9265/9815

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ATTORNEY GENERAL

August 28, 2014

The Honorable Kathy P. Zorn
Pickens County Probate Court
222 McDaniel Avenue, B-16
Pickens, South Carolina 29671

Dear Judge Zorn:

Thank you for your letter dated August 8, 2014 requesting an opinion of this Office as to the ability of an associate probate judge to serve as the personal representative for an estate of a "family friend" pursuant to her appointment within the decedent's Last Will and Testament. As the applicable law governing this question, you reference S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) which prohibits a "probate judge" from serving as personal representative for an estate of any person within his or her jurisdiction, with the exception that he or she can serve as personal representative for the estate of a "family member," pursuant to the restrictions specified therein. You question whether the term "probate judge" as referenced in this section applies to an associate probate judge in addition to an elected probate judge.

Based on the analysis below, while it is opinion of this Office that S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) applies to an associate probate judge, we believe the exception within this section permits an associate or elected probate judge to serve as personal representative solely for "family members," as specifically defined by statute. Thus, because a "family friend" would presumably fall outside of the purview of the "family member" exception within S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013), it is our opinion that the associate probate judge referenced in Your Honor's correspondence would be prohibited from serving as the personal representative of the estate of a family friend despite being nominated in the Last Will and Testament to do so.

Law / Analysis

S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) states in its entirety that:

> [n]o person is qualified to serve as personal representative who is:
> ...
> a probate judge for an estate of any person within his jurisdiction; however, **a probate judge may serve as a personal representative of the estate of a family member** if the service does not interfere with the proper performance of the probate judge's official duties and the estate must be transferred to another county for administration. For purposes of this subsection, "family member" means a spouse, parent, child, brother, sister, aunt, uncle, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild.[1]

[1] It is important to note that Rule 501, Canon 4, SCACR is also directly on point. Canon 4 provides rules for conducting extra-judicial activities to minimize the risk of conflict with judicial obligations. Subsection (E) speaks directly to fiduciary activities:

(emphasis added).

As your question relates to statutory construction, we will briefly note the applicable rules pertaining thereto. It is well established that "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and the language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and courts must apply the literal meaning of those terms. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 486-87, 636 S.E.2d 598, 616 (2006) (citing Carolina Power & Light Co. v. Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)). Thus, like a court, this office must apply the plain meaning of the words contained in a statute when such terms are clear. Rejection of the plain meaning of statutory terms should be done only to escape absurdity that could not have possibility been the intent of the legislature. Id. at 487, 636 S.E.2d at 616 (citing Kiriakides v. United Artists Commc'n, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Application of the plain meaning of S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) produces a clear and logical result; therefore, it is our opinion that it must be applied. Pursuant to the statute's terms, it is the Legislature's intent to prohibit a probate judge from serving as the personal representative of an estate. However, the exception to this rule permits a probate judge to serve as the personal representative for an estate of a "family member" if the service does not interfere with the proper performance of the probate judge's official duties and if the estate is transferred to another county for administration.[2] The Legislature specifically defines "family member" as a "spouse, parent, child, brother, sister, aunt, uncle, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild." Because "family member" is expressly defined within the statute, we need look no further to attempt to determine the legislature's intent. Thus, it follows that the "family member" exception set forth in S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) includes only those family members defined by statute and would not extend to a family friend, as Your Honor indicates is the relationship between the associate probate judge and the decedent at issue.[3]

> (1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, conservator, attorney in fact or other fiduciary. Further, a judge should not be a signatory on a joint account with a guardian, conservator, attorney in fact, or personal representative, or otherwise exercise influence or control over the investment or use of such funds and property as are within the jurisdiction of the court. A judge may, however, serve in one of these capacities for the estate, trust or person of a member of the judge's family, but only if such service will not interfere with the proper performance of judicial duties.
> (2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
> (3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.
>
> Rule 501, Canon 4(E), SCACR.

[2] If serving as personal representative of a family member's estate, a judge must also comply with the Rules of Judicial Conduct; as noted above, Rule 501, Canon 4(E) speaks specifically to rules regarding service as a fiduciary in the context of minimizing the risk of conflict with judicial obligations.

[3] Rule 501, Terminology, SCACR defines "[m]ember of a judge's family" as "spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." Read together with the definition of "family member" provided in S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013), it is our opinion that a court would likely find that "a person with whom the judge maintains a close familial relationship" who is not a "relative" for purposes of Rule 501, Canon 4(E) would be a relationship such as a judge's mother-in-law, father-in-law, son-in-law, or daughter-in-law, as opposed to merely a "family friend."

While the relationship in the question posed does not appear to fall within the "family member" exception in S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013), we will nonetheless address your question of whether S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) applies to an associate probate judge in addition to an elected probate judge. For the reasons set forth below, it is our opinion that a court would find that it does.

In South Carolina, a probate court must be established in each county, and each probate court is considered a part of the unified judicial system of the State. S.C. Code Ann. § 14-23-1010 (Supp. 2013). A "judge of probate" must be elected by the qualified electors of the respective counties for a term of four years. S.C. Code Ann. §§ 14-23-1020, 62-1-309 (Supp. 2013). In addition to the elected "judge of probate," S.C. Code Ann. § 14-23-1030 (Supp. 2013) permits the appointment of "associate judges of probate." S.C. Code Ann. § 14-23-1030 (Supp. 2013) specifically states that:

> [i]n addition to the judge of probate, there shall be one or more associate judges of probate in any county whose governing body appropriates the funds therefor. Associate judges of probate shall be appointed by the judge of probate to serve at his pleasure for a term coterminous with his term. The associate judges have jurisdiction to hear and decide all matters assigned to them by the judge which are within the jurisdiction of the court. The judge is accountable and responsible for all acts of his associates within the scope of their duties.

In a prior opinion of this Office we analyzed the office of associate probate judge to determine whether such position fell within the mandatory retirement age of seventy-two (72), applicable to other judges in the unified judicial system. S.C. Op. Att'y Gen., 2004 WL 1297827 (June 7, 2004). In that opinion, we concluded that there is "little doubt that associate probate judges are part of the probate court structure, which, in turn, is part of the unified judicial system." Id. at *3. We will note the relevant authorities outlined in that opinion, as we find them particularly helpful in answering the question at hand, as well as point out additional sources supporting the same conclusion.

S.C. Const. art. V, § 1 establishes our State's unified judicial system, which consists of "a Supreme Court, a Court of Appeals, a Circuit Court and such other courts of uniform jurisdiction as may be provided for by general law." Upon the creation of the office of associate probate judge within S.C. Code Ann. § 14-23-1030 (Supp. 2013), the General Assembly has made clear that such position is part of the probate court, which in turn is part of the unified judicial system. S.C. Code Ann. § 14-23-1010 (Supp. 2013) expressly states that "the probate court of each county is part of the unified judicial system of this State." In addition, the position of associate probate judge is generally paralleled to that of the elected probate judge throughout Title Fourteen, Chapter 23 of the South Carolina Code. For instance, S.C. Code Ann. § 14-23-1110 (Supp. 2013) states that "[n]o *judge* or *associate judge of probate* shall act as attorney or counsel or receive fees as such in any matter pending or originating in his court;" S.C. Code Ann. § 14-23-1050 (Supp. 2013) provides that "each *judge of probate* and *associate probate judge* shall, before assuming the duties of that office, enter into a bond in the sum of one hundred thousand dollars conditioned for the faithful performance of the duties of such office . . . . ;" and S.C. Code Ann. § 14-23-1080 (Supp. 2013) requires that neither a *judge* or *associate judge*

> sit in any case which he has a vested interest, or in which he is biased or prejudiced in favor of or against any interested party, or in which he has been counsel or a material witness, or in the determination of any cause or proceeding in the administration of settlement of any estate under a will that he has prepared, or of any estate of any person in which he is interested as heir, legatee, executor, administrator, guardian or trustee.

(emphasis added to all).

The conclusion that associate probate judges, as part of the probate court, are therefore included within the unified judicial system has been further solidified by our Supreme Court. One example is specific inclusion of associate probate judges in South Carolina Appellate Court Rule 504(a),[4] setting the continuing legal education requirements for the judiciary ("For the purposes of this Rule, the term "judge" means . . . all probate judges (including associate and deputy probate judges and other persons, regardless of job description or title, who perform the duties of a probate judge either full-time or part-time")). Furthermore, in State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 233 S.E.2d 166 (1975), the Supreme Court made clear that probate courts of this State are part of the unified judicial system by holding statutes that authorized the addition of associate probate judges to existing probate courts, which were at the time non-unified, violated Article V of the South Carolina Constitution. Of particular relevance, the Court stated that: "there can be no doubt but that the probate courts of this State come within the orbit of . . . [South Carolina Constitution] Article V [i.e. the unified judicial system]." Id. at 291, 223 S.E.2d at 172. We also point out In re Former Newberry County Assoc. Probate Judge Allen, 385 S.C. 506, 507, 685 S.E. 2d 612, 613 (2009) where the Supreme Court accepted an Agreement between an associate probate judge and the Office of Disciplinary Counsel upon the associate probate judge's admission that she violated certain canons and rules in the Code of Judicial Conduct and Rules for Judicial Disciplinary Enforcement. By approving the agreement, the Supreme Court indirectly acknowledged the Code of Judicial Conduct and Rules for Judicial Disciplinary Enforcement apply to associate probate judges.

The Advisory Committee on Standards of Judicial Conduct has also made clear that associate probate judges are considered a part of the probate court and thus part of the unified judicial system by holding them to the standards set forth in the Code of Judicial Conduct. In S.C. Advisory Comm. on Standards of Judicial Conduct, 2001 WL 36383721 (Jan. 5, 2001) (Opinion No. 1-2001), the Advisory Committee concluded that an associate probate judge could not serve as a board member on Advocates for Woman on Boards and Commission pursuant to Rule 501, Canons 2 & 4, SCACR, which prohibit a judge from creating the appearance of impropriety by lending the prestige of the judicial office to advance the private interest of another and consulting with executive and legislative officers on non-legal and non-pro se matters involving the judge or the judge's interest. Thus, like the Supreme Court in In re Allen discussed above, the Advisory Committee indirectly acknowledged that the Code of Judicial Conduct applies to associate probate judges.

We also mention Rule 501, Application, SCACR, which was relied on by the Advisory Committee in concluding that an associate judge of a Municipal Court could not be controlled by the Department of Human Resources if he or she performed any type of judicial function. S.C. Advisory Comm. on Standards of Judicial Conduct, 1995 WL 17956209 (Dec. 26, 1995) (Opinion No. 2-1996) (citing Rule 501, Application, SCACR). Rule 501, Application, SCACR states that "[a]nyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions. . . is a judge for the purposes of the Code." We believe Rule 501, Compliance, SCACR also applies to associate judges of probate as they have jurisdiction to hear and decide all matters assigned to them by the judge of probate within their jurisdiction, which would clearly classify as a "judicial function" for purposes of the Rule.

[4] Pursuant to Article V, § 4, of the South Carolina Constitution, "[t]he Supreme Court shall make rules governing the administration of all the courts of the State[;] [and] [s]ubject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."

Next, we note a prior opinion of this Office also opining that the position of associate probate judge is part of the unified judicial system. In S.C. Op. Att'y Gen., 1991 WL 632921 (June 7, 2004) we were asked to determine the viability of local law permitting the appointment of an associate probate judge in light of the unified judicial system and the enactment of S.C. Code Ann. § 14-23-1010, making the probate court a part of such system. In our conclusion, we noted that:

> the Beaufort County Probate Judge, whose court is an integral part of the unified judicial system, would be statutorily authorized to appoint a deputy probate judge, one or more associate judges, and a clerk of court, in addition to other support personnel who may be needed to carry out the functions of the office and the court. The local law relative to appointment of a deputy probate judge specifically for Beaufort County has most likely been impliedly repealed with the implementation of the unified judicial system.

Id. at *4.

Last, and perhaps most helpful in clarifying why the term "associate probate judge" is not specified in S.C. Code Ann. § 62-3-203(e)(4), is that nowhere in the statutory text of Title 62 (the South Carolina Probate Code) is the term "associate judge" or "associate probate judge" used. While the term "associate judge" is mentioned twice in the Reporter's Comments in Title 62, in both instances, the Reporter's Comment is referencing Title 14, Chapter 23 of the Code where "judge of probate," and "associate judge" are consistently distinguished. To further explain, in the first instance, the term associate judge is used in the Reporter's Comment to S.C. Code Ann. § 62-1-307 (Supp. 2013), noting that the terms of that section that provide who may perform the acts of the court does not conflict with S.C. Code Ann. § 14-23-1030, relating to the appointment of an associate judge. Second, the Reporter's Comment to S.C. Code Ann. § 62-1-309 (Supp. 2013) notes that the provisions of S.C. Code Ann. § 62-1-309 (Supp. 2013), relating to election and term of judges, does not disturb S.C. Code Ann. § 14-23-1040 (Supp. 2013) "which requires that a probate judge or an associate judge must be a qualified elector of the county in which he is to be a judge." Thus, while S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) states that "no person is qualified to serve as a personal representative who is . . . *a probate judge* for an estate of any person within his jurisdiction; however, *a probate judge* may serve as personal representative of the estate of a family member . . ." the lack of distinction between associate probate judge and probate judge throughout all of Title 62 provides an explanation for use of the term "probate judge."

Conclusion

From the authorities analyzed above, it is our opinion that a court would find that an associate probate judge, as part of the unified judicial system, is held to the same ethical standards as an elected probate judge. Thus, it follows that a court would also find associate and elected probate judges alike are prohibited from serving as the personal representative for an estate with the exception that he or she can serve as the personal representative of the estate of a "family member," pursuant to the parameters set forth in S.C. Code Ann. § 62-3-203(e)(4) (Supp. 2013) and the other applicable restrictions stated in the Code of Judicial Conduct. However, if the relationship between the associate probate judge and the decedent is, as Your Honor's correspondence states, merely a "family friend," and not a "family member" as defined by statute, it is our belief that the associate probate judge would be prohibited from serving as the personal representative despite being nominated in the decedent's Last Will and Testament to do so.

If we can answer any further question regarding this opinion, please do not hesitate to contact our office.

Sincerely yours,

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REVIEWED AND APPROVED BY:

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