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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER  
ATTORNEY GENERAL

June 7, 2004

The Honorable A. Victor Rawl  
2835 Preakness Stakes  
Charleston, South Carolina 29414

Dear Judge Rawl:

You have inquired as to "the propriety of the application of the requirements of the unified judicial system to associate probate judges." Specifically, you wish to know "whether the requirements for mandatory retirement age of 72 years applies to associate probate judges such that an associate judge would be required to retire upon reaching 72."

By way of background, you advise as follows:

Article V, Section 1 of the S. C. Constitution provides for a unified judicial system with the Chief Justice as the administrative head (Section 4). Art. V, §8 provides that probate courts are statutory, not constitutional, courts of limited jurisdiction.

S. C. [Code Ann.] §14-1-70 includes the probate court as a court of justice and §14-23-1010 establishes it within the unified judicial system. S.C. Code §14-23-1140 authorized the Supreme Court to regulate the "practice, procedure and business" of the probate courts. Pursuant to the authority of the United States Supreme Court in Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 4115 (1991), the court has mandated that our state judges are required to retire upon reaching the age of 72 years. The question presented herein is whether this requirement is applicable to associate probate judges who are appointed by probate judges pursuant to S. C. Code 14-23-1030.

Probate judges, as popularly elected officials pursuant to S. C. Code §14-23-1010, may fall outside the requirements of the mandatory retirement age since they serve at the will of the electorate; however, associate probate judges are not elected but appointed by the probate judge to serve at his/her discretion. (S.C. Code § 14-23-1030).

This is a current question of interest as the Charleston County Probate Judge seeks to appoint a currently sitting county magistrate who is resigning his magisterial

position due to his reaching the mandatory retirement age of 72. (Op. Atty. Gen. 92-16 and S.C. Code §22-1-25). He seeks to obtain the position of associate probate judge by appointment which would still appear to violate the mandatory retirement age of 72 years as a member of the unified judicial system since the appointee is not an elected official.

### Law / Analysis

Article V, Section 1 of the South Carolina Constitution creates a unified judicial system. Such system 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." Article V, § 4 designates the Chief Justice of the Supreme Court as the administrative head of the unified judicial system.

Pursuant to S.C. Code Ann. Section 14-23-1010, "[t]he probate court of each county is part of the unified judicial system of this State." Section 14-23-1140 states that the Supreme Court shall regulate the "practice, procedure and business" of the probate courts. The probate judge "shall be elected by law for a term of four years ..." pursuant to § 14-23-1020.

Section 14-23-1030 establishes the office of associate judge of probate. Such Section provides as follows:

[i]n addition to the judge, 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.

Section 14-23-1110 further provides that "No 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." (emphasis added). Pursuant to § 14-23-1050, "[e]ach judge of probate and associate probate judge shall, before assuming the duties of that office, enter into bond in the sum of one hundred dollars conditioned for the faithful performance of the duties of such office ... ." Section 14-23-1980 requires that neither a probate judge or associate judge

shall sit in any case in 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 or settlement of any estate under a will that he has prepared or of any estate or any person in which he is interested as heir, legatee, executor, administrator, guardian or trustee.

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Thus, the General Assembly, in creating the position of associate judge of probate, has made clear that such position is part of the unified judicial system pursuant to Article V of the South Carolina Constitution. Section 14-23-1010 expressly so states. In terms of jurisdiction and judicial authority, the position of associate probate judge generally corresponds to that of probate judge.

Similarly, the South Carolina Supreme Court which, as noted, possesses oversight authority over the unified judicial system, has determined that associate probate judges are part of the Art. V unified court system. Rule 504 of the South Carolina Appellate Court Rules prescribes certain requirements for Continuing Legal Education for members of the Judiciary. Associate Probate Judges are specifically included in these requirements. See, Rule 504(a). Moreover, in State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975), the Court held that “[t]here can be no doubt that the probate courts of this State come within the orbit of ... Article V ... .” The McLeod Court specifically held that statutes which had authorized the addition of associate probate judges to then existing probate courts, which at that time were non-unified, violated Article V.

In addition, previous opinions of this Office, have also reached the conclusion that the position of associate probate judge is part of the unified judicial system. For example, in an opinion dated February 21, 1991, we stated:

[i]n conclusion, 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 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.

And in an opinion of March 21, 1986, we advised:

[w]e note at the outset that it is doubtful that a probate judge, as an elected official or a deputy or associate probate judge selected by the probate judge to serve at his pleasure, would be considered a classified county employee thus subject to the county regulation [relating to political activity of county employees]. Probate judges are within the unified judicial system. Election of probate judges and selection of deputy probate judges or associate probate judges are provided for in Chapter 23 of Title 14, Code of Laws of South Carolina (1976, as amended).

In that 1986 opinion, we referenced a ruling by the Advisory Committee on Standards of Judicial Conduct (Opinion no. 2-1982). There, we noted that this Advisory Committee opinion had concluded that, pursuant to Canon 7 of the Code of Judicial Conduct, “a judge may properly retain

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his/her judicial position while a candidate for election to judicial office provided he/she complies with the restrictions enumerated in Canon 7 of the Code of Judicial Conduct.”

Accordingly, based upon the foregoing authorities, 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.

The question here, however, is whether such judges must retire at age 72. In Op. S.C. Atty. Gen., Op. No. 93-49 (July 15 1993), we concluded that magistrates must retire at age 72. In that opinion, we considered the impact of the federal Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. § 621 et seq. We noted that the United States Supreme Court had concluded in Gregory v. Ashcroft, 501 U.S. 452 (1991) that appointed State judges in Missouri were not covered by the ADEA, a federal act which was, in 1974, made applicable to the states as employers and which “removed the ADEA’s upper age limit for those scheduled to retire after the effective date of the Act, January 1, 1987.” Op S.C. Atty. Gen., January 13, 1987. In Gregory the Supreme Court held that state appointed judges were to be considered as “policymaking” officials, and thus not covered by the reach of the ADEA’s express exemption contained therein. In light of Gregory, our conclusion was thus that any state’s mandatory retirement requirement for judges remained unaffected by the ADEA.

Therefore, with respect to the requirement that magistrates must retire at age 72 under South Carolina law, the 1993 opinion concluded that such requirement continues to exist. We noted that the General Assembly had, in 1988, amended § 9-1-1530 so as to reference exceptions which were written into the ADEA. At the time of our 1993 opinion, Section 9-1-1530 provided that

[i]t shall be mandatory for any employee, described in Section 1-13-80(h)(8)(10) or (12) ... to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.

We also cited in the opinion § 1-13-80(h)(8), which then provided as follows:

[n]othing in this chapter may be construed to prohibit compulsory retirement of any employee who has attained sixty-five years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy making position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of the employee, which equals, in aggregate, at least forty-four thousand dollars.

Our 1993 opinion further referenced § 22-1-25, a statute which specifically mandates the retirement of magistrates at age 72. Such provision states:

[n]otwithstanding the provisions of Section 9-1-1530 or Section 1-13-80(h)(8), (10) or (12), it shall be mandatory for a magistrate to retire not later than the end of the fiscal year in which he reaches his seventy-second birthday. Any magistrate serving in office on the effective date of this section who has attained the age of seventy-two years prior to July 1, 1993, may continue to serve until June 30, 1994.

Thus, we concluded in the 1993 opinion that, based upon the “clear and unambiguous provision” contained in § 22-1-25, as well as then existing § 9-1-1530, magistrates must retire at age 72. We further noted that a magistrate would, in light of Gregory, likely be deemed an “appointee on the policymaking level” so as to be excepted from the ADEA coverage.” See also, Op. S.C. Atty. Gen., Op. No. 92-16 (April 2, 1992) [magistrates required to retire at age 72].

Against that background, we now turn to the question of associate probate judges. For purposes of the ADEA, such associate judges would, like magistrates, clearly be “appointees on the policymaking level” as so construed by the Supreme Court in Gregory v. Ashcroft, supra. Associate probate judges are, by statute, given “jurisdiction to hear and decide all matters assigned to them which are within the jurisdiction of the court.” § 14-23-1030. Such associate judges are, as discussed above, clearly a part of the State’s unified judicial system. Moreover, unlike the probate judge, the associate probate judge is not elected, but is appointed by the probate judge. He or she serves “at his pleasure for a term coterminous with” the probate judge’s term. Thus, unless the associate probate judge is entitled to a retirement package below \$44,000, as prescribed in the ADEA, (an issue which, as we noted in the 1993 opinion, is factual and one beyond the scope of an opinion of this Office), the ADEA does not apply and thus does not exempt the associate probate judge from any mandatory retirement requirements which the State of South Carolina may impose.

Thus, the question here is whether there exists any current state law which requires an associate probate judge to retire at age 72. Clearly, the probate judge himself, who is elected by the people, need not retire at 72, or at any age. As we recognized in the above-referenced 1993 opinion, “South Carolina’s mandatory retirement law has long exempted probate judges as elected officials.”

As discussed above, § 9-1-1530 has long served as the general mandatory retirement provision for state, county or other public employees. See, University of South Carolina v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). Until 2000, § 9-1-1530, with certain exceptions, required that “any employee or teacher in service who has attained the age of seventy shall be retired forthwith ....” The statute allowed the mandatory retirement requirement to be extended to age seventy-two. However, § 9-1-1530 was repealed by Act No. 387, Part II, § 67R, of 2000. That repeal became effective January 1, 2001. Thus, there no longer exists any general statutory provision requiring mandatory retirement at age 72 by state, county or other public employees.

Likewise those provisions requiring mandatory retirement of judges generally are inapplicable to associate probate judges. Section 9-8-10 et seq. establishes the Retirement System for Judges and Solicitors. Pursuant to § 9-8-60(1) “[a] member of the system may retire upon written

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application ... setting forth at what time, not later than the end of calendar year in which the member attains age seventy two ...” he or she plans to retire. However, the Retirement System for Judges and Solicitors does not include probate judges or associate probate judges. Section 9-8-10(16) defines a “Judge” as “a justice of the Supreme Court or a judge of the court of appeals, circuit or family court of the State of South Carolina.” Thus, the mandatory retirement requirement specified by § 9-8-60(1) would also be inapplicable here.

Pursuant to § 9-11-25, probate judges “may elect to participate in the South Carolina Police Officer Retirement System or they may elect to remain under regular state retirement.” However, this provision by its express terms relates only to the probate judge himself, not to associate probate judges. It is our understanding that associate probate judges are authorized to participate only in “regular state retirement” or the State Retirement System.<sup>1</sup> As noted above, the previously existing mandatory retirement requirements contained in former § 9-1-1530 have now been repealed. Accordingly, inasmuch as there is no state law which presently requires associate probate judges to retire at age 72, or any other age, we are of the opinion that the proposed appointment of the individual to the position of associate probate judge which you describe in your letter would not be prohibited by any requirement of mandatory retirement.

### Conclusion

Based upon the foregoing authorities, it is our opinion that there currently exists no mandatory retirement age requirement for associate probate judges. We are advised that, generally speaking, associate probate judges are members of the regular State retirement system. Laws governing that System no longer impose a mandatory retirement requirement. While there continues to exist a mandatory retirement age requirement for those judges who are members of the Retirement System for Judges and Solicitors, and there is separately provided in § 22-1-25 a similar mandatory retirement requirement for magistrates, we are aware of no such limitation for state or county employees or police officers. Our conversation with officials with the Retirement System confirms this conclusion.

While we have no knowledge of the specific facts surrounding the situation referenced in your letter, it is likely that the magistrate in question is a member of the regular State Retirement System. Although magistrates are required to retire at age 72 by virtue of § 22-1-25, there is no parallel requirement of mandatory retirement for associate probate judges (or probate judges). As noted above, the general state mandatory age limit which previously governed state employees generally has now been repealed.

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<sup>1</sup> Even if an associate probate judge is, for whatever reason, a member of South Carolina Police Officer Retirement System, we are advised that there exists no mandatory retirement provision as to those members.

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Accordingly, we find no age limitation extant in state law for associate probate judges.

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

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