HENRY MCMASTER
ATTORNEY GENERAL

November 4, 2008

The Honorable A. Shane Massey
Member, South Carolina Senate
Post Office Box 551
Edgefield, South Carolina 29824

Dear Senator Massey:

We understand from your letter to Attorney General Henry McMaster that you desire an opinion interpreting section 8-21-770 of the South Carolina and whether an opinion issued by this Office in 1981 remains valid. You state as follows:

> As constituent has contacted me regarding the payment of probate fees on out-of-state property owned by her deceased father who was domiciled in South Carolina but who had real estate in Virginia. The South Carolina county probate court has required her to pay fees, but the 1981 Attorney General's Opinion on Section 8-21-770 opines that no out-of-state property should be included in the property evaluation for the purpose of computing the Probate Court's fee. However, this section of law has been amended several times since 1981 and this opinion may not longer be valid. It could also be that the provisions in I.R.C. § 2033 concerning property included in a decedent's estate for federal tax purposes have changed.

Thus, you request an opinion on the following issues:

- Are the conclusions in the 1981 Attorney General opinion no longer valid because of subsequent amendments to S.C. Code Ann. § 8-21-770 or I.R.C. § 2033?
- Does the definition of the "decedent's probate estate" including in S.C. Code Ann. § 8-21-770 include out-of-state property for the purposes of computing probate fees?

Law/Analysis

As you mentioned in your letter, this Office issued an opinion on this matter in 1981. Op. S.C. Atty. Gen., January 6, 1981. In that opinion, we looked to the language of 8-21-770 of the

South Carolina, which described the calculation of the fee to be imposed. Id. This provision, on the date of the opinion, referenced the totals of personal and real property as presented on the Warrant and Appraisement form produced by the South Carolina Tax Commission. Id. We found "[t]he Warrant does not say specifically whether out-of-state property should be on it." Id. Thus, we continued in our analysis, analyzing real and personal property separately. Id. In regard to real property, we relied on a rule providing that "land is administered only by the courts of its situs" to determine that out-of-state real property should not be included as part of the estate when computing probate fees. Id. With regard to personal property, we explained that a personal representative does not have title to personal property situated outside of the state in which he or she is appointed and is dependent upon the state where the property is located as to his or her ability to collect such property. Id. Thus, because a personal representative's ability to collect personal property depends on another state, "[i]t is illogical for the court to impose a fee on property it is not absolutely assured of taking jurisdiction over." Id. Therefore, we found that personal property should not be included in computing such fees. In further support of our position, we cited law indicating that the domiciliary court does not have jurisdiction to administer personal property in another state without that state's consent. Id.

As you pointed on in your letter, the Legislature made significant amendments to section 8-21-770 since the issuance of our1981 opinion. This section currently provides, in pertinent part:

> (B) In estate and conservatorship proceedings, the fee shall be based upon the gross value of the decedent's probate estate or the protected person's estate as shown on the inventory and appraisement as follows:
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> (1) Property valuation less than $5,000.00 $25.00
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> (2) Property valuation of $5,000.00 but less than $20,000.00 $45.00
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> (3) Property valuation of $20,000.00 but less than $60,000.00 $67.50
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> (4) Property valuation of $60,000.00 but less than $100,000.00 $95.00
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> (5) Property valuation of $100,000.00 but less than $600,000.00 $95.00 plus .15 percent of the property valuation between $100,000.00 and $600,000.00
>
> (6) Property valuation of $600,000.00 or higher amount set forth in (5) above plus one-fourth of one percent of the property valuation above $600,000.00.

> For purposes of this subsection, "decedent's probate estate" means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy and "protected person's estate" means the protected person's property that vests in a conservator as trustee pursuant to Section 62-5-420.

S.C. Code Ann. 8-21-770 (Supp. 2007).

According to section 8-21-770, the fee imposed is based on the gross value of the decedent's estate. Therefore, the answer to your inquiry hinges upon whether the decedent's gross estate includes out-of-state property. To make this determination, we must employ the rules of statutory interpretation. As the Court of Appeals stated in a recent opinion:

> The cardinal rule of statutory interpretation is to determine the intent of the legislature. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.
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> . . .
>
> When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction.

State v. Brannon, 379 S.C. 487, 666 S.E.2d 272, 276 (Ct. App. 2008) (citations omitted). "The lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act or section to which it relates and is intended to apply." Fruehauf Trailer Co. v. South Carolina Elec. & Gas Co., 223 S.C. 320, 75 S.E.2d 688, 690 (1953).

According to section 8-21-770, the fee imposed is based on the gross value of the decedent's estate. Section 8-21770 defines "decedent's probate estate" as "the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy . . . ." Because the statute does not specifically exclude out-of-state property from this definition, we presume this definition includes such property.

Moreover, like the prior version of 8-21-770's reference to the use of the Warrant of Appraisement to determine value of the decedent's estate for purposes of determining the fee, the current version of 8-21-770 references the value of the decedent's gross estate as determined by the inventory and appraisement. Probate Courts in South Carolina use the Inventory and Appraisement form, form 350, to establish the inventory and appraisement of a decedent's property for estate administration purposes. This form provides different schedules for different types of property, which includes schedules for real estate and personal property. Above the schedules, the form includes the following note: "WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED." Accordingly, this form provides further support for our interpretation that out-of-state property must be included in the value of the decedent's estate for purposes of section 8-21-770.

This Office does not generally overrule prior opinions. Op. S.C. Atty. Gen., June 6, 2007. However, we believe we must depart from our prior findings in this circumstance. Our prior opinion focuses on the fact that our courts may not have jurisdiction over out-of-state property in an administration of an estate and therefore, cannot impose a fee for the probate of such property. While our prior opinion's findings with regard to a South Carolina probate court's jurisdiction are subject to debate, we do not find it necessary to analyze this issue. Regardless of whether our courts have jurisdiction for probate purposes, the language in the statute, which does not either expressly or implicitly exclude out-of-state property, controls. Furthermore, the section 8-21-770 specifically bases the fee imposed as that shown on the inventory and appraisement, which according to the form employed by probate courts for presenting the inventory and appraisement, includes out-of-state property. As such, we believe a decedent's probate estate for purposes of determining probate fees under section 8-21-770 includes out-of-state property. Accordingly, this opinion, interpreting section 8-21-770, as amended, serves to replace our 1981 opinion on this matter, written prior to those amendments.

Very truly yours,

Henry McMaster
Attorney General

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REVIEWED AND APPROVED BY:

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