

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
Case No. 2013-002319

70962

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, Appellant/
Cross-Respondent

v.

Martha Brown and Mary Moses, Respondents/
Cross-Appellants

MOTION FOR ESCROW OF FUNDS

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SOUTH CAROLINA COURT OF APPEALS

Respondents/Cross-Appellants hereby move the Court to require the Personal Representative (Appellant/Cross-Respondent) to place into escrow the funds (\$ 42,475.00) he was ordered to return to the Estate by Paragraph 14 on p. 4 and (b) on p. 7 of the Final Order of the Laurens County Probate Court dated May 24, 2011 (copy attached) with post-judgment interest. It is not just and equitable that the PR should flout the order below and have the continued use of the Estate's money, and the PR's retention of these funds makes the post-judgment interest question more difficult.

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The PR may have already spent the money without court approval. If the PR has already spent these funds, the Court and Cross-Appellants have the right to know this, because it affects the equitable standing of the Appellant/Cross-Respondent and the ability of the Court to award relief.

This money should be held by the Greenwood County Probate Court until there is a final determination of the issues. In making this motion, the Cross-Appellants reserve their right to make further claims for post-judgment interest due to them and to their attorney.

COX, FERGUSON & WHAM, LLC
Attorneys for Cross-Appellants

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January 8, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, Appellant/
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v.

Martha Brown and Mary Moses, Respondents/
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MEMORANDUM IN SUPPORT OF MOTION FOR ESCROW OF FUNDS

JR7 This Memorandum is presented in support of Respondents/Cross-Appellants' Motion for Escrow of Funds. In his Final Order (attached to the motion), the probate judge found that the Personal Representative had grossly overcharged the Estate and ordered him to disgorge \$ 42,475.00 to the Estate within thirty days. The Appellant PR, who is a member of the S.C. Bar, has willfully refused to comply with this directive.

Under Rule 241(b)(1), SCACR and S.C. Code Section 18-9-130, an appeal does not stay a money judgment, so the PR's defiance of the Court has no colorable defense. The concern of the undersigned is that the PR has already spent the funds

in question and that only at the end of the case will we find this out. As Judge Addy's Order of September 30, 2013 found, the Estate is entitled to post-judgment interest on the funds, so this should be escrowed as well.

Much of this case is equitable, so the PR's appeal involves this Court's equitable jurisdiction. The PR has seized \$ 42,475 of the Estate's money and continues to use it and profit from it as if it were his own. This unconscionable conduct violates the maxim that "He who comes into equity must come with clean hands." 11 S.C. Digest^{2d} Equity 65, pp. 128-130. Although the PR is bound by the maxim that "He who seeks equity must do equity," 11 S.C. Digest Equity 66, pp. 132-134, he continues to flout the order directing him to return the money. It would be unthinkable for a court of Equity to allow the current situation to prevail.

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Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. *Ex parte Dibble*, 299 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983). See also 20 AmJur2d Courts 79 (1965). Certainly a court "has the authority to issue an order compelling compliance with a prior order." *Blakely v. State Board of Medical Examiners*, 310 S.C. 29, 31, 425 S.E.2d 37 (1993); 20 AmJur2d Courts 101 (1965). "Equity suffers no right to be without a remedy." 11 S.C. Digest Equity 55, p. 125. "Equity delights to do justice and not by halves." *Coleman v. Coleman*, 208 S.C. 103, 108, 37 S.E.2d 305

(1946).

Conclusion

This Court should direct the Appellant/Cross-Respondent to immediately place in escrow with the Probate Court of Greenwood County (which has the case because of a conflict of the Associate Judge of the Laurens County Probate Court) the \$ 42,475.00 originally he was ordered to disgorge plus all accrued post-judgment interest. See S.C. Code Section 34-31-20(b).

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January 8, 2014

- I) \$ 13,447.05 to Daryl Hawkins for attorney's fees and costs;
- j) \$ 1,695.00 for expert fees to Major and Co.;
- k) \$ 350.00 for expert fees to Wilson Forestry;
- l) \$ 285.00 court reporting fees to Shorb Court Reporting;
- m) \$ 875.00 court reporting fees to Garber Court Reporting.

Together these fees and costs total \$ 157,179.00; and the PR is claiming an additional unspecified amount for preparation of tax returns and closing the estate. Of this amount, only \$ 7,714.57 (5% of the total) related to litigation outside of litigation costs in connection with approval of all of these fees and expenses in the current action.

I make the following findings of fact:

1. The twin flaws in the PR's position are his failure to provide adequate proof for the hours he claims and his failure to prove a necessity for most of the hours he claims.

2. The PR unnecessarily complicated the Estate by insisting on filing a partition action. This was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution. This would also have been in conformity with the Testatrix's Will.

3. The PR unnecessarily complicated the Estate by converting an eight month option to purchase the Estate's one half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will.

4. There was no necessity for a sale of the real estate. The Court understands that a sale of real property generates proceeds.

5. The Court does not understand why the PR began charging the

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Estate before the Testatrix died on May 3, 2007 and before he was appointed PR on May 16, 2007.

6. The PR did an excellent job in securing the sales price for the real estate, but this does not justify the commission sought.

7. Although the PR argued the existence of novel issues regarding the real estate, I do not find any.

8. The PR failed to provide any legitimate basis for the fees he claimed and instead testified that he had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air. Although the PR in Memorandum argued that he had 468.6 hours of time as PR, the proof he provided failed to support this.

9. No explanation was offered to explain or excuse the PR's failure to provide interim accountings until the latter part of 2010 when the final accounting was in the offing, about three and a half years after the estate was opened.

10. The Supplemental Inventory reflects an Estate value, including real estate, of \$ 513,491.00; however, the addition of the personal property value of \$ 122,491.00, real estate proceeds of \$ 365,012.00 and additional income to the Estate of \$ 24,682.47 produces a total Estate value of \$ 512,185.47.

11. The PR's total draws to date equal 18.3% of the estate value. Adding the additional request of \$ 13,447.05 would boost the PR's share to 21.0% of the estate, and this percentage would go even higher if additional compensation were allowed for preparation of tax returns and closing of the estate. By contrast, the

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statutory rate of 5% would produce a commission of \$ 25,650; and a 10% commission would be \$ 51,300.

12. The claimed \$ 157,179.00 in commissions, attorney's fees and expenses would constitute 31% of the Estate's value. Although litigation can deplete an estate, that is not the situation here. Most of the amount claimed is not related to litigation resulting from the demand for a hearing on the final accounting.

13. The commissions sought by the PR are clearly excessive, and he failed to provide the Court with an alternate proposal for valuing his services.

14. I find that a PR fee of \$ 51,300, which is about ten (10%) percent of the Estate, is reasonable. The PR had previously paid himself \$ 93,775.00 without prior court approval. The balance of the commission draws previously taken (\$ 42,475.00) must be promptly refunded to the Estate. This compromise takes into account that not all of the heirs opposed the PR's final accounting and that the PR may face difficulties in obtaining the necessary funds to make the refund. The PR is not entitled to the additional \$ 13,447.05 he has claimed.

15. Although the PR has exemplary credentials and good standing in the Bar, this in and of itself does not ^{Automatically} justify the relief requested. (DAN)

16. I do not find bad faith on the part of the PR.

17. I approve the previous payment of \$ 13,499.58 to Collins and Lacey and find that the Collins and Lacey is entitled to be paid an additional \$ 12,306.80. Although the Court questions the

necessity of 204.6 hours of paralegal time, they should be compensated for their work.

18. The PR is entitled to have the Estate pay \$ 5000 to Paul Major for an appraisal and \$ 750 to Wilson Forestry for consultant work.

19. Although Daryl G. Hawkins represented the PR well, his representation was primarily of the PR in his individual capacity seeking approval of the PR's commissions and expenses. I therefore do not find that the Estate should pay Mr. Hawkins or the trial expenses for his three experts, Major, Wilson and Massey.

20. There were three exhibits marked for identification (Plaintiff's L and Defendants' 4 and 14). All of these shall come into evidence and be made part of the record.

21. Defendants have sought attorney's fees for their attorney, John R. Ferguson; and I find that this is warranted. Mr. Ferguson has been in practice for more than 30 years and enjoys a high reputation. He is the author of a legal reference work. He necessarily devoted 99.3 hours to this case to date (all of which appears related to the merits of the matter) and the usual compensation rate in such situations is \$ 200 per hour. Through his efforts the Estate has benefitted substantially. Having considered all the *Glasscock* factors, I therefore find that he is entitled to be paid \$ 19,860.00 as his fee from the Estate.

I make the following conclusions of law:

1. Inasmuch as the Testatrix was a resident of Laurens County, jurisdiction and venue are properly with this court.

2. A personal representative has a duty to settle and distribute the estate in accordance with the terms of the Will and the Code as expeditiously and efficiently as is consistent with the best interests of the Estate. S.C. Code § 62-3-703.

3. A personal representative is a fiduciary and in equity and good conscience is bound to act in good faith and with due regard to the interests of the estate. *Ex Parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 838 (Ct. App. 2009).

4. Equity requires that all the heirs pay for the work of Defendants' attorney, because his work preserved and protected a common fund, not just for the benefit of the Defendants, but for all the heirs. *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320 (2008).

5. While S.C. Code § 62-3-720 allows litigation expenses, including attorney's fees for the PR, I do not find this statute to be applicable to a situation where the representation was primarily for the benefit of the PR individually and not the Estate.

6. In light of the fact that this Estate is ready to be closed, Defendants' Motion for Removal of Personal Representative is denied. If the PR is willing to finish wrapping up the Estate (including filing the necessary tax forms), he shall be entitled to an additional \$ 2500 in commissions for this. See S.C. Code § 62-3-715(16) and (19).

7. Offset pursuant to S.C. Code § 62-3-903 is denied, as the PR did not present sufficient evidence to grant this relief.

8. In light of my other rulings, I do not reach the

Defendants' contention that the PR is not entitled to enhanced compensation for legal services rendered to himself. See *Hopkins v. Hopkins*, 343 S.C. 301, 540 S.E.2d 545 (2000).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

a) the PR is granted the right to retain \$ 51,300.00 in commissions;

b) the PR must refund to the Estate within thirty (30) days of this Order all other commissions he has taken. His request for further compensation is denied;

c) the previous payment of \$ 13,499.58 to Collins and Lacey is approved, and Collins and Lacey is entitled to an additional \$ 12,306.80 from the Estate;

d) the payment of \$ 5000.00 to Paul Major for an appraisal and the payment of \$ 750.00 to Wilson Forestry for consultant work by the Estate are approved;

e) the Estate shall pay John R. Ferguson the sum of \$ 19,860.00 for his attorney fee pursuant to the common fund doctrine;

f) attorney fees for Daryl Hawkins are denied, and these are the responsibility of the PR and not the Estate;

g) costs pertaining to the Petition for Settlement and the expert witness fees of Major, Wilson and Massey, must be borne by the PR and not the Estate;

h) the exhibits marked for identification are admitted into evidence;

I) the Motion for Removal of the Personal Representative is

denied. If Mr. Sullivan is willing to finish winding up the affairs of the Estate, he shall be entitled to an additional \$ 2500 in commissions. If he is not willing to continue, then both sides shall promptly submit the name of a possible successor who is willing to serve so that the Court may select a successor; and

k) offset pursuant to S.C. Code § 62-3-903 is denied.



DONALD B. HOCKER
Associate Judge
Laurens County Probate Court

Laurens, SC

May
24, 2011

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Edward D. Sullivan, as Personal Representative
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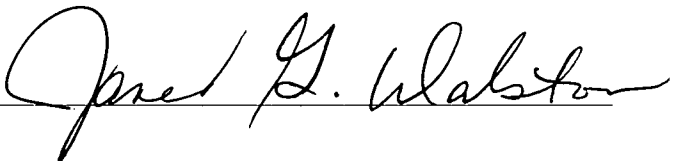
Martha Brown and Mary Moses, Respondent/
Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox
Ferguson & Wham, LLC and that on the 8 day of January,
2014 she served the Motion for Escrow of Funds with attached
order and Memorandum in Support of Motion for Escrow of Funds
herein by depositing a copy of them in the United States Mail,
postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
Attorney at Law
P.O. Box 11906
Columbia, SC 29211.

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JAN 13 2014
SC Court of Appeals



January 8, 2014

COX, FERGUSON & WHAM

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January 9, 2014

Office of the Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia, SC 29201

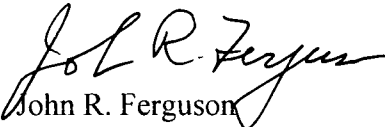
Re: Sullivan v. Brown, et al., 2013-002319

Gentlemen:

Enclosed with this letter you will find a Motion for Escrow of Funds and seven copies, a Memorandum in Support of Motion for Escrow of Funds and seven copies, a Certificate of Service and one copy. Please file these documents and send me a clocked copy of each in the enclosed envelope. I am enclosing a check for \$ 25 for the filing fee.

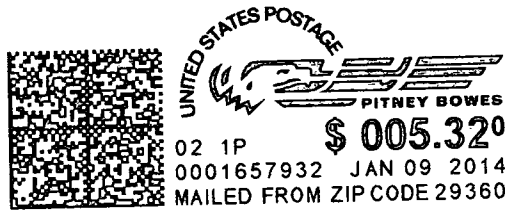
Thank you for your assistance.

Sincerely,


John R. Ferguson

JRF/wp
Encl.
CC: Daryl G. Hawkins, Esq.

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