1983 WL 181932 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 6, 1983

***1** The Honorable Heyward E. McDonald
Member
South Carolina Senate
Post Office Box 58
Columbia, South Carolina 29202

Dear Senator McDonald:
You have asked the opinion of this office with respect to the following question:
If a State Senator, who is a candidate in the upcoming election to the Court of Appeals, is elected Chief Judge of the Court, may he validly serve in view of Code Section 2-1-100? Assume that the Senator was first elected to the Senate in the November 1976 general election and has served continuously to date, having been reelected in the November 1980 general election.

Section 2-1-100 provides:
No Senator or Representative shall, during the time he was elected, be elected by the General Assembly or appointed by any executive authority to any civil office under the dominion of this State which shall have been created during the time for which such Senator or Representative was elected to serve in the General Assembly.

This provision clearly prohibits 'the election of legislators during their terms to offices created by them.' State, ex rel. Riley v. Martin, 274 S. C. 106, 262 S.E.2d 404, 410 (1980). The prohibition is aimed at preventing 'the opportunity to vote to create the office in order to serve one's own personal interest . . .'. Supra.

Prohibitions such as Section 2-1-100 must be strictly construed to uphold eligibility if possible. State v. Gray, (Fla.), 74 So.2d 114 (1954). It is evident from the language of Section 2-1-100 that the office must have been created and the member of the General Assembly elected or appointed to the office during the same term to which he was elected to the General Assembly. This office has previously so concluded. 1976 Op.Atty.Gen., Op. No. 4318, pp. 137-138. That conclusion is in accord with the general authority in other jurisdictions. See, 67 C.J.S. Officers § 24 (1978); State v. Wisehart, (Fla.), 28 So.2d 589, 592 (1946); contra, Meredith v. Kauffman, (Ky.), 169 S.W. 37 (1943). Any construction otherwise would preclude a member of the Legislature from ever offering for a judgeship while he is a member of the General Assembly.

Here, since the Senator was elected to the Senate in 1976 for a four year term and was reelected for another four year term in 1980, the critical question, for purposes of Section 2-1-100, thus becomes: when was the Court of Appeals, and more specifically the office of Chief Judge, created? For, if recently enacted R-159 (1983) abolished the Court and office of Chief Judge established by Act No. 164 of 1979, and created a new court and new judgeships, then Section 2-1-100 would prevent the Senator from serving on the Court if elected at the upcoming election. State, ex rel. Riley v. Martin, supra. If, on the other hand, the Court and office of Chief Judge were created in 1979 and have not been abolished by R-159, Section 2-1-100 offers no prohibition to service on the Court because, in that case, the Senator would have been elected to the office of Chief Judge during a different term from the one during which the Court and office were created. In that instance, there would not occur the 'election of . . . [a] legislator [ ] during his term to an office created by [him].' State, ex rel. Riley, v. Martin, supra.

***2** The historical background surrounding the Court of Appeals is a long and involved one and will not be repeated in its entirety here. The Court's history, leading to the passage of R-159, is adequately summarized in R-159's own preamble:
Whereas, the General Assembly enacted at its 1979 Session Act 164 which under Part IV-A created a Court of Appeals for South Carolina. The creation of the Court as well as constitutionality of certain provisions were subsequently challenged by the Attorney General in State, ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). While the Court struck down several provisions relating to the power of the Court of Appeals to set additional terms of court, keep records of the court in a manner prescribed by the judges thereof, and except candidates for the offices of the Court of Appeals for the general prohibition of Section 2-1-100 of the 1976 Code of Laws, it upheld the creation of the Court of Appeals and left the remaining provisions of the Act in full force and effect. Efforts to further amend Act 164 of 1979 in the Bond Act of 1979 (Act 194) and the Appropriations Act of 1980 (Act 517) were struck down by the Court as violative of Article III, Section 17, in that they were not reasonably related to the subject of Act 194 and Act 517 in Maner v. Maner, Opinion No. 21801, filed October 20, 1982. Additionally, the Court in Maner determined four of the five judges elected by the General Assembly to serve on the Court of Appeals were ineligible as a result of the Martin decision and since the 'offices of the judges of the Court of Appeals came into existence upon creation of the Court on July 1, 1979, there were four vacancies on the existing Court of Appeals' . . ..

We must now determine whether R-159 created a new Court with new offices or instead merely sought to continue and implement the Court which had been established in 1979.

It is well recognized in this State that in the absence of constitutional prohibition, the General Assembly may create an office and can impose such limitations and conditions upon the manner of filling it and the exercise of the duties of the office and may modify or abolish any of these or the office itself, as its wisdom may dictate . . ..

Ward v. Waters, 184 S.C. 353, 360-1, 192 S.E. 410 (1937). In this regard, as is true with any enactment, it is the legislative intent which is paramount. Cf., Ridgill v. Clarendon County, 188 S.C. 460, 467, 199 S.E. 683 (1938); 67 C.J.S. Officers § 13-14, pp. 248-251; generally see, City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936). Since the law completely disfavors repeals by implication, Strickland v. State, 276 S.C. 17, 274 S.E.2d 430 (1981), the intention of the Legislature to abolish an office must be clearly stated. 67 C.J.S. Officers, supra at § 14, p. 251. Such abolition must be in precise terms. McQuillen, Municipal Corporations, § 12-121; in short, there must be a 'crystal clear expression of legislative intent; such a result is not to be read into a statute by implication.' Twilley v. Stabler (Del.Sup.), 290 A.2d 636, 638 (1972). See also, Suermann v. Hadley, (Pa.Sup.), 193 A.645 (1937); Ball v. State, 394 N.Y.S.2d 597, 363 N.E.2d 323 (1977).

***3** These same principles apply with equal force to the creation or abolition of courts generally. For it is recognized that:
Whether a new court is created or an established court continued depends on the intent expressed in, or lawfully implied from the . . . statutory provision in question. Even though the jurisdiction is somewhat different, a court may nevertheless be a continuation of an established court. The mere addition of certain duties to those of the members of a court already existing is not a creation of a new court.

21 C.J.S. Courts § 134, pp. 204-205 (1940). Thus, R-159 must be carefully examined, especially with respect to the office of Chief Judge, in order to ascertain legislative intent.

The title to R-159, in pertinent part, states that the Act is:
TO AMEND CHAPTER 8 OF TITLE 14, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE COURT OF APPEALS, SO AS TO PROVIDE FOR A TERMINATION DATE OF JUNE 30, 1985, FOR THE COURT OF APPEALS.

Nowhere in the title to the Act is there even the suggestion of the creation or establishment of a new Court of Appeals. To the contrary, the title simply recognizes that the Court is already in existence, having been created by Chapter 8 of Title 14, as amended. [1] If the Legislature had intended to abolish the 1979 Court and establish a new one, it must be presumed that it would have been so expressed in the title to the Act, since Article III, § 17 of the South Carolina Constitution (1895) so requires. See, Maner v. Maner, supra. It is well recognized in South Carolina that legislative intent may be ascertained from the title of an Act. Lindsay v. Southern Farm Bureau v. Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972). From the Act's title at least one can only gather that the intent of R-159 was to continue an already existing Court.

This same intent to continue the 1979 Court is expressly reflected in the Act's preamble, which states in part:
Whereas the General Assembly through a joint Judiciary Subcommittee in reviewing the entire appellate judicial system in South Carolina now finds that rather than simply filling the vacancies a permanent solution to the problem requires a Court of Appeals with a constitutional base. However, recognizing the need for immediate relief to the existing appellate backlog, the General Assembly finds it necessary to amend provisions of the existing court as created by Act 164 of 1979 to provide for changes as recommended by the Joint Judiciary Subcommittee as well as a termination date to coincide with the constitutional amendment creating a permanent court. In order to achieve these findings, the following amendments are offered. [Emphasis added.]

Thus, the Legislature expressly concluded in the Act's introductory statement that R-159 constitutes merely an amendment to provisions concerning an 'existing court', one which had been created in 1979, rather than a repeal or abolition of the 1979 Court and creation of a new one. When attempting to determine legislative intent, it is universally recognized that the words used by the Legislature must be focused upon. Banks v. Cola. Ry. Gas and Elec Co., 113 S.C. 99, 101, S.E. 285 (1919). Moreover, even though the Legislature's own construction of its acts is not controlling, there is a strong presumption that the legislative interpretation is the correct one and should be adopted by the Court. Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290 (1970).

***4** It is also well settled that an Act's preamble may supply a guide to the meaning of the Act in question. City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936). The preamble to an Act often serves as 'a key to open the understanding of a statute.' Supra at 405; Coosaw Mining Co. v. State of South Carolina, 144 U.S. 550, 36 L.Ed. 537 (1892). The declared purpose of the Legislature is always accepted 'unless inconsistent with the meaning and effect of the enactment.' White Dental Manufacturing Co. v. Commonwealth, 98 N.E. 1056 (1912). See also, Flint v. Stone Tracy Co., 220 U.S. 107, 55 L.Ed. 389 (1911); Judson Freight Forwarding Co. v. Commonwealth, 136 N.E. 275, 377 (1922). Courts traditionally are very reluctant to 'look behind the statement of purpose and findings of fact set forth [in a preamble] unless they are palpably without reasonable foundation.' Akari House, Inc. v. Irazzary, 366 N.Y.S.2d 955, 963 (1975). Where the matter is primarily one for legislative determination such as is the case with the creation or abolishment of public offices, Ward v. Waters, supra, the judicial branch of government will not interfere with legislative findings unless the determination is 'clearly wrong'. Harper v. Schooler, 258 S.C. 486, 496, 189 S.E.2d 284 (1972). [2]

This office cannot conclude with respect to R-159 that the General Assembly's findings were erroneous. An examination of the body of the Act reveals that the Legislature's clear determination and finding that R-159 constitutes simply an amendment to an earlier act and is only an alteration of an already existing court, is neither clearly wrong nor palpably without reasonable foundation. Here, it is evident that the declared purpose of R-159 is not 'inconsistent with the meaning and effect of the enactment.' White Dental Manufacturing Co. v. Commonwealth, supra. The reasons for this conclusion are set forth below.

First, with respect to the office of Chief Judge R-159, in identical fashion to Act No. 164 of 1979, states that 'Seat Five shall be designated as the office of Chief Judge and shall be a separate and distinct office for the purpose of an election.' Compare, Section 14-8-20 of Act No. 164 of 1979 with Section 14-8-20 of R-159. Moreover, generally, R-159 merely adds to, rather than alters, the duties and powers of Chief Judge from those enumerated in Act No. 164. Pursuant to both Acts, the basic function of the Chief Judge is to preside over and be responsible for the day to day administration of the Court. Under R-159, the Chief Judge simply possesses more detailed and extensive duties and authority. See, Sections 14-8-80 and 14-8-90 of R-159. It is well

settled that, where additional, but not different, duties are added to those already existing in an office or position, a new position or office is not created. People v. Johnson, 91 N.E.2d 119, 121 (1950); Allen v. United States Fidelity and Guaranty Co., 269 Ill. 234, 109 N.E. 1035 (1915); 67 C.J.S. Officers supra at § 24, p. 273; 67 C.J.S. Officers, supra at § 13, p. 248 ('the imposition of additional duties in an existing office to be performed under a different title does not constitute the creation of a new office.').

***5** Neither does R-159 upon examination create a new Court or abolish the existing Court of Appeals. First, it should be noted that the General Assembly, when it enacted R-159, stated in the Act itself its awareness concerning the case of Maner v. Maner, supra, where the Supreme Court of South Carolina, less than a year earlier had stated:
In State, ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980), this Court declared unconstitutional several provisions of the Act creating the Court of Appeals [No. 164 of 1979], and left the remaining provisions in full force and effect.

296 S.E.2d, supra at 537. Such express awareness by the General Assembly that, at the time of R-159's enactment, the 1979 Court of Appeals still existed, must surely be taken into account in any determination as to whether R-159 impliedly abolished the 1979 Court and created a new one.

Second, while it is true that the present Act adds an additional judge to the Court, thereby increasing the number from five to six, a new court is not created by that fact alone. 21 C.J.S. Courts § 134, n. 77. Moreover, Section 14-8-30(d) of R-159 expressly provides:
. . . Notwithstanding the above provisions of this Section which provide for the election of judges for the Court of Appeals by the General Assembly, nothing herein shall be construed as diminishing or enlarging the term of the judges elected to the Court of Appeals on August 16, 1979.

Clearly in our view, this provision expresses the legislative intent to allow the one judge validly elected to the Court in 1979, see, Maner v. Maner, supra, to serve whatever term remains to him. This itself evidence a strong legislative intent to continue the Court of Appeals created in 1979. See, Middleton v. Taber, 46 S.C. 337, 24 S.E.2d 282 (1896); Worthington v. London Guarantee and Accident Co., 58 N.E.2d 102 (1900). If the General Assembly had meant to establish an entirely new Court, it would then seem anomalous to have also allowed the judge validly elected to the 1979 Court to serve out whatever term he had remaining. [3] Cf., Hammond v. Maxfield, (Utah), 132 P.2d 660, 664 (1942).

Further, while R-159 clearly alters the subject matter jurisdiction of the Court of Appeals from that of 1979, the new Act generally does to only by broadening that jurisdiction, rather than diminishing it. [4] The jurisdiction of the Court of Appeals has now been expanded to include the hearing of appeals from most civil matters whereas the Court originally was to hear only certain criminal appeals. See, Act No. 164 of 1979. As already noted, the general law is that:
Even though the jurisdiction is somewhat different, a court may nevertheless be a continuation of an established court. The mere addition of certain duties to those of the members of a court already existing is not a creation of a new court.

21 C.J.S. Courts, supra at § 134; Worthington v. London Guarantee and Accident Co., supra; Bomar v. Bomar, 229 S.W.2d 859 (1950); Beebe v. Richardson, 23 So.2d 718 (1945). While there is general authority recognizing that where an office has substantially new, different or additional functions, such may constitute the creation of a new office, this authority usually exists in an entirely different context, [5] and certainly without the strong accompanying expression of legislative intent to the contrary present here and discussed above.

***6** It is also true that R-159 provides that the terms of judges will be for two years only, until June 30, 1985, when the present Court is abolished. By comparison, pursuant to Act No. 164 of 1979, the terms of office of the judges were for six years, although the initial terms were staggered. Moreover, no time limitation was placed upon the Court's existence originally in 1979 under Act No. 164. These changes in the length of terms and in the length of the Court's existence are, however, insufficient in

our opinion to override the strong legislative intent expressed in and demonstrated throughout the Act, [6] that R-159 represents merely the continuation of an already existing Court.

First of all, the Legislature can alter the terms of the members of a statutory court and shorten the length of that Court's existence without necessarily abolishing the Court itself, unless the intent to do so is 'clearly stated'. 67 C.J.S. Officers, supra at §§ 13-14; Alexander v. McKenzie, 2 S.C. 81 (1870); State v. McDaniel, 19 S.C. 114 (1883). Here, the reasons for reducing the length of the Court's existence and terms of judges to two years are explained by the Legislature itself in R-159's preamble. The Legislature has found that because of the backlog of appellate cases, it is necessary simply to implement the 1979 Court in a modified form for two years and then clearly abolish in favor of an anticipated constitutional Court of Appeals. If this statement of legislative purpose is disregarded, we would have to conclude instead that R-159, by implication only, abolished the 1979 Court, created a new statutory Court for two years and then, once again, abolished that Court in order to effectuate the creation of a new constitutional Court of Appeals. Such a conclusion would place far greater reliance upon speculation than the intent as expressed in R-159 and would require us to ignore almost every rule of construction relating to the creation and abolition of offices. Ante at 4-7.

Moreover, in further support of our conclusion, it should be noted that it is evidence the General Assembly was well aware of the clear language necessary to legally abolish the 1979 Court, and yet chose not to employ that language. R-159 itself states that in two years, on June 30, 1985, the present Court 'shall cease to exist.' The fact that nowhere else in the Act is such clear and unambiguous language used in connection with the 1979 Court of Appeals is, we believe, significant to show that the General Assembly did not intent to abolish that Court simply upon enactment of R-159; instead, as expressly stated in the Act, the Legislature sought to implement and continue the 1979 Court in a somewhat different form until June 30, 1985.

In short, it must be concluded that '[t]here is nothing in [R-159] . . . indicating that it was the intention of the Legislature at the time the Act was passed' that the 1979 Court of Appeals was now abolished and a new two year statutory Court of Appeals was to take its place. Ex Parte Haley, (Okla.), 210 P.2d 653, 12 A.L.R.2d 416 (1946). For,

***7** [i]f the legislature had so intended it would have said so in plain, explicit and concise language.

Supra. Here, to the contrary, all legislative intent points toward continuation of a Court created in 1979 for two more years. We have found no case which squarely holds that a mere expansion of jurisdiction or reduction of the life of a Court in itself implicitly creates a new Court where the very act purportedly creating that Court states completely otherwise.

Therefore, it is the opinion of this office that R-159 does not create either a new Court or a new office of Chief Judge, but continues those already in existence. Accordingly, in our opinion, Section 2-1-100 does not prohibit the Senator from serving as Chief Judge of the Court of Appeals.

Very truly yours,

T. Travis Medlock
Attorney General

Footnotes

1 By comparison, the title to Act No. 164 of 1979 clearly provided' . . . FOR THE ESTABLISHMENT OF THE 'COURT OF APPEALS' . . .'.

2 Compare, the South Carolina Supreme Court's statement in Baver v South Carolina State Housing Authority, 267 S.C. 224, 229, 227 S.E.2d 195 (1976):

Legislative findings and declarations have no magical quality to make valid that which is invalid but they are entitled to weight . . ..

3 It should also be noted that this proviso is meaningful to show legislative intent to continue an established court regardless of whether the term of the one judge validly elected to the 1979 Court of Appeals legally ends prior to September 1, 1983, the beginning date for the Court of Appeals. See, Op.Atty.Gen., (July 6, 1983). For, it is well recognized that '[w]here the law provides for holding

over [as R-159 indeed does], such holdover period is as much a part of the judge's term as the period within the statutory term.' 48A C.J.S. Judges § 25 (1981).

4 Comparing Act No. 164 of 1979 with R-159, we can find no specific instance where the Court as presently constituted does not now possess the subject matter jurisdiction which it had in 1979. Under R-159, the Court possesses jurisdiction to hear 'all questions of law and equity arising in the course of proceedings of the Circuit Court and the Family Court . . .'. The only caveat to this general appellate jurisdiction is the enumerated exception is Section 14-8-200(b), as well as the general authority of the Supreme Court (with the concurrence of four justices) to 'retain in the Supreme Court a case not otherwise retained pursuant to Section 14-8-200(b).' Section 12-8-260.

5 For example, in In Re Lloyd, (Cal.), 20 P. 872 (1889), the Court simply observed in concluding that a new court had not been created, that the 'jurisdiction, powers and duties of the court are unchanged.' 20 P. supra at 873. Moreover, in In Re Household Realty Corp., 286 N.Y.S. 413 (1936), the Court examined the issue of whether the 'essential functions' of a constitutional office are new, rather than whether changes had been made in that office. In State, ex rel. Hammond v. Maxfield, (Utah), 132 P.2d fice violated separation of powers by removing the executive's right to appoint a particular person to an office held that in certain circumstances the Legislature had no power to abolish an office merely for the purpose of retaining an appointment. Although, in dicta the Court stated that where the duties and functions of the office were substantially new or different, a new office may have been created, it considered the issue solely in the context of removal of particular individuals in order to usurp the Executive's right to appoint. No such situation exists here, and thus we view the language in the case regarding new or different duties to be not controlling. Here, there is simply no attempt by the Legislature to 'circumvent by indirection the governor's power to remove . . .' but an amendment of provisions of an 'existing court.' Compare, 132 P.2d, supra at 633 with preamble to R-159.

6 See also, Sections 14-8-20(b), (c); 14-8-30 (qualifications); 14-8-50 (salary); 14-8-60, 14-8-70; 14-8-100; 14-8-220. All of these provisions involving various aspects of the organization and function of the Court are generally the same as set forth in Act No. 164 of 1979.

1983 WL 181932 (S.C.A.G.)

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