

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

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JAN 27 2014

In the Matter of the Estate of Marion M. Kay **SC Court of Appeals**

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

REPLY TO APPELLANT-CROSS-RESPONDENT'S MOTION RETURN

This Reply is presented in response to Appellant/Cross-Respondent's Return to Motion to Escrow Funds in accordance with Rule 240(f), SCACR.

The probate judge found that the Personal Representative had grossly overcharged the Estate by paying himself \$ 93,775 to administer what the judge found to be an uncomplicated estate. He required the PR to return \$ 43,475 to the Estate within thirty (30) days. Part of the appeal will deal with whether that amount is far too low to remedy what amounts to looting of the Estate by the PR.

The PR has refused to return his ill-gotten gains and has sought to confuse this Court with such irrelevancies as how much the undersigned was awarded as his attorney fee. He also

makes the jaw-dropping assertion that he is "not a party in the traditional sense" (p. 8 of his Return) though he had no hesitation in asserting standing to appeal.

He makes the disingenuous assertion that my clients have obstructed his efforts to settle the Estate by increasing Estate assets by \$ 42,475 against his will. In fact, his efforts to settle the case amounted to an attempt to tie the hands of this Court by limiting its options to deal with his wrongdoing. The court below found (See attached order) that it did not have jurisdiction to deal with settlement. This lack of jurisdiction is not the fault of my clients.

Under the law, Respondent/Cross-Appellants are entitled to have the Appellant/Cross-Respondent pay what he was ordered to pay. To preserve this Court's options for deciding the issues, the Respondent/Cross-Appellants have merely asked that the funds the PR was required to disgorge be put into escrow for safekeeping until a final decision. How much more he ultimately has to disgorge will have to await the final decision of this Court.

The PR's legal position that he can keep the money during the appeal is without legal support. *State v. Cooper*, dealt with the payment of expenses, which the Court there found not to be a money judgment for the purpose of Rule 241(b)(1), SCACR. *Pelzer Mfg. Co. v. Cely*, 40 S.C. 430, 18 S.E. 790 (1894) speaks of money for a party being under the mandate of S.C. Code Section 18-9-130; and this is the situation here.

The money returned to the Estate will ultimately be distributed to the heirs, including Ms. Moses and Ms. Brown, so it is not a collateral issue.

The PR is in error in his claim that this Court cannot deal with matters affecting its control over the funds at issue because they were not raised below. First of all, the court below did rule that the money should be returned to the Estate. Second, the issue of post-judgment interest could not have been raised to the Probate Court, because it had not yet accrued. This is not a matter of changing the order below but rather having this Court exercise its duty to preserve assets during the appeal by enforcing a provision in the Final Order as required by Rule 241(b)(1), SCACR. Putting the funds in escrow does not prejudice the rights of any party. The PR, who is a member of the Bar, should be willing to comply with what the Court ordered him to do.

The PR dismisses the application of Equity to this situation by claiming that Respondent/Cross-Appellants' efforts to keep him from looting the Estate and their calling to the attention of the probate judge that he no longer had jurisdiction to consider asset distribution amounted to obstructing the PR's administration of the Estate. This diversionary maneuver is transparently baseless.

CONCLUSION

For the reasons stated in this Return and in the prior memorandum, the PR must be required to comply with the lower court's order that he disgorge and return to the Estate the excess fees he wrongfully charged. Only in this way can the heirs be assured that they will receive all the money to which they are entitled. See *In the Matter of James*, 267 S.C. 474, 229 S.E.2d 594 (1976).

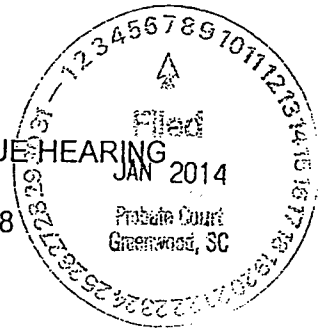
COX, FERGUSON & WHAM, LLC
Attorneys for Cross-Appellants

By: John R. Ferguson
John R. Ferguson
S.C. Bar No. 1987
107 W. Laurens St. - PO Box 286
Laurens, SC 29360
(864) 984-212
Fax (864) 984-7372

January 23, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)
)
IN THE MATTER OF: MARION M. KAY)

ORDER TO CONTINUE HEARING
2007-ES-30-208



This issue came before the court pursuant to a Motion to Distribute Proceeds filed by Deryl G. Hawkins, Esquire who represents Edward D. Sullivan, Esquire, the Personal Representative of the above-reference Estate. A hearing to Distribute Estate Proceeds was scheduled on the matter on Thursday, January 9, 2014 at 11:00 a.m.

Mr. Ferguson, attorney for two of the beneficiaries, wrote a letter dated December 4, 2013 to this court objecting to the hearing based on the fact that portions of the Final Order are currently on appeal in the Court of Appeals. Mr. Ferguson does not believe this Court has jurisdiction due to the appeal.

Upon review of the file, it does appear that a portion of the case is, in fact, on appeal with the South Carolina Court of Appeals. Upon learning of the appeal, this Court was hesitant to conduct the hearing to Distribute Estate Proceeds that was scheduled for Thursday, January 9, 2014 based on S. C. Code § 62-1-308 (c), which states:

When appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.

This court requested a conference call with the parties on Monday, January 6, 2014 to discuss the issue of jurisdiction. Prior to the call, the court received a Brief in support of Petition to Distribute Estate Proceeds from Edward D. Sullivan, Esquire, who is the PR of the Estate of Marion Kay. No other parties submitted a brief.

A conference call was held on January 6, 2014 at 9:30 am. Present for the conference call were Mr. Sullivan (PR), his attorney Mr. Hawkins, Mr. Ferguson, and George R. McElveen, III, Esquire, who represents one beneficiary (Bart Heard).

At the outset of the conference call, Mr. Sullivan informed the court that the issues on appeal would not affect the distribution. He stated that it has been 3 ½ years and he simply wanted to go ahead and distribute the money in the Estate account, which was approximately \$299,000.00, to the beneficiaries. To support his position, he cited Ulmer vs. Ulmer, 369 SC 486, 492, 632 SE 2d 858 (2006) where the South Carolina Supreme Court held that 62-1-308(c) "does not apply to all orders of the

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probate court concerning the parties. The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken."

However, Mr. Ferguson believes that the issue(s) before the Court of Appeals would, in fact, affect the proposed distribution and the issue(s) before this court. Specifically, the issue on appeal is whether the PR must reimburse \$42,475.00 to the Estate Account. Mr. Ferguson believes that if the Court of Appeals affirms the lower court's decision, this money may be required to be added back to the Estate Account; which would directly affect the amount of the distribution to the beneficiaries.


Mr. Sullivan simply wants to distribute the funds to the beneficiaries as soon as possible and feels this court does have jurisdiction since the only issues on appeal do not affect the proposed distribution.

This court finds that § 62-1-308(c) is clear. It states that "all proceedingsshall cease until the judgment of the court of appeals." The statute does not have any exceptions. Mr. Sullivan relies on Ulmer, however this court does feel that the proposed distribution would be affected by the court of appeals ruling. This court finds that the issue(s) before the Court of Appeals would have a direct, or indirect, affect on the amount of distribution to the beneficiaries.

Moreover, as a matter of judicial economy, this court would like to streamline any and all remaining issues into one final hearing, if possible. If the Court of Appeals remands and/or reverses any portion of the case, it is possible another hearing would be required. All parties involved would benefit by having one final hearing to resolve all the issues at one time rather than piecemealing them. According to the file, all parties have incurred substantial attorney fees and costs, so streamlining the issues into one hearing would be beneficial for everyone.

Therefore, the hearing on the Motion to Distribute Estate Proceeds shall be continued until the Court of Appeals has ruled on all issues before them.

It is so Ordered.


Travis W. Moore, Special Judge of
Probate for Laurens County

January 7, 2014

Greenwood, SC

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In the Court of Appeals

APPEAL FROM LAURENS COUNTY
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Frank R. Addy, Jr., Circuit Court Judge
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Edward D. Sullivan, as Personal Representative
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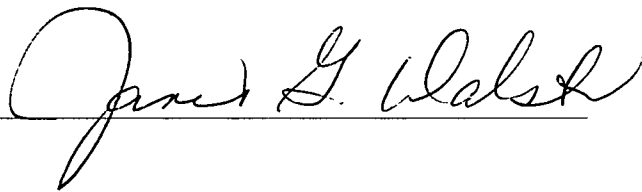
v.

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 24 day of January,
2014 she served the Reply to Appellant/Cross-Respondent's
Motion Return herein by depositing a copy of it in the United
States Mail, postage prepaid and addressed to:

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



January 24, 2014

COX, FERGUSON & WHAM

ATTORNEYS AT LAW
107 E. Laurens St.
P.O. Box 286
LAURENS, SOUTH CAROLINA 29360-0286

W. REID COX, JR.
JOHN R. FERGUSON
ALLEN M. WHAM

PHONE: (864) 984-2126
FAX: (864) 984-7372
E-MAIL: jferg@backroads.net

January 23, 2014

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

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JAN 27 2014

SC Court of Appeals

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

Gentlemen:

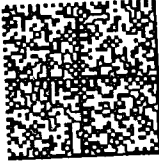
Please find enclosed for filing the original and seven (7) copies of Respondent/Cross-Appellants' Reply to Appellant/Cross-Respondent's Motion Return plus the original and a copy of the Certificate of Service on opposing counsel. Please return a clocked copy of each of these documents to me in the enclosed envelope.

Thank you for your assistance.

Sincerely,


John R. Ferguson

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



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COX, FERGUSON & WHAM, LLC

ATTORNEYS AT LAW
107 E. LAURENS ST. - PO BOX 286
LAURENS, SC 29360

TO:

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