate, the AG and these family members created a new charitable trust, the Legacy Trust. The AG gave himself sole authority to select, remove, and replace the managing trustee of the Legacy Trust.[33] Furthermore, the disinherited children and putative wife of Mr. Brown were authorized to select a trustee from whom the managing trustee would seek input and advice when managing the Legacy Trust.

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[32] Everyone agrees that the AG's initial intervention was proper amidst allegations of fraud and misappropriations of the trust funds by the original trustees, Bradley, Dallas, and Cannon.

[33] In fact, the settling parties represented to the circuit court that under the settlement agreement, "there will be a replacement of the currently serving personal representatives and trustees with a managing trustee who will be controlled completely by the attorney general of South Carolina" and that "the [AG] under the documents has full power to remove and replace any trustee serving . . . as trustee of the . . . Legacy Trust."

In approving the settlement agreement, the circuit court observed:

> When the [AG] does appear in litigation involving a charitable trust either by motion for intervention or being brought in by an amendment to the pleadings, he has a right to take charge and control that portion of the litigation which relates to the charitable trust . . . This authority that allows the [AG] to control the litigation also provides that the [AG] has exclusive authority, in order to protect the public interest, to settle or compromise litigation . . . .
>
> Therefore, it is for the [AG], as the officer charged with the duty of protecting charitable beneficiaries, to exercise his discretion as to the appropriateness of a settlement. It is the responsibility of this Court in reviewing the record to determine if the [AG] acted in good faith [in] entering in this compromise agreement.

(citations omitted).

This is a gross misstatement of AG's authority. While the circuit court ultimately approved the settlement, in my view, this erroneous statement of law suggests that the circuit court did not engage in meaningful independent review of the settlement because the court wrongly assumed that the AG had discretion to settle the estate, with the court merely required to "rubber-stamp" any agreement presented to it by the AG.

It goes almost without saying that the AG, like the attorneys general of most states, has common law and statutory authority to enforce trusts domiciled in the State of South Carolina. *See* S.C. Code Ann. § 1-7-130 (Supp. 2011).[34] The precedents relied upon by the circuit court and cited by Respondents are in line with this position and stand for the proposition that the attorney general is the appropriate party to "protect the interests of the public at large in the matter of administering and enforcing charitable trusts." *Epworth Children's Home v.*

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[34] I note that this power to enforce the trust is not *exclusive*. *See* S.C. Code Ann. § 62-7-405(c) ("The settlor of a charitable trust, *the trustee*, and the Attorney General, among others may maintain a proceeding to enforce the trust." (emphasis added)).

Beasley, 365 S.C. 157, 163 n.3, 616 S.E.2d 710, 713 n.3 (2005) (citing *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961)).

Epworth and *Furman* are foundational in that they define the role of an attorney general in our state jurisprudence; however, these cases cannot be read as broadly as Respondents urge. In my view, these cases illustrate the traditional role of the AG's enforcement and oversight role in charitable trust administration, but do not grant the AG a "blank check" authorizing the AG to do what he will when it comes to charitable enforcement. Under the traditional model, the role of an attorney general in overseeing charitable entities is "limited . . . to ascertaining that trustee actions are permitted by, and not inconsistent with, the underlying trust instrument, and safeguarding against fraud." Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. Pitt. L. R. 1, 2 (2002); *cf.* 1 S.C. Jur. Attorney General § 14 ("The Attorney General is charged with responsibility for enforcement of the due application of funds given or appropriated to public charities within the State of South Carolina. He is responsible for the prevention of breaches of trust in the administration of public charities. His duty is to protect the interests of the public at large rather than those who may have an immediate or peculiar interest in a charitable trust." (footnotes omitted)). This traditional oversight role, contrary to the AG's view, "does not include . . . a right to direct either the day-to-day affairs of the charity or the action of the court." *Id.* at 32 (citation omitted).[35]

This viewpoint is very much in line with other state court and scholarly opinions. For example, in *Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973), the Hawaii Supreme Court aptly described an attorney general's role in charitable trust administration as follows:

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[35] The facts of both *Epworth* and *McLeod* exemplify the valid exercise of attorney general enforcement power. In *Epworth*, 365 S.C. 157, 616 S.E.2d 710, the trustees wished to terminate the trust in a manner that was violative of the settlor's intent, and the attorney general intervened to protect the charitable trust from destruction. In *McLeod*, 238 S.C. 475, 120 S.E.2d 865, the attorney general was made a party to protect the public interest when trustees sought to deviate from the technical terms of the trust.

> The function of the attorney general, as *parens patriae* of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction. The authority of the attorney general over charitable trusts does not extend beyond the performance of that function.

(internal citations omitted).[36]

Of course, this view of the AG's supervisory powers, embodied in reporting requirements and other oversight and investigative tactics, does not mean that the AG has *no* role to play when a charitable trust is involved. In *Estate of Horton*, 90 Cal. Rptr. 66, 68 (Ct. App. 1970), the California court was presented with the question of how much involvement the attorney general should have in settlement

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[36] Importantly, the Hawaii Supreme Court found that the attorney general did not have the authority to sanction trustee deviation from the provisions of the trust. *Id.* Instead, that court stated, "If a deviation from any trust provision is necessary in the interest of the trust, the power to authorize the deviation rests solely with the court." *Id.* Our facts are slightly different, but I think the import of this statement rings true in the present controversy, as the circuit court, in approving the AG's settlement agreement, wrongly assumed that the AG had total control over the litigation, and thus the court's approval was a foregone conclusion. The Respondents repeatedly proclaimed to the court that they sought court approval of the agreement not out of legal necessity, but as a matter of course, because court approval of a private settlement agreement was not essential to its validity. In my view, in any instance where any party desires to deviate from the express terms of a testamentary trust, meaningful court review is required. *See, e.g.*, *Brown v. Ryan*, 788 N.E.2d 1183, 1191 (Ill. App. Ct. 2003) (citations omitted) (holding while "the community has an interest in enforcing the trust and the Attorney General represents the community in seeing that the trust is properly construed and that the funds are applied to their intended charitable uses[,]" the state could not "compel the court to terminate the trust and end the relationship between the Trustees and the Trust *corpus*.").

negotiations involving several charitable entities and other beneficiaries of a testamentary trust. In approving the settlement agreement, the court defined the role of the attorney general as follows:

> The role of the Attorney General is as an overseer of charities representing the public, the ultimate beneficiary of the charitable trust . . . . His duty is to remedy abuses in trust management . . . . He is a necessary party to proceedings affecting the disposition of the assets of a charitable trust . . . . It is his right and duty to participate in proceedings to protect charitable gifts . . . .

Id. (internal citations omitted). While the court found the attorney general "has undoubted standing to seek redress in the courts of contracts entered into by charities which are collusive, tainted by fraud or which demonstrate any abuse of trust management," the court also found that the attorney general could not assume "the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities." *Id.*; *cf.* Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 47 (1993) ("The attorney general does *not* . . . have a right to regulate the actions of a charity or to direct its day-to-day affairs. Courts have denied the attorney general authority to intervene in suits contesting wills involving charities, to enforce obligations owing to charities, to intervene or appear for the establishment of an invalid charitable trust, or to authorize deviations from trust provisions." (emphasis in original) (footnotes omitted)).

While no one disputes the propriety of the AG's initial intervention amidst allegations of fraud by the original trustees, once the court appointed Pope and Buchanan as fiduciaries, the AG's involvement was no longer necessary to stave off maladministration of the Charitable Trust. At that point, the AG should have assumed a more passive role. Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 Harv. J. L. & Pub. Pol'y 355, 372–73 (2006) ("In general . . . government oversight is premised on a view of nonintervention in the substantive decision-making and operations of foundations . . . . 'With few exceptions, the law neither attempts to control the decisions of managers, made in good faith, as to how the purposes will be achieved, nor how their organizations will be administered.' Generally, a state attorney general can pursue legal action against foundations in cases where charitable assets are in jeopardy (thus possibly

violating donor intent), and in cases involving illegal actions." (quoting Waldemar A. Nielsen, *The Golden Donors: A New Anatomy of the Great Foundations* 13, 110 (1985))).

Instead, the AG took it upon himself to discontinue the court-appointed trustees' administration of the trust in accordance with their fiduciary responsibilities by settling the claims against the estate, and then proceeded to create an entirely new estate plan in which he has a direct role in the management and day-to-day operation of the Charitable Trust through the appointment, at will, of the managing trustee. Thus, the AG impermissibly crossed "the line between oversight and management" in this case. Brody, *supra*, at 974. Absent any claims of fraud or mismanagement, the trustees should have been permitted to probate the will in accordance with its terms or engaged in any settlement negotiations they deemed necessary to protect the assets of the estate. *Cf. Murphey v. Dalton*, 314 S.W.2d 726, 730–31 (Mo. 1958) ("And trustees of a public charitable trust, like trustees of a private trust, may bring actions against third persons to recover or preserve or protect the trust assets and may bring suits for instructions, and it should follow that they may take any reasonable action (including the defense of a will contest suit) necessary to uphold the validity of the trust established by a will and thereby protect and preserve the trust assets . . ."). When the AG hijacked the proceedings here, the case was nothing more than a run-of-the-mill will contest (aside from the size of the estate).[37] The AG had no authority to act as the lawyer

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[37] Indeed, I question whether the AG has any role to play in a will contest. *See Com. ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 949 (Ky. 1959) ("The contention that the Attorney General should be permitted to intervene and participate as a party in the present type of will contest does not appeal to this court as being independently sound in principle. The object of the contest is to determine one issue, i. e. [sic], whether the papers probated are the last will and testament of Ed Gardner. If not, nothing was thereby devised, bequeathed, or created to go to charity, and there will be no administration to be supervised."); *Spang v. Cleveland Trust Co.*, 134 N.E.2d 586, 591 (Ohio Com. Pl. 1956) ("The object of this will contest proceeding is to determine one simple issue: Whether the paper writing is the last will and testament of the testatrix. If it is found not to be, then it never was the last will and testament; and nothing was bequeathed or devised by it, and nothing was created by it. The object of the proceeding is not primarily, if at all, to terminate a charitable trust. The will contest proceeding may result in the

for the trust or the trustees by entering into this settlement agreement at the exclusion of the rightful fiduciaries. *See Murphey*, 314 S.W.2d at 730–31 (finding the trustee was empowered to hire outside counsel to defend a will contest and stating "the attorney general as the attorney for the public is not the attorney for the trustee of a public charitable trust who was appointed by the settlor, and that when and under what circumstances the attorney general is a necessary or proper party to a will contest or to any other suit involving a public charitable trust or when and under what circumstances he should or must bring such action, has nothing to do with the right of a trustee to be represented by counsel of his own choosing." (internal citations omitted)).

Furthermore, as noted by the majority, the testamentary documents, which are the guiding indicator of a testator's intent, absent a *court* finding otherwise, conferred upon the trust, acting through its trustees, and upon the estate, acting through the personal representatives, the power to compromise claims. Trust, Art. X(19); Will, ITEM VI; *see also Bob Jones Univ. v. Strandell*, 344 S.C. 224, 230, 543 S.E.2d 251, 254 (Ct. App. 2001) (citation omitted) ("In construing a will, a court's first reference is always to the will's language itself."); *Limehouse v. Limehouse*, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) ("The court's aim in construing a Will is to discover and effectuate the expressed intention of the testator. In searching for intention, however, we may not conjecture how the testator might have chosen to express himself had his mind adverted to the particular contingency. Circumstances known to the testator at the execution of his Will are an admissible aid in construing doubtful provisions, but the main recourse must be to the language used. We may not redraft the Will, nor may we doctor a crucial part." (internal citations omitted)). There has not been a finding by any court concerning the validity of the will or the trust instruments. Therefore, the plain language of the testamentary documents only reinforces Appellants' claim that the AG overstepped his authority in this case.

In sum, the Court has rightly decided that the AG simply does not possess the sweeping and unprecedented authority he assumed in this case, perhaps best illustrated by the dearth of case law supporting the AG's position in our own jurisprudence. The AG orchestrated the fabrication of an entirely new estate plan

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nonexistence of a *purported* trust created by a paper writing, having no recognition in law as a conveyancing, assigning, transferring, bequeathing or devising instrument." (emphasis in original)).

under the auspices of his power to intervene in the litigation when settlement negotiations in this case should have been undertaken (or not) by the trustees as the rightful fiduciaries of the charitable trust, and not the AG. The AG, absent claims of fraud or mismanagement, has no right to interfere in the operation of a validly created testamentary trust based solely on his statutory authority to enforce a charitable trust.

> Where discretion is conferred on a charity's board, proper state enforcement action over fiduciary decision making reduces to a single rule: The role of the attorney general and courts is to guard against charity fiduciaries' wrongdoing, and not to interfere in decision making carried out in good faith . . . . To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board. However, the attorney general is not a "super" member of the board.

Brody, *supra*, at 1034.

Because the circuit court labored under the erroneous assumption that the AG had the right to control this litigation, failed to review the *bona fides* of the claims against the estate, and approved a settlement that was entirely unjust and unreasonable based on the dubious claims of the contestants, I would further find that the circuit court erred in removing Appellants as fiduciaries of the estate based on the recommendation of the settling parties.[38]

[38] Nevertheless, I agree with the majority that the circuit judge, on remand, has the authority to review the propriety of Bauknight's continued service to the estate in a fiduciary capacity. I further join in the majority's directive that the circuit judge should proceed to review all fees awarded and requested up to this point in these proceedings, determine the appropriateness of such fees, and order the payment or the disgorgement of such fees based on his calculations.

The Supreme Court of South Carolina

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ORDER

The petition for rehearing is denied. The attached opinion is, however, substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ON WRIT OF CERTIORARI

Appeal from Greenville County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27233
Submitted October 15, 2012 –Refiled May 8, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and William H. Ehlies, II, of Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and

Assistant Attorney General Melody Jane Brown, all of Columbia, for Respondent.

JUSTICE HEARN: A jury convicted Brad Keith Sigmon of two counts of murder and burglary in the first degree, and it subsequently sentenced him to death. His convictions and sentences were affirmed on direct appeal in *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). We granted certiorari to review the circuit court's dismissal of Sigmon's application for post-conviction relief (PCR) and now affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sigmon and Rebecca "Becky" Larke were in an intimate relationship for approximately three years. They were living together in her trailer when she informed Sigmon she did not want to see him anymore. Becky's parents, Gladys and David Larke, lived next door to them in a trailer on the same property. David also informed Sigmon that Becky wanted him to move out and served him with eviction papers, stating Sigmon had to leave within two weeks. Becky subsequently moved in with her parents. Sigmon believed she had begun a new relationship and although he pleaded with her to come back, she refused. Sigmon became increasingly obsessed with Becky, stalking her in an attempt to verify she was seeing another man.

About a week after Becky asked him to leave, Sigmon was drinking and smoking crack cocaine with his friend, Eugene Strube, in Becky's trailer. At some point in the evening, Sigmon decided he would go to the Larkes' home the following morning after Becky left to take her children to school and tie up Becky's parents. When Becky returned home, Sigmon intended to kidnap her and disappear with her, but he did not want her parents to be able to call the authorities. Sigmon and Strube eventually ran out of crack and Strube fell asleep.

In the morning, after they saw Becky leave, Strube and Sigmon exited the trailer. However, Strube changed his mind about helping Sigmon and left. Sigmon grabbed a baseball bat from beneath his trailer and entered the Larkes' trailer. Upon seeing Sigmon, David told his wife to bring him his gun, and Sigmon hit him in the back of the head several times with the bat. Sigmon then saw Gladys, ran after her into the living room, and hit her several times in the head. He

returned to the kitchen where David lay and hit him several more times with the bat because he was still moving. He then went back to Gladys, saw that she was still moving, and hit her several more times.

Sigmon retrieved David's gun and waited for Becky to return home. When Becky arrived, Sigmon brandished the gun, took her car keys, and forced her in her car. He intended to pick up his own car and drive to North Carolina with Becky. However, she managed to jump out of the car and tried to run away. Sigmon pulled over and chased after her, shooting her several times. When he realized he was out of bullets, he got back in her car and fled. Although Becky was injured, she survived the assault and told the witnesses who came to her aid that Sigmon told her he had either tied up or killed her parents. Police officers were dispatched to the Larkes' home where the bodies were discovered.

A manhunt ensued and Sigmon was eventually captured in Gatlinburg, Tennessee after he called his mother, who was assisting the police in locating him. He was arrested without incident and taken into custody by the Gatlinburg police department where he confessed to murdering the Larkes and kidnapping and shooting Becky. He admitted that he intended to kill Becky and then kill himself. Officers from Greenville arrived to transfer him back to Greenville, but, at Sigmon's request, they took his statement before leaving Tennessee. He again confessed to his crimes and stated his plan had been to kill Becky and himself.

Sigmon was indicted for two counts of murder; assault and battery with intent to kill; kidnapping and possession of a firearm during the commission of a violent crime; first degree burglary; and grand larceny. The case proceeded to trial only on the murder and first degree burglary charges. Sigmon conceded guilt and presented no evidence in his defense. The State presented expert testimony that both of the Larkes died as a result of blunt force trauma to the head, describing the severity of their wounds. Both sustained nine lacerations to the head, causing hemorrhaging and filling the sinuses with blood, so that they were breathing in blood as they died. It was estimated that both lived for three to five minutes before dying from their wounds. Additionally, both sustained defensive wounds to their forearms. The jury ultimately found Sigmon guilty.

During the penalty phase, the defense presented testimony regarding Sigmon's mental state, such as his issues with childhood abandonment and neglect that affected the development of his social mores and overall judgment, as well as evidence of an extensive history of drug use stemming from his "recurrent major

depressive disorder" or his "chemical dependency disorders." Sigmon additionally presented evidence that he was adapting to prison life and that he was not a problematic or difficult prisoner. Sigmon testified he was sorry for the crimes and admitted he probably deserved to die.

The court charged the jury to consider three factors in aggravation: that two or more persons were killed, that the murder was committed during the commission of a burglary, and that the murder was committed with physical torture. It also charged the jury to consider four statutory mitigating circumstances: that the defendant had no prior history of criminal convictions involving the use of violence against another person; the murder was committed while the defendant was under the influence of emotional or mental disturbance; the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the law was substantially impaired; and the defendant was provoked by the victim. Although Sigmon requested a charge on the statutory mitigating circumstance of age or mentality, the judge declined to give that charge, noting mental state would be covered by the other mitigating circumstances he charged.

The jury ultimately sentenced Sigmon to death. On direct appeal, this Court affirmed Sigmon's convictions and sentences. *Sigmon*, 366 S.C. 552, 623 S.E.2d 648. Sigmon subsequently filed an application for PCR. The State filed a return and motion to dismiss, and Sigmon amended his application, arguing his counsel provided ineffective assistance in failing to properly preserve various issues for appellate review, failing to adequately present evidence of his mental state, and attempting to blame the victims for the crimes. Sigmon moved for summary judgment, submitting depositions of his trial attorneys. At the hearing, the PCR court ultimately dismissed Sigmon's application. We granted Sigmon's petition for a writ of certiorari on the following issues:

I. Did the PCR court err in failing to find trial counsel ineffective when they failed to object to the solicitor's reference to his own opinion of the death penalty during his closing statement?

II. Did the PCR court err in finding trial counsel was not ineffective for failing to argue that the trial court was required to charge the jury on the statutory mitigating factor of the age and mentality of the defendant at the time of the crime under Section 16-3-20(C)(b)(7) of

the South Carolina Code (2003) because evidence in the record showed Sigmon was intoxicated during the commission of the crimes?

III. Did the PCR court err in failing to find trial counsel ineffective for failing to object to the trial court's charge on non-statutory mitigation?

STANDARD OF REVIEW

To prevail in a PCR action, an applicant must satisfy a two prong test: he must first show his counsel's performance fell below an objective standard of reasonableness, and he is then required to prove he suffered prejudice as a result of counsel's deficient performance. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). We will uphold the PCR court's findings if supported by evidence of probative value within the record and we will only reverse where there is an error of law. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

LAW/ANALYSIS

I. CLOSING ARGUMENT

Sigmon argues the trial court erred in not finding his counsel ineffective for failing to object to the State's closing arguments because the Solicitor expressed his own opinion as to why the death penalty was the appropriate punishment and thereby injected an arbitrary factor into the proceedings in violation of the Eighth Amendment and Section 16-3-25(C)(1) of the South Carolina Code (2003). We disagree.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor . . . ." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67.

During his closing argument, the solicitor stated:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.

….

> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

(emphasis added). Trial counsel did not object.

When deposed for the PCR hearing, counsel stated he considered this personal reference inappropriate, and it was his understanding that such statements would be inadmissible. He further noted that if he had not objected to it, it was either because he "missed it or was oblivious." Nevertheless, the PCR court concluded that the statements would not justify an objection because they did not diminish the role of the jury in rendering a death sentence nor were they inflammatory. Instead, it found the closing argument was overall tailored to the facts within the record regarding the specific crimes at issue.

Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. Sigmon relies on *Woomer* in arguing that the comments were inadmissible. In *Woomer*, we reversed a death sentence on direct appeal where the solicitor's argument plainly attempted to minimize the jurors' sense of responsibility in choosing death. *Woomer*, 277 S.C. at 175, 284 S.E.2d at 360. We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process. Specifically, he stated:

> [T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 175, 284 S.E.2d at 359. Unlike the statements in that case, we do not find the solicitor's comments here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in *Woomer*.

Instead, we find the statements more akin to those we upheld on direct appeal in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), where the solicitor told the jury that "if this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none." *Id.* at 33, 393 S.E.2d at 372 (alterations in original). He further implored the jury to "do what is right," stating "if it was not right in this case, it was never right." We held that these statements were easily distinguishable from the statements in *Woomer*, noting they did not lessen the role of the jury in sentencing death by mentioning the solicitor's role in the process and did not contain the solicitor's personal opinions. As *Bell* illustrates, the solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.

Furthermore, examining the closing argument as a whole, we find the solicitor often emphasized the important role the jury played in determining the appropriate sentence. He acknowledged that this was a "tough decision for [it] to have to make" but that it was "a responsibility that the government places upon its citizens." Although Sigmon makes much of the solicitor's frequent references to the fact that he represented the State, we fail to discern the error. The jurors were aware the State brought the charges against Sigmon and knew the State was asking for the death penalty. It is reasonable to assume that the jury therefore inferred that the solicitor believed death was the appropriate sentence. We therefore find trial counsel were not deficient for not objecting to the State's closing argument.

II. STATUTORY MITIGATING CIRCUMSTANCES

Sigmon also argues his trial counsel were ineffective in failing to obtain a charge on the statutory mitigating circumstance of age or mentality because evidence at trial established he was intoxicated at the time of the murders. We disagree.

We have held that where there is evidence that the defendant was intoxicated at the time the crime was committed, the trial judge is *required* to submit the mitigating circumstances in section 16-3-20(C)(b)(2), (6), and (7). *State v. Vasquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Sigmon contends evidence in the record clearly demonstrates he was intoxicated at the time of the murders and his trial attorneys were ineffective for not making this argument to obtain the charge of statutory mitigation for age or mentality. However, we find there is evidence of probative value supporting the PCR court's finding that Sigmon was not intoxicated at the time of the murders.

During the penalty phase, counsel requested a charge pursuant to section 16-3-20(C)(b)(7) on "the age or mentality of the defendant at the time of the crime" based on the evidence presented as to Sigmon's mental state at the time of the murders. This mitigating circumstance would be in addition to the other mitigating circumstances the court charged under section 16-3-20(C)(b): that (1) "[t]he defendant has no significant history of prior criminal conviction involving the use of violence against another person;" that (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance;" (6) that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and that (8) "[t]he defendant was provoked by the victim into committing the murder." The trial court declined to charge (7), concluding any inference from mental state was encapsulated in (6).

In his deposition for Sigmon's PCR hearing, trial counsel admitted that upon reading the statute anew, it did appear that subsection (7) was substantively different from subsection (6), but also stated he had "no knowledge or memory of distinction on these issues then or now." He further stated that at trial he thought "the facts were the thing that would carry the day, not any charge [the court]

happened to give about mitigation." The PCR court ultimately found there was insufficient evidence of intoxication at the time of the crime to require charges pursuant to section 16-3-20(C)(b)(2), (6), and (7) and thus found that it was not ineffective assistance to only obtain charges on (2) and (6).

Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

Thus, the record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not deficient for failing to argue that his intoxication warranted the charge of mitigating factor (7).

III. NON-STATUTORY MITIGATING FACTORS CHARGE

Sigmon finally argues trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances because the charge disparaged the legitimacy of this type of evidence. We disagree.

"A jury instruction must be viewed in the context of the overall charge." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991). "The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death." *Id.* at 19, 406 S.E.2d at 170.

During the sentencing phase of the trial, the court charged the jury to consider non-statutory factors of mitigation as follows:

> [A] mitigating circumstance is neither a justification or [sic] an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.
>
> ….
>
> A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.

However, Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider:

> whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all . . . . In other words you may choose a sentence of life imprisonment if you find a statutory or non-

> statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider *any* reason in deciding whether to sentence Sigmon to death. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not deficient for not objecting to the charge.

CONCLUSION

We find Sigmon has not presented evidence that trial counsel were deficient. In light of this conclusion, it is not necessary for us to reach the second prong of prejudice in analyzing Sigmon's claim of ineffective assistance of counsel. Accordingly, we affirm the PCR court's dismissal of Sigmon's application for post-conviction relief.

TOAL, C.J., BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

Bernadette R. Hampton, Jackie B. Hicks and Carlton B. Washington, Petitioner,

v.

The Honorable Nikki Haley, in her official capacity as Governor of South Carolina, The Honorable Richard Eckstrom, in his official capacity as Comptroller General for the State of South Carolina, The Honorable Curtis Loftis, in his official capacity as Treasurer of the State of South Carolina, and The South Carolina Budget and Control Board, Respondents.

Appellate Case No. 2012-212723

ORDER

After further review, the Court withdraws its original opinion filed on April 24, 2013, and substitutes the attached opinion.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bernadette R. Hampton, Jackie B. Hicks, and Carlton B. Washington, Petitioners,

v.

The Honorable Nikki Haley, in her official capacity as Governor of South Carolina, The Honorable Richard Eckstrom, in his official capacity as Comptroller General for the State of South Carolina, The Honorable Curtis Loftis, in his official capacity as Treasurer of the State of South Carolina, and The South Carolina Budget and Control Board, Respondents.

Appellate Case No. 2012-212723

ORIGINAL JURISDICTION

Opinion No. 27244
Heard January 23, 2013 – Refiled May 8, 2013

JUDGMENT FOR PETITIONERS

W. Allen Nickles, III, of Nickles Law Firm, LLC, of Columbia, for Petitioners.

C. Mitchell Brown, William C. Wood, Jr., and Michael J. Anzelmo, of Nelson, Mullins, Riley, & Scarborough, LLP, of Columbia, for Respondents.

John S. Nichols, of Bluestein, Nichols, Thompson and Delgado, of Columbia, for Amicus Curiae, State Retirees Association of South Carolina.

JUSTICE HEARN: At its most basic level, this case presents a policy dispute: whose policy choice concerning health insurance premiums for State employees controls—the General Assembly's or the Budget and Control Board's? While policy decisions are matters left to the political branches, this Court is tasked with maintaining and enforcing the constitutional and statutory framework through which such issues must be resolved. We find that under the South Carolina Constitution, the General Assembly had and exercised the power to determine the contribution rates of enrollees for the State's health insurance plan in 2013. We hold the Budget and Control Board violated the separation of powers provision by substituting its own policy for that of the General Assembly, enter judgment for the petitioners, and direct the Board to use the appropriated funds for premium increases.

FACTUAL/PROCEDURAL BACKGROUND

I. THE STATE HEALTH PLAN

The State provides its employees and certain other persons with health insurance through a statewide, group health insurance plan (the Plan). The persons eligible for participation in the Plan, as set forth in Section 1-11-720 of the South Carolina Code (2005 & Supp. 2012), consist of State employees and retirees, their spouses and dependents, and employees of numerous statutorily specified entities, including for example, counties, municipalities, and private organizations.

Prior to 1992, the Budget and Control Board received authority yearly to administer the Plan through the annual appropriations act. In 1992, the General Assembly enacted Section 1-11-710 of the South Carolina Code, codifying the Board's authority to administer the plan. As it existed prior to 2012, section 1-11-710 provided in relevant parts:

> (A) The State Budget and Control Board shall:
>
> > (1) make available to active and retired employees of this State and its public school districts and their eligible dependents

> group health, dental, life, accidental death and dismemberment, and disability insurance plans and benefits in an equitable manner and of maximum benefit to those covered within the available resources.
>
> (2) approve by August fifteenth of each year a plan of benefits, eligibility, and employer, employee, retiree, and dependent contributions for the next calendar year. The board shall devise a plan for the method and schedule of payment for the employer and employee share of contributions . . . .
>
> The amounts appropriated in this section shall constitute the State's pro rata contributions to these programs . . . .
>
> (3) adjust the plan, benefits, or contributions, at any time to insure the fiscal stability of the system.
>
> (4) set aside in separate continuing accounts in the State Treasury, appropriately identified, all funds, state-appropriated and other, received for actual health and dental insurance premiums due. Funds credited to these accounts may be used to pay the costs of administering the health and dental insurance programs and may not be used for purposes of other than providing insurance benefits for employees and retirees. A reserve equal to not less than an average of one and one-half months' claims must be maintained in the accounts and all funds in excess of the reserve must be used to reduce premium rates or improve or expand benefits and funding permits.
>
> . . . .

On June 26, 2012, Act No. 278 was enacted, creating the South Carolina Public Employee Benefit Authority (PEBA) as codified at Section 9-4-10, *et seq.* of the South Carolina Code (Supp. 2012), and amending section 1-11-710 by transferring the Board's powers and duties under that statute to PEBA.[1]

[1] The Act substituted "Board of Directors of the South Carolina Public Employee Benefit Authority" for "State Budget and Control Board" in subsection 9 of the definitions provision of Article 5, Section 1-11-703 of the South Carolina Code.

Additionally, the Act made PEBA's decisions subject to approval by a majority vote of the Board as set forth in Section 9-4-45 of the South Carolina Code (Supp. 2012). The Act took effect July 1, 2012, and thus, as of that date, PEBA exercises the powers formerly exercised by the Board in relation to the Plan, and the Board has a veto power over PEBA's decisions.

Although nine of PEBA's eleven members had been appointed on or before the August 15th deadline for setting the yearly terms of the Plan as specified in section 1-11-710, only two members had taken the oath of office and only one member had filed his statement of economic interests on or before that deadline.

II. THE 2012 BUDGET PROCESS AND THE PLAN

The State's budget and the Plan's budget operate on different timetables because the State's fiscal year runs from July 1 to June 30, whereas the Plan's fiscal year runs from January 1 to December 31. For that reason, in addition to any premium increases the General Assembly decides the State must cover in the upcoming Plan year, the State's budget each year must also cover the last six months of the insurance premium increases set by the Board on August 15th of the previous year, an amount known as the "annualization."

Employees covered by the Plan are split into "general fund employees" and "non-general fund employees." General fund employees consist of State and school district employees, and the premiums borne by the State through general fund appropriations cover these employees. *See* S.C. Code Ann. § 1-11-710. For fiscal year 2012-2013, general fund employees constituted 51.6% of the Plan's enrollees. Non-general fund employees work for those entities specified in section 1-11-720, and if an employer entity chooses to provide insurance to its employees through the Plan, the employer is responsible for paying the employer portion of the premiums—the portion borne by the State for general fund employees. S.C. Code Ann. § 1-11-720.

In November 2011, the Board produced a memorandum informing the General Assembly of the Plan's needs in relation to the State's budget for fiscal year 2012-2013. The memorandum stated the Plan required an annualization of

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S.C. Code Ann. § 1-11-703 (Supp. 2012). The Act also substituted "board" for "State Budget and Control board" in subsection A of section 1-11-710. S.C. Code Ann. § 1-11-710 (Supp. 2012).

$14.264 million and $15.767 million to cover new, general fund retirees. Also, the Plan's insurance premiums had increased over the past year by $79,705,991. Thus, to cover the premium increases for the first six months of the Plan's fiscal year, the Plan required $39,852,996. Removing the portion attributable to non-general fund employees, the Plan required a premium increase of $20,564,146 for general fund employees.

The memorandum presented the General Assembly with three options for dividing the premium increases between the State and enrollees. First, the General Assembly could split the premium increases evenly between the State and enrollees which would require an appropriation of $14.487 million for premium increases, and when combined with the annualization and new retiree costs would necessitate a total appropriation of $44.878 million. Second, the General Assembly could place the entire premium increase on the State which would require an appropriation of $20.564 million, and when combined with the annualization and new retiree costs would necessitate a total appropriation of $50.595 million. Third, the General Assembly could place the entire premium increase on the enrollees which would only require appropriations for the annualization and new retiree costs, for a total appropriation of $30.031 million.

On August 3, 2012, the 2012-2013 Appropriations Act was enacted.[2] In Section 80C under a heading for State employee benefits, and a subheading for rate increases, the General Assembly appropriated $51,528,219 for health insurance employer contributions.

On August 8, 2012, the Board convened and considered the Plan's benefits and contribution rates for 2013. First, the Board discussed what powers it possessed after the creation of PEBA and concluded the Board served in a de facto capacity for PEBA because it did not yet exist. In the discussion of contribution rates that followed, all of the members of the Board acknowledged the General Assembly fully funded the premium increases such that enrollees would not bear any of the increases. However, by a three-to-two vote, the Board decided to split the premium increase equally between the State and enrollees.

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[2] *See* South Carolina Legislature, 2012-2013 Appropriations Bill H. 4813, http://www.scstatehouse.gov/sess119_2011-2012/appropriations2012/ta12ndx.php.

III. PROCEDURAL HISTORY

Petitioners Bernadette Hampton, Jackie Hicks, and Carlton Washington filed a petition for original jurisdiction and a complaint with this Court challenging the Board's decision. Hampton is Vice-President of the South Carolina Education Association, Hicks is President of the South Carolina Education Association, and Washington is Executive Director of the South Carolina State Employees Association. The petitioners all participate in the Plan's health insurance by virtue of their employment.

ISSUES PRESENTED

I. Did respondents violate the separation of powers required by the South Carolina Constitution?

II. Did the General Assembly unconstitutionally delegate legislative authority to the Board to unilaterally increase Plan premiums?

III. Is the challenged conduct subject to an injunction and mandatory reimbursement of premium increases to enrollees?

LAW/ANALYSIS

I. SEPARATION OF POWERS

The petitioners argue the Board did not have the power, except in limited circumstances not applicable here, to raise premiums for enrollees. They contend that the Board thus violated the separation of powers required by the South Carolina Constitution because it substituted its policy choices for those enacted by the General Assembly. We agree.

The South Carolina Constitution establishes three branches of government and requires they be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. This mandate of a separation of powers stems from "the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the

hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

At its simplest, the constitutional division of powers can be described as "[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E. 481, 486 (1935). Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be. *State v. Moorer*, 152 S.C. 455, 479, 150 S.E. 269, 277 (1929); *Sutton v. Catawba Power Co.*, 101 S.C. 154, 157, 85 S.E. 409, 410 (1915). The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." S.C. Const. art. IV, § 15. Of course, the executive branch, including the Board, may exercise discretion in executing the laws, but only that discretion given by the legislature. *See Moorer*, 152 S.C. at 478, 150 S.E. at 277. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power.

Respondents contend they had complete discretion to take the challenged action because the General Assembly simply appropriated the $51 million without any indication as to what the funds were appropriated for. In other words, the respondents argue the General Assembly did not direct the Board to fund the premium increases through any particular means, rather the Plan received a general appropriation of $51 million and the Board was required to decide how those funds should be spent. Alternatively, the respondents assert the Board had the power to decline the appropriated funds and unilaterally set the State and enrollee contribution rates. We reject both contentions.

We accept the unremarkable principle asserted by the respondents and acknowledged by other jurisdictions that an appropriation is only a spending cap, not a spending mandate, and therefore, an executive agency is generally not required to spend all appropriated funds. *See, e.g.*, *Detroit City Council v. Mayor of Detroit*, 537 N.W.2d 177, 181 (Mich. 1995) ("[A]n appropriation is not a 'mandate' to spend."); *Island Cnty. Comm. on Assessment Ratios v. Dept. of Revenue*, 500 P.2d 756, 763 (Wash. 1972) ("An appropriation of public monies by the legislature is not a mandate to spend, rather it is an authorization given by the

legislature to a designated agency to use not to exceed a stated sum for specified purposes."); *see also* 81A C.J.S. *States* § 399 (2012) ("The appropriation is . . . merely an authorization to spend the appropriated sums."). To require otherwise would be to force agencies to waste tax dollars, rather than to encourage the efficient delivery of governmental services.

However, as established by this Court and decisions from other jurisdictions, an executive agency's power to decline to use all appropriated funds does not exist when there is a legislative mandate requiring the expenditure of those funds. We have made clear that "[t]he General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which appropriated monies shall be spent." *Edwards v. State*, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009). Furthermore, where the General Assembly directs that appropriated funds be treated in a particular manner, executive agencies must comply with those directions. *See id.* at 91, 678 S.E.2d at 417 (holding that the "General Assembly has the authority to mandate that the Governor apply for federal funds which it has appropriated" and the Governor must comply with that mandate).

Other jurisdictions, while generally recognizing that an executive agency may decline to spend appropriated funds, also acknowledge that a statute may deprive an agency of that power by directing the expenditure of the funds. For example, in *Ellis v. City of Valdez*, 686 P.2d 700 (Alaska 1984), the Alaska Supreme Court recognized that beyond the usual appropriation of funds by the legislature, in some instances the legislature "both sets aside funds to be used by an administering authority for a particular purpose, and affirmatively directs the authority to accomplish the specified purpose." *Id.* at 705. The court went on to consider an appropriation of funds to purchase property and an agency's decision not to purchase the property. *Id.* at 704-06. The court concluded that because there was no "indication of a legislative mandate directing [the agency] to acquire [the property]," the agency was under no statutory duty to purchase the property. *Id.* at 706.

Similarly, in *Felicetti v. Secretary of Communities & Development*, 438 N.E.2d 343 (Mass. 1982), the Massachusetts Supreme Judicial Court considered whether an executive agency acted contrary to an appropriations act by refusing to use appropriated funds. *Id.* at 344. The agency interpreted the act as requiring federal approval of the state's energy assistance plan prior to the agency releasing the funds to eligible individuals. *Id.* at 345. The court disagreed and construed the

act as requiring the funds be distributed prior to federal approval. *Id.* at 346. The court noted that while executive agencies normally may decline to spend appropriated funds, that principle was not applicable because the agency's "action in withholding the funds effectively contravened Legislative policy." *Id.* Thus, the court held the agency's failure to use the appropriated funds as specified violated the appropriations act. *Id.* at 347.

In light of the appropriations act and section 1-11-710, we find the General Assembly mandated the appropriated funds be spent in full on the premium increases and afforded the Board no discretion as to enrollee premiums. The 2012-2013 Appropriations Act expressed the clear intent of the General Assembly that the entire $51 million appropriation be spent on the premium increases and enrollees not bear any of the premium increase. Under a subheading entitled "Rate Increases," the $51 million was listed as being appropriated for "HLTH INSURANCE-EMPLOYER CONTRIBUTIONS." Also, the amount, while slightly more than, closely corresponded to the amount specified in the Board's report to the General Assembly as necessary if the General Assembly decided the State should cover all of the premium increases. In short, in appropriating this amount for that purpose, the General Assembly made clear it had decided the State would bear all of the premium increase.[3] Furthermore, the members of the Board all acknowledged that the appropriation indicated that intent.

[3] The respondents dispute this conclusion by pointing to prior appropriations acts in which the General Assembly included provisos limiting the ability of the Board to raise enrollee premiums and the lack of such a proviso in the 2012-2013 Appropriations Act. For example, Proviso 63B.5 of the 1998-1999 Appropriations Act provided: "When devising a plan for the method and schedule of payment for the employer and employee share of contributions for Plan Year 1999, the Board shall not increase the contribution rates nor decrease benefits for State Health Plan participants." The respondents assert this language indicates the General Assembly understands that without such limitations, the Board can freely spend less than the full amount appropriated for premium increases. While provisos are useful where an appropriations act is open to interpretation, when an appropriation is clear, a proviso is unnecessary. Here, the appropriation was clear—the Board was to use all of the appropriated funds to cover the premium increases—and thus the lack of a proviso is immaterial.

Additionally, section 1-11-710 mandates the expenditure of the funds appropriated for premium increases, and thus the Board does not have the power to decline to spend all of the appropriated funds. Section 1-11-710(A)(1) provides the Board shall make available to enrollees a group health plan with "maximum benefit to those covered within available resources." Therefore, the statute requires that the Board use all appropriated funds, because to do otherwise—to decline funds and instead place a greater burden on enrollees—would contravene the mandate to provide "maximum benefit . . . within available resources." In other words, section 1-11-710 directs the expenditure of the funds and thus deprives the Board of the power to decline to spend the appropriated funds.

Finally, we are guided in our consideration of section 1-11-710 and the 2012-2013 Appropriations Act by the nondelegation doctrine. That doctrine is a component of the separation of powers doctrine and prohibits the delegation of one branch's authority to another branch. *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978). While the legislature may not delegate its power to make laws, it may "authorize an administrative agency or board to 'fill up the details' by prescribing rules and regulations for the complete operation and

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Likewise the respondents argue the inclusion of a "carry-over" provision in the 2012-2013 Appropriations Act demonstrates the General Assembly's recognition that the Board can decline to spend the appropriated funds on premium increases. Contrary to the respondents' assertions, the carry-over provision is compatible with the Board having to use all funds appropriated for premium increases for that purpose because other sources of carry-over funds exist. For example, the Plan's costs for a particular year may be less than anticipated and the surplus funds could be carried-over to the next year.

The respondents also assert the General Assembly's attempt to amend section 1-11-710 through the 2000-2001 Appropriations Act indicates the Board has the power to decline appropriated funds. Section 21 of the 2000-2001 Appropriations Act as passed by the General Assembly would have restricted the Board's ability to raise enrollee contribution rates; however, Governor Hodges vetoed Section 21. Again, while the General Assembly there expressed a desire to codify specific restrictions on the Board's powers in relation to the Plan, that is immaterial in light of the General Assembly's clear intent for the Board to spend all of the 2012-2013 appropriated funds on the premium increases and section 1-11-710's clear mandate that the Board spend all appropriated funds.

enforcement of the law within its expressed general purpose." *S.C. State Hwy. Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (citations omitted). Therefore, so long as a statute does not give an agency "unbridled, uncontrolled or arbitrary power," it is not a delegation of legislative power. *Bauer*, 271 S.C. at 233, 246 S.E.2d at 876.

In a somewhat similar case, the Board adopted a plan to reduce appropriations under the 1992 Appropriations Act because of projected revenue shortfalls. *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992). The Board's action was challenged as beyond its statutory authority, and we found that construing the statute as allowing the Board to reduce appropriations with the only limitation being that its reductions be as uniform as possible would violate the nondelegation doctrine. *Id.* at 216, 423 S.E.2d at 105. We held that "[i]f the Act is so broad as to allow the Board to apply reductions with the only requirement being that they be applied uniformly, the effect would be to allow the Board to appropriate funds with unbridled discretion." *Id.* Accordingly, we refused to construe the statute as unconstitutional when a constitutional reading was possible, and held the Board did not have the claimed discretion to reduce appropriations. *Id.*

Here, if the Board could decline appropriated funds based on its own policy choices, it would have the unbridled power to disregard the General Assembly's appropriations and make its own appropriations decisions. *See id.* at 212, 423 S.E.2d at 103 (holding that the appropriation of public funds is a legislative function and that the Board's claimed power to reduce appropriations according to its own criteria would be an impermissible delegation of legislative powers). Furthermore, if the Board can make its own choices as to enrollee premiums based solely on what it believes to be the best policy, the legislature has impermissibly delegated its powers to the Board. Therefore, to interpret section 1-11-710 and the 2012-2013 Appropriations Act as giving the Board the power to decline appropriated funds and instead set contribution rates at the level it desires would constitute an impermissible delegation of legislative powers in violation of the separation of powers. We will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation. *Joytime Distributors & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). That constraint on our interpretation of the statutes further supports our conclusion that the Board lacked the power to decline the appropriated funds.

In conclusion, we hold the Board violated the separation of powers by acting beyond its statutory authority and infringing upon the General Assembly's power to make policy determinations, when it declined to use the appropriated funds for the premium increases and instead raised enrollee contribution rates.

II. NONDELEGATION DOCTRINE

Having found that the Board violated the separation of powers in declining the appropriated funds and setting a different enrollee contribution rate, we need not consider the petitioners' assertion that the Board violated the nondelegation doctrine. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

III. INJUNCTION AND REIMBURSEMENT

Petitioners request an injunction prohibiting the increase of their insurance premiums and compelling the Board to utilize the funds appropriated in the 2012-2013 Appropriations Act for premium increases. The respondents contend an injunction is not warranted because they will comply with this Court's ruling. An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party. *Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). Due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Petitioners do not face irreparable harm as any premiums paid could be returned. Also, the declaratory judgment entered herein provides petitioners with an adequate remedy at law. Accordingly, an injunction is not necessary.[4]

[4] Petitioners also sought the reimbursement to enrollees of all premium increases paid as a result of the Board's decision. The increased premiums were to be collected from enrollees starting on January 1, 2013. However, on November 30, 2012, the collection of the increased premiums was stayed by order of the Court. Accordingly, no increased premiums were collected from enrollees, there are no funds to return to enrollees, and the petitioners' request is moot.

CONCLUSION

For the reasons set forth, we enter judgment for the petitioners and declare the Board's premium increase unconstitutional as a violation of the separation of powers. We direct the Board to apply the appropriated funds to the Plan's premium increases.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.