THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
Civil Action No. 2012-CP-30-258
The Honorable Frank R. Addy, Circuit Court Judge

In the Matter of the Estate of Marion M. Kay

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

vs.

Martha Brown and Mary Moses ..... Respondents-Appellants.

INITIAL BRIEF OF APPELLANT- RESPONDENT

Daryl G. Hawkins
LAW OFFICE OF DARYL G. HAWKINS, LLC
Post Office Box 11906
Columbia, SC 29211-1906
803.733.3531 – Tel
803.744.1949 – Fax

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. Was the PR required to deed real property to residual beneficiaries, or did he have discretion to pursue an action for partition and sale of an undivided interest by statute, terms of the will and applicable law?

II. Did the Circuit Court err in affirming the Probate Court's erroneous decision requiring the PR to refund a substantial portion of his compensation simply because the Probate Court disagreed with the PR's use of discretionary powers granted by the will and probate code?

III. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation and disallowing his request for payment of expenses and ongoing services to the Estate because the Probate Court disagreed with PR's method for determining reasonable compensation?

IV. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation because it would unjustly enrich the Estate beneficiaries who benefitted from the services of the PR?

V. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation given that Brown and Moses did not petition the court pursuant to SC Code Section 62-3-720 to review the reasonableness of the compensation determined by the PR for his services?

VI. Did the Circuit Court err in affirming the Probate Court's erroneous ruling that the PR was not entitled to be compensated and reimbursed for expenses related to the hearing on the Petition for Settlement and the ongoing efforts to settle the Estate?

VII. Did the Circuit Court err in affirming an award of legal fees to counsel for beneficiaries Brown and Moses?

VIII. Did the circuit err in affirming the Probate Court's erroneous denial of the PR's Rule 59 Motion?

INTRODUCTION

The underlying purposes of the South Carolina Probate Code include (1) to discover and make effective the intent of a decedent in the distribution of property and (2) to promote a speedy and efficient system for liquidating the Estate of the decedent and making distributions to [her] successors. S.C. Code Ann. §§ 62-1-102(b)(1) and (b)(2) (1976).

In this case, the PR set out to liquidate the Estate as provided by the powers granted by the will and statute in the Estate's best interest and give effect to the intent of the decedent as he understood it. After a hearing on the Petition for Settlement, the Probate Court, despite the extensive powers granted by the will as well as statutory power, substituted its discretion for that of the PR. It ordered the PR to refund a substantial portion of compensation because it arbitrarily disagreed with the actions taken by the PR to make effective the intent of the decedent in the distribution of her property - to liquidate the Estate and make distributions to the beneficiaries.

The court also disagreed with the method used by the PR to determine a reasonable amount of compensation (and expenses) granted by the will. The will provides that the PR "shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses". The PR determined a fee based on research with multiple factors taken into consideration including time, complexity of issues, litigation, sale of real estate and results obtained. The court limited the compensation to $51,300.00, which the Court equated to approximately 10% of the value of the Estate. In addition, the Court denied the PR's request for additional compensation and attorney's fees and costs incurred on behalf of the Estate in preparing for and attending the hearing.

The orders below should be reversed because the Circuit Court erred in affirming the decisions of the Probate Court.

STATEMENT OF THE CASE

This action arises from the administration of the Estate of Marion M. Kay, who died on May 3, 2007. On November 12, 2010, after more than three years and six months of Estate administration, litigation in the Circuit Court, and the negotiation and closing on a sale of the Estate's interest in real estate, the PR, Edward D. Sullivan, filed a Petition for Settlement and a Proposal for Distribution. Counsel for Martha Brown and Mary Moses, each 1/10 residual beneficiaries and defendants in the aforementioned litigation wrote a letter to the Probate Court requesting a hearing. No pleadings were filed other than the PR's Petition for Settlement.

Hearings were held on February 2, 2011 and February 21, 2011. At the hearings, Mr. Sullivan presented the (1) last will and testament of Ms. Marion M. Kay, (2) a Supplemental Inventory and Appraisement reflecting her assets and valuation at the time of death and several accountings for the administration, (3) his extensive affidavit including issues confronted during the administration of the Estate and his time spent on the administration (4) an affidavit of an expert witness in support of his compensation (5) invoices for legal fees for services rendered by a law firm during the administration of the Estate, (6) invoices for legal counsel and expert witnesses for purposes of the hearing.

In addition, the PR testified as to the identity of the beneficiaries of the residuary Estate, and their respective interests, the intent of Ms. Kay as it related to the liquidation and distribution of the Estate's primary asset, a one-half undivided interest in a 330 acre tract of land (the "Farm"), the stated desires of various beneficiaries to receive cash rather

than an interest in land, the various competing claims to the Farm which led to litigation including a partition and declaratory judgment action, the results of the litigation, the novel issues in the administration of the Estate, the difficulty in completing the Estate, and the various charges and expenses of the Estate administration, including the amount of PR compensation and factors used in determining reasonable compensation.

The reasonableness of compensation was supported by the testimony of two beneficiaries of the Estate. In addition, two expert witnesses testified as to the outstanding results achieved by the PR in selling real estate owned by the Estate.

The Court disallowed the introduction into evidence of a comprehensive affidavit of the PR outlining and describing the events of the Estate administration. The Court also disallowed the affidavit of R. David Massey, Esquire offered by the PR in support of the reasonableness of his compensation.

The Court ruled that the PR should not have filed a partition/declaratory action to sort out various claims to Estate Property, but rather should have deeded out the Estate property to the beneficiaries as tenants-in-common. The Probate Court essentially found that the PR (1) unnecessarily complicated the Estate and (2) failed to provide adequate proof for the hours claimed and necessity for the hours. Based on these findings, the Court ruled that the amount paid to the PR during the three and one-half year administration, $93,775, was excessive, that a fee of $51,300, about 10% of the Estate value was reasonable, and ordered the PR to refund to the Estate within 30 days the amount paid in excess of $51,300, that amount being $42,475 or, if the PR completed the settlement, $39,975, reflecting additional compensation of $2,500 for winding up the Estate. (See, Final Order, Page 4, Paragraph 14; Page 7, items a) and b)). Additionally, the Court denied the PR's

request for compensation for preparing for and attending the hearing, as well as the request for reimbursement of legal fees and witness fees.

The Probate Court also ruled that counsel for Brown and Moses was entitled to be paid $19,860 by the Estate pursuant to the common fund doctrine. (See, Final Order, Page 5, Paragraph 21; Page 7, item e).

Thereafter, the PR filed a Rule 59 motion to alter or amend the judgment and/or reopen the record on the basis that such motion should be granted to prevent clear errors of law and/or prevent manifest injustice. (See, Rule 59 Motion to Re-Open Record, Accept Additional Evidence and/or to Alter or Amend Judgment.) Counsel for Brown and Moses simultaneously appealed and thereafter the PR, in an abundance of caution, cross-appealed to preserve his rights to an appeal. These appeals were later dismissed so that the Probate Court could entertain the PR's Rule 59 motion. After a hearing on the Rule 59 motion, the Court upheld its earlier decision and declined to re-open the record to allow in certain timesheets offered by the PR as well as an Affidavit of Teri Stomski, an attorney who had earlier counseled the PR on the wisdom of filing a partition action due to title issues regarding the Estate Property. The Court further denied a claim brought by Brown and Moses for five acres that had been owned by the Estate, denied additional legal fees sought by Brown and Moses and ordered that Brown and Moses be responsible for one-half of the Court reporter costs. (See, Order Disposing of Post-Trial Motions).

The PR and Brown and Moses filed Grounds for Appeal. A hearing was held in the Circuit Court on July 19, 2013 resulting in the two Orders of the Probate Court being affirmed. (See, Order dated August 20, 2013.) Brown and Moses filed a Rule 59 Motion for Rehearing. The motion was denied. (See, Order dated September 30, 2013.)

The PR served his notice of appeal in this matter on October 24, 2013. It later served an amended notice of appeal on October 30, 2013. Brown and Moses served a notice of cross-appeal on October 29, 2013. This appeal follows.

STATEMENT OF FACTS

A. The Estate and Residuary Devise of Marion M. Kay

Marion Milam Kay, a resident of Laurens County, South Carolina died on May 3, 2007. (See, Supplemental Inventory and Appraisement, 2/2/2011 Transcript at 40:24.) At the time of her death, Ms. Kay owned a house and 10 acres of land as well as a one-half undivided interest in an adjoining 330 acre parcel (the "Farm"). (See, Supplemental Inventory and Appraisement; Appraisals; 2/2/2012 transcript at 44:19 – 47:16; PR Exhibit C-1, Items 1, 4). The other one-half undivided interest was titled in the name of "The Heirs of W.H. Milam". (PR Exhibit C-I, Item 1.) The heirs of W.H. Milam consist of Respondents-Appellants Martha M. Brown and Mary Leona M. Moses. (PR Exhibit C-I, Item 1.) The house and 6.238 acres (the "Homeplace") are separated from the remaining 3.762 acres (the "Lot") by a public roadway. (PR Exhibit C-1, Item 4). Including Ms. Kay's personal property, the Estate was valued at Five Hundred Thirteen Thousand Four Hundred Ninety-one and 33/100 ($513,491.33) dollars. (Supplemental Inventory and Appraisement).

Item IV of Ms. Kay's will provides as follows:

Outright Gift of Residuary. I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises) wherever situate and whether acquired before or after the execution of this Will, absolutely and forever, as follows:

One-fourth (1/4) interest to Lisbon Presbyterian Church, absolutely forever;

One-fourth (1/4) interest to Lisbon Presbyterian Church Cemetery fund, absolutely forever, the interest to be used to keep up the Milam-Kay plot;

One-tenth (1/10) interest to Marla Elizabeth Heard, (per stirpes), to be hers absolutely forever;

One-tenth (1/10) interest to Bart Edward Heard, (per stirpes), to be his absolutely forever;

One-tenth (1/10) interest to Martha Milam Brown (per stirpes), to be hers absolutely forever;

One-tenth (1/10) interest to Mary Leona Milam Moses (per stirpes), to be hers absolutely forever;

One-tenth (1/10) interest to Presbyterian Home of South Carolina, Clinton, South Carolina.

(PR Exhibit B.)

The will also granted Charles P. Copeland, Ms. Kay's neighbor and close friend, an Option to Purchase Ms. Kay's Estate in the Farm. Item XIV of the Will provides as follows:

Option to Purchase. It is my desire and I hereby direct that Charles P. Copeland be permitted to buy my interest in the real estate within eight (8) months after my death at the fair market price on the date of my death, the decision of my PR regarding the fair market price to be final.

(PR Exhibit B. Item IX).

B. The PR, Discretionary Powers Granted by the Will, and Compensation and Reimbursement for Expenses

The will named Ms. Kay's attorney and life-long friend Edward D. Sullivan ("Mr. Sullivan" or the "PR") as PR (PR Exhibit B; 2/2/2011 transcript at page 40, lines 12 – 18). Mr. Sullivan is an attorney with more than 25 years of legal experience. In addition, he is a Certified Public Accountant with several years of experience in public accounting and as Controller of a propane gas company. In addition to Bachelors of Science - Accounting

and Juris Doctor Degrees, the PR has earned a Master of Accountancy degree and an LLM-Taxation degree. Mr. Sullivan is also a licensed real estate broker. He is originally from Laurens, South Carolina, and he and Ms. Kay both attended Lisbon Presbyterian Church, a small church in Mountville (Laurens County), South Carolina. (PR Exhibit A, 2/2/11 Transcript, Page 32, line 16 – Page 33, line 2). He also served as her attorney in various matters beginning in 1997, including an effort to divide the Farm in 2003.

The will essentially authorized and empowered the PR "by way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to PRs generally" . . . "to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my PR my seem best and to do all acts which my PR may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a Court order." (Emphasis added) (Item VII PR Exhibit B). In addition, the will's language regarding Copeland's option provides "the decision of my PR regarding the fair market price to be final" (emphasis added). (PR Exhibit B. Item IX).

C. Issues Confronted by the PR During the Administration of the Estate.

The primary asset of the Estate was a one-half undivided interest in farm consisting of 330-acre tract of land, partially planted with pine trees (the "Farm"). Moses owned some property which adjoined the Farm. In 2003, four years prior to her death, Ms. Kay retained the PR to divide the Farm. He corresponded with Brown and Moses to set up a meeting concerning the division and sharing of costs. (2/2/11 Transcript, Page 36, Line 17

– Page 38, Line 6, PR Exhibit C-2). Brown and Moses were unresponsive and the efforts to divide the Farm were discontinued at that time. (PR Exhibit C-1, Item 20)

After Ms. Kay's death, Brown and Moses were bitterly disappointed to learn that they did not inherit Ms. Kay's interest in the Farm. They questioned Ms. Kay's ownership interest in the Farm and her right to leave the property to anyone but them. (2/2/11 Transcript, page 44, line19 – page 45, line 21).

The PR understood that Ms. Kay intended that her real estate be sold and the proceeds distributed to the devisees. (2/2/11 Transcript, Page 125, lines 4 – 19). In addition to Ms. Kay's previous desire to divide the farm, the provision of the will referenced above refers to the "interest to be used to keep up the Milam-Kay plot." (PR Exhibit B, Item IV). The PR did not believe a simple deed of distribution to the beneficiaries would carry out Ms. Kay's testamentary intent (The beneficiaries would be minority co-tenants of the Farm with Brown and Moses, responsible for property taxes and insurance, and subject to liability. Because of the lack of marketability of their respective interest in the property, these heirs would be faced with filing a partition action or selling to Brown and Moses at a deep discount). The PR was also concerned about possible title issues. (2/21/12 Transcript, Page 118, line 21 – Page 123, line 22; Page 129, line 13 – Page 131, line 5).

Furthermore, at least three of the residuary beneficiaries, including Bart Heard, The Presbyterian Home of South Carolina, and Lisbon Presbyterian Church, together owning 70% of the residuary Estate, indicated that they desired that their share of the Estate assets be cash rather than an interest in the real estate. (2/2/11 Transcript, Page 48, line 17 – 22;

letter of R. Fuller, Exh. C-9, R.p. _____. Assuming Ms. Orias also desired cash, 80% of the residuary interests wanted cash rather than an undivided interest in real estate.)

With his knowledge of Ms. Kay's intent, the powers granted to him by the will, and the desire of the beneficiaries[1] to receive cash rather than an undivided interest in real estate, the PR set out to divide the property so that he could sell the Estate's land and distribute cash to the beneficiaries. The division was very complicated and involved the following issues:

i. In 1972, owners of the Farm granted to each other a "right of refusal" thereby creating a conflict with Copeland's Option to Purchase.
ii. Ms. Brown and Ms. Moses claimed Ms. Brown was entitled to approximately 5 acres of the Farm that had never been deeded to them.
iii. There were claims that Ms. Kay either did not have title and/or did not have the right to devise her interest to anyone other than the Heirs of W.H. Milam.

(PR Exhibit C-1, Paragraph 10; 2/2/12 Transcript, Page 46, line 23 – page 47, line 24; page 38, line 18 – page 39, line 20).

Furthermore, Copeland desired to exercise his option by purchasing 46.85 acres that adjoined his property. He made a written offer of $56,400 on April 16, 2008 (PR Exhibits C-5, C-1, Item 11). Later he agreed to pay $1500 per acre, the appraised value. (PR Exhibits C-1, Paragraph 11; C-11).

The PR discovered during this process that Respondent/Cross-Appellant Mary Moses had judgments against her. The PR personally looked at the records at the Laurens County Courthouse. He was concerned how these judgments might affect the title to the property. (PR Exhibit C-1, paragraph 17; 2/2/11 Transcript, Page 129, line 13 – Page 131, line 22).

[1] Other than Moses and Brown.

Another issue was what action was required by church protocol regarding the church's interest in the Estate to properly approve and consent to the sale of the real estate. The PR had several telephone conferences with Robert Fuller, and received and reviewed his "opinion" letter (PR Exhibit C-1, Paragraph 16; Exhibit C-9).

D. The PR's Actions to Address the Issues Confronted by the Estate

In an effort to sort out these claims, Mr. Sullivan obtained bids from surveyors and appraisers, and ultimately hired a surveyor and an appraiser. The Farm appraised at $614,000 (PR Exhibit C-6), the Estate's interest being $307,000. The Homeplace appraised at $64;000 (PR Exhibit C-7) and the Lot appraised at $20,000 (Plaintiff Trial Exhibit C-8).

In order to reach a resolution, the PR met several times with Charles Copeland and his wife, Patsy Copeland about Mr. Copeland's option. On Saturday evening, April 26, 2008, the PR met with the Lisbon Church Session (governing body) to discuss a compromise proposal. (PR Exhibit C-1, Paragraphs 18 – 19).

On May 2, 2008, the PR submitted a written proposal to Ms. Brown, Ms. Moses, and Mr. Copeland in an attempt to resolve the issues (PR Exhibit C-11). The proposal, subject to approval from the heirs and the Probate Court, was to convey 5 acres to Ms. Brown (as she claimed was hers) at no cost, convey 46.85 acres to Mr. Copeland that adjoined his property, and offer the remainder to Brown and Moses at the appraised value. No response was received from Brown and Moses. (2/2/11 Trial Transcript Page 67, lines 14 – Page 69, line 10; PR Exhibit C-1, Paragraph 20).

In another attempt to reach a resolution, the PR arranged a meeting with the beneficiaries, including representatives from Lisbon Presbyterian Church, Presbyterian

Home of South Carolina, Mary Moses, Martha Brown, and Paul Major, appraiser. The meeting was held in Newberry, SC at Paul Major's office on July 31, 2008. Reverend Hampton Hunter attended the meeting on behalf of the church. Penny Arnold attended the meeting on behalf of Presbyterian Home of SC. The purpose of the meeting was to discuss an equitable division of the Farm. Initially, Ms. Moses and Ms. Brown refused to discuss any proposal with Mr. Major and the PR as long as Reverend Hunter and Ms. Arnold were allowed to attend the meeting. Subsequently, the meeting was held and it was decided that Mr. Major would prepare a proposed division of the property and present a written proposal to the parties. (2/2/2011 Transcript, Page 69, Line 11 – Page 70, line 6; PR Exhibit C-1, Paragraph 21).

A proposal was ultimately prepared and presented to Ms. Moses and Ms. Brown. They retained counsel. No comment was ever received on the proposal, nor did Ms. Moses or Ms. Brown ever submit a counter-proposal on a division of the Farm. (PR Exhibit C-1, Paragraph 22).

E. The Partition/Declaratory Judgment Action, the Resolution of the Competing Claims, and the Sale of the Undivided Interest

Having not made progress toward a resolution after approximately 20 months, the PR filed a partition and declaratory judgment action on or about January 1, 2009 in the Circuit Court. The purpose of the litigation was to determine the rights of the parties arising out of Copeland's Option to Purchase, the Right of First Refusal and other claims made by Brown and Moses, clear the title to the property, and divide or sell the property so that the Estate could be settled. (The Complaint was amended on March 4, 2009. See PR Exhibit C-12A). Mary Moses and Martha Brown filed a counterclaim asserting a right to 5 acres. (PR Exhibit C-12B). The litigation ensued and the parties engaged in discovery.

After approximately 15 months, a mediator was retained to mediate the dispute. (2/2/1 Trial Transcript, Page 70, line 3 – Page 72, line 2; PR Exhibit C-1, Paragraph 23).

Throughout this time period, the PR took phone calls from people who were interested in the property and showed the Homeplace and Farm to potential buyers. (PR Exhibit C-1, paragraph 24).

In the summer of 2009, the PR and Rowland W. Milam, a relative of Moses and Brown, began discussions about a possible purchase by Milam of the Estate's interest in the Farm. The first offer received from Rowland Milam was forwarded to the beneficiaries on March 1, 2010. Milam offered $48,000 for the Homeplace, $4500 for the Lot and $224,410 for the Estate's interest in the Farm, approximately 71% of the appraised value. The offer included terms requiring the Estate to give general warranty deeds and pay for a termite inspection and be responsible for repairs. (PR's Exhibits C-1, Paragraph 26, C-13). Other offers and exchanges followed.

On the eve of mediation of the ongoing litigation, the PR reached an agreement to sell Rowland Milam the Estate's one-half undivided interest in the Farm, the Homeplace, and the Lot, subject to the necessary approval, if any, of the beneficiaries and the Probate Court. The sales price for the property was as follows: one-half undivided interest in Farm, $292,500; Homeplace, $57,000; and Lot, $17,500. The Estate was not responsible for any repairs and the type of deed was "quit-claim". (PR's Exhibit C-1, Paragraph 29).

The PR prepared three contracts which were signed and dated May 4, 2010. The total purchase price for all of the Property was $367,000, approximately 94% of the 2007/2008 appraised values. (PR's Exhibits C-1, Paragraph 30, C - 14.)

The PR prepared and obtained the consent of all interested parties to close the sale of the property subject to the terms of the Contract. (PR's Exhibits C-1, Paragraph 31, Exhibit C-15).

The PR prepared the deeds and attended the closing of the transactions in Laurens, South Carolina on July 9, 2010. (PR's Exhibits C-1, Paragraph 32, C-16). Through the efforts of the PR, there was no sales commission. The net proceeds collected by the Estate were $365,012.85. (See Settlement Statements, Exhibit C-16). Furthermore, the Estate was expressly relieved of any responsibility for roll-back taxes. (PR's Exhibits C-1, Paragraph 32, C-16, Addendum to Settlement Statements). Despite the downturn in the economy and the stagnant real estate market, the Estate realized almost 94% of the appraised value through the efforts of the PR, an "exceptional" result. (PR's Exhibit C-1, Paragraph 30; 2/2/2011 Transcript, Page 203, lines 6 – 24).

From September 1, 2010 until November 12, 2010, the PR made the final distribution of personal effects, met with beneficiaries, and sorted through the personal papers, pictures, books and remaining personal effects of Ms. Kay. (PR Exhibit C-1, Paragraph 33).

F. Reasonable Compensation and Reimbursement for Reasonable Costs Incurred by the PR

Item V(3) of the Ms. Kay's will provides "For its services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." (PR Exhibit B).

From Ms. Kay's death until August 31, 2010, the PR was an employee ("Of Counsel") with Collins and Lacy, PC, attorneys (the "Law Firm"). The PR retained the Law Firm to assist in the administration of the Estate. At the PR's request, the hourly rates

for attorneys working on the matter were reduced from $225 to $145. Additionally, at the PR's request, the invoices were discounted/written down in an amount exceeding $20,000. In addition, at the PR's request, the invoices reflect that the PR had 249.7 "no charge" hours so as to further reduce the fees to the Estate and to avoid doubling billing by the PR. (2/2/2011 Transcript, Page 61, line 19 – Page 65, line 12; See PR Trial Exhibit D, August 17, 2010 invoice, 173.3 hours plus August 16, 2010 invoice, 76.4 hours). Furthermore, the PR worked an additional 216.10 hours in this matter in addition to the time listed on the aforementioned invoices - a total of 465.80 hours. (See Rule 59 Motion to Re-open Record, Accept Additional Evidence, and/or to Alter or Amend Judgment.)

In order to determine a reasonable amount of compensation, the PR reviewed the statutory and case law on compensation of PRs, consulted with Alan Medlin, a professor at the University of South Carolina School of Law, teaching Trusts and Estates and a recognized authority in South Carolina on these issues. He also sought and relied on other counsel. (2/2/11 Trial Transcript, Page 144, line 5 – Page 146, line 9; Page 159, line 16 – line 24.)

At an hourly rate of $225 and based on 465.8 hours, the value of the PR's services rendered to the Estate through November 12, 2010 was $104,805. Based on the time involved, the issues and complications of the Estate administration, the litigation, the sale of the real estate (without retaining a real estate professional or paying a commission), his relationship with the client, his experience, knowledge and skills, and the results achieved, the PR determined that a reasonable fee for that three and one-half year period was $93,775, an amount which was paid through periodic draws. 2/2/11 Transcript, Page

173, lines 10 – 23; Page 174, lines 8 – 25; Page 172, line 2 – Page 173, line 9; Page 144, line 5 – Page 146, line 9;Page 77, line 13 – Page 79, line 16.)

In addition, the PR has continued to provide services to the Estate and incur expenses since November 12, 2011. These services include preparation of an Amended Proposal for Distribution, preparation for the hearing on the Petition for Settlement, preparation of accountings, filing of tax returns, and attendance at hearings. Expenses incurred include legal fees and expert witness fees. (2/21/2011 Transcript, Page 146, lines 10 – 22; PR Exhibits C-18,).

STANDARD OF REVIEW

"The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity." University of Southern California v Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners below. Dean v. Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993)

The appellate court is free to decide questions of law with no particular deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Furthermore, the interpretation of a statute is a question of law, which is reviewed de novo. Layman v State, 376 S.C. 434, 444 658 S.E.2d 320, 325 (2008).

ARGUMENT

I. The Circuit Court erred in affirming the Probate Court's erroneous decision requiring the PR to refund a substantial portion of his compensation because the PR's use of discretionary powers granted by the will and probate code was reasonable.

The will gives the PR broad powers and discretion to settle the Estate. See Item VII, PR Trial Exhibit B. SC Code §§ 62-3-704 and 62-3-1001 require the PR to meet certain deadlines, subject to extensions of time as may be granted. The PR complied with all deadlines, as extended, that were imposed by the Code, the Court, and/or probate administration. There is no evidence that the PR abused or acted outside of the powers granted under the will or acted in bad faith in any way. In fact, the Probate Court made a specific finding that "[it] did not find bad faith on the part of the [PR]". Final Order, page 4, item 16, R. p. _____. All of the actions of the PR to settle the Estate were reasonable. Despite the powers granted by the will and statute, the PR's personal and professional relationship with Ms. Kay, and his understanding of Ms. Kay's testamentary intent based on these relationships, the will, and his statutory and testamentary powers, the Probate Court impermissibly substituted its discretion for that of the PR as to what action the PR should have taken, i.e. deed out undivided interests in the real estate to the beneficiaries. In affirming this decision, the Circuit Court erred.

A. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he carried out the intent of the decedent.

The underlying purposes of the South Carolina Probate Code include (1) to discover and make effective the intent of a decedent in the distribution of property and (2) to promote a speedy and efficient system for liquidating the Estate of the decedent and making distributions to [her] successors. South Carolina Code Ann. §§ 62-1-102(b)(1) and (b)(2) (1976). "The paramount rule of will construction is to determine and give effect to the testator's intent." Holcombe-Burdette v. Bank of America, 371 S.C 648, 655, 640 S.E.2d 480, 483 (Ct. App. 2000) citing S.C. Code Ann § 62-1-102 (b)(2) (1976), which

provides "[t]he underlying purposes and policies of this Code are . . . to discover and make effective the intent of a decedent in the distribution of his property." "A testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy." Id. at 656, 483. In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator. Indeed, the rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself. Id.

"In determining the intent of the deceased, a court must always look first to the language of the will itself. The primary rule of ascertaining intent is that resort is first to be had to the instrument's language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." Id. at 656, 485.

After providing an Option to Copeland, the will gives no instruction requiring passage of the real property by devise. Instead, the will identifies residual beneficiaries and specifically grants to the PR the right to sell property among other things.

It was the understanding of the PR, based on personal history with Ms. Kay and specific terms of the will, that Ms. Kay intended for her real estate to be liquidated and the proceeds distributed to the various residuary beneficiaries. Prior to Ms. Kay's death, she retained the PR to seek partition of the property. At Ms. Kay's request, the PR wrote letters to co-tenants Brown and Moses seeking to have the real property divided. (PR Trial Exhibit C-2).

The will provides for a residuary share of the Estate to go to the "Lisbon Cemetery fund, absolutely forever, the interest to be used to keep up the Milam-Kay plot." (Emphasis

added. PR Trial Exhibit B, Item IV). The Probate Court ruled that the PR should have deeded out the real estate to the various beneficiaries rather than seeking to liquidate it. However, this bequest to the Lisbon Cemetery fund requires a distribution of cash to a fund that would earn interest as intended by Ms. Kay for the upkeep of the cemetery plot. It is questionable that a deed of distribution to a cemetery "fund" would have legal significance in that the "fund" has no independent legal identity as an entity to buy, own or sell real property. The PR in good faith understood that only liquidation would accomplish Ms. Kay's testamentary intent.

Furthermore, the will provides an Option to Purchase to Ms. Kay's neighbor Charles Copeland. While the option in the will (Item XIV) provided for 8 months the appraisals were not ready within 8 months. In deciding how to handle the distribution of the Estate it was within the PR's discretion to hold the opinion that a greater value to the Estate would be accomplished by working with Copeland in a manner to sell him all or some of the property. The will gave the PR broad powers to contract with respect with Ms. Kay's property and the PR dealt with the option granted to Mr. Copeland in such a way as to satisfy his claim against the real estate. (See Will of Marion M. Kay, Item VIII, PR Trial Exhibit B). Ultimately, Mr. Copeland consented to the sale releasing his claim and clearing the title. (PR Trial Exhibit C-15).

Finally, the will granted to the PR a power of sale in order to effect the liquidation and distribution of the real estate and effect the testamentary intent of Ms. Kay.[2] All of the foregoing supports the PR's discretionary determination that the real estate was to be sold

[2] See S.C. Code Section 62-3-906 (a), "[u]nless a contrary intention is indicated by the will, such as a power of sale, the distributable assets of an estate . . . " (emphasis added).

and the net proceeds distributed to the various residuary beneficiaries. As discussed below, statutory authority specifically allowed a partition action.

B. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he acted in the best interests of the Estate.

The Estate was complicated by competing claims to the real estate, including potential liens resulting from judgments against the beneficiary Moses, and the pre-existing (1972) Right of First Refusal. The ruling of the Probate Court seems to ignore, overlook or misapprehend the discretion given to the PR by both the will and statutory authority and would seem to prefer the desires and interests of two heirs above the other four. The Probate Court does not address how these issues would have been resolved through a deed of distribution nor does it even consider the burden that would be placed on other beneficiaries. The PR successfully resolved these issues after exhausting attempts to reconcile the parties amicably. In handling the Estate as he did, the PR achieved, as the Probate Court finds, an excellent result in the sales price. According to experts John Wilson and Paul Major, the PR "beat the market" by approximately $147,460 to $157,820. (2/2/2011 Transcript, Page 190 line 25 – Page 191 line 23, and Page 204, lines 12 – 15; Appendix D to Tab 10, R p. _____). (Also, see attached **Appendix A** - calculation of the result in selling interest in the 330 acres.) Additionally, beneficiaries Lisbon Presbyterian Church, the Presbyterian Home of South Carolina, Bart Heard, and Marla Orias would have been co-tenants - a result they did not want - paying real estate taxes, sharing in the maintenance of the property, and bearing responsibility for accidents on the property, while Brown and Moses would have controlled the property (since Brown and Moses as the Heirs of W.H. Milam owned the other 50 percent undivided interest, their

combined interest, when including that under the will, would have totaled 60 percent). These beneficiaries would have been placed in the position of filing a partition action themselves, continuing with the expense and risks of co-tenancy or selling to Moses and Brown at conceivably heavily discounted prices. As testified to by Paul Major, qualified by the Court as an expert "in the field of real estate appraisals and in the field of real estate - -agent work" (see 2/2/2011 Transcript, p. 202, line 15 – p. 203, line 1), undivided fractional interests on property similar to the real property at issue in this case, has a diminution of value of 30 percent to 35 percent. (2/2/2011 Transcript, p. 203, line 25 – p. 204, line 15).

This is a result that these beneficiaries did not want. See Testimony of Penny Arnold, Presbyterian Home of South Carolina, 2/2/2011 Transcript, Pages 213, Line 12 – Page 214, Line 2. Also see PR Exhibit C-9 letter dated April 21, 2008 from Robert Fuller.

C. The PR had the absolute right by statute to seek partition of the Farm property.

As stated above, the Church, The Presbyterian Home and Bart Heard representing 70% of the residual Estate interests, all expressed a strong preference to receive cash as opposed to an undivided interest in real estate. 2/2/2011 transcript, page 48, lines 12 - 22. See, testimony of Penny Arnold, Section II B, infra. S.C. Code Section 62-3-911 provides in part, "When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the Estate, the PR or one or more of the interested heirs or devises may petition the court prior to the closing of the Estate to make partition." The PR deemed that partition was in the best interests of the Estate and invoked the power granted by the probate code to file such an action. The Probate Court and Circuit Court erred as a matter of law in finding, and then affirming, that the PR

wrongfully filed an action for Declaratory Judgment and partition of the Farm and accordingly decreasing the amount of compensation he was entitled to.

D. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he acted on the advice of counsel and successfully addressed all competing claims to real estate and cleared up title defects.

The sale of the real estate was necessary to carry out the intentions of Ms. Kay and attempt to clear title defects. The will and other evidence, including letters from Ms. Kay before she passed away prove, that the testator intended for the real property to be sold and/or that the PR had a reasonable belief that such was the intent of Ms. Kay. The PR was in fact Ms. Kay's counsel for years prior to her death, had prepared the will, and had first-hand knowledge of Ms. Kay's intentions.

One purpose of filing the partition action and the Declaratory Judgment action, after numerous attempts to reach a compromise amicably, was to clear up title to the real estate and to determine the rights of the parties who had claims to the real estate. This was a bona fide purpose and completely within the powers of the PR as granted by the will and by statute. Item VII of the will empowers and authorizes the PR to "to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my Person Representative may seem best, and to execute and deliver any and all instruments and to do all acts which [he] may deem proper or necessary to carry out the purposes of this my will...". This language is perfectly plain and capable of legal construction. "In determining the intent of the deceased, a court must always look first to the language of the will itself." Holcombe-Burdette, 371 S.C. 16 656. Thus, the will provided the PR with the discretion as to take such action as he might choose if it were his

own property and as he did. Furthermore, if the PR had deeded the property by Deed of Distribution, the title to the real property, in the opinion of the PR would have been defective. The Court does not address the role of title insurance in real property transactions and did not consider the problems to be encountered by heirs who would have received a deed of distribution rather than a cash disbursement. During the administration of the Estate, the PR consulted with title counsel concerning these issues including insurability and marketability of title. (PR Trial Exhibit C-1, Paragraph 15.) Issues included (a) the competing right of "First Refusal" and "Option to Purchase," (b) the continuing dispute [predating the decedent's death] as to the real property, (c) the refusal of Charles Copeland who had the "Option to Purchase" to consent to any sale (until well after the initiation of the lawsuit and the execution of a contract), (d) the dispute as to the approximately five (5) acre tract, (e) the outstanding interests of the heirs of W.H. Milam, and (f) the competing interests of a Church and other non-profit in the real property per the decedent's will.

Furthermore, Ms. Kay's will expressly provides "Powers for PR". (See, Will, Item VII, PR Trial Exhibit B.) The powers are exhaustive and after providing a comprehensive list of powers which are described in the will as being "[b]y way of illustration and not of limitation and in addition to any inherent, implied, or statutory powers granted to PR generally, . . ." This provision regarding powers concludes with " . . . and to do all acts which my PR may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order." This provision not only gives extremely broad powers to the

PR but expressly grants the PR the discretion to use these powers as he "may deem just and proper." This language is perfectly plain and capable of legal construction.

Thus, the PR was granted the authority to make decisions, subjectively, not objectively. The Probate Court's Order overlooks or misapprehended the subjective discretion granted in that the Court's Order makes no such reference. The PR had both the discretion and statutory authority to file the partition. (As a further illustration provided to the PR by Ms. Kay's will, Item IX grants the PR discretion in reference to tax matters and elections; Item VIII provides that the PR shall act as trustee for beneficiaries under age 21 and provides that the PR "shall have with respect to each share or property so retained all the powers and discretions conferred upon it as PR" (emphasis added). The probate code does not restrict these powers and expressly defers to the will. See S.C. Code Ann. §62-3-715 (1976).

The lower courts hold that a deed of distribution was preferable to them and would have satisfied the PR's duties under the will. The lower courts overlooked the complications and potential defects in title that would have resulted from such a transfer and exposure of the PR to litigation over the transfer. As noted, there were competing claims to the real estate, including the claim of Brown and Moses to an interest in 5 acres of land belonging to the Estate. S.C. Code Section 62-3-709 specifically empowers the PR to "take possession of property or maintain an action to recover property or to determine the title thereto." In exercising this statutory power, the PR acted reasonably.

Section § 62-3-910, subsections (A) and (B), do not protect all parties to transfer against the claims or interests of others. Subsection (A) protects only the *purchaser*; Subsection (B) was added in 2000 to provide protection to a *purchaser for value* from the

PR and squarely places any liability on the PR. Neither Section 62-3-910, subsection (A) or (B) would prevent a title company from having to defend a purchaser in an action by a beneficiary, devisee or third party to challenge the purchaser's clear title including Brown and Moses' claim of a 1972 right of first refusal as asserted in their Answer and Counter Claim in the DJ/partition action.

A deed of distribution would not resolve these outstanding title defects. A deed of distribution is not an instrument of conveyance, so it cannot convey the interests of outstanding heirs. Further, it cannot resolve the disputes among the beneficiaries nor the competing rights and options. To use a Deed of Distribution would merely distribute uninsurable and unmarketable real property plagued with potential or real title defects. It might be simple but it would not be a solution here.

Based on the title issues involved in the Estate, the risk in insuring over these issues and the liability of the PR, the only prudent action to take with regard to the sale of the real property was to have all parties consent to the sale and/or to have the court's approval through a final order of a court of competent jurisdiction. This was the only logically safe option that would make the title insurable and marketable and provide reasonably for the competing interests and thus the procedure chosen by the PR in his discretion and as allowed by law. A mere deed of distribution or sale by the PR without court approval would leave the title issues unaddressed, thereby leaving a cloud on the title to the Estate's real property.

As a matter of law, the PR acted reasonably because he relied on counsel and used his discretion and powers provided by the will and by law as well as his understanding of testator's intent to sell the property. .

II. The Circuit Court erred in affirming the Probate Court's erroneous ruling that the PR was paid excessive compensation based on the Probate Court's determination that the PR did not use a proper method for determining the amount of reasonable compensation.

A. The PR's method for determining reasonable compensation was proper and should have been allowed because the amount was not subject to arbitrary statutory or arbitrary percentage limitations.

South Carolina does not have a definitive standard for assessing reasonable compensation for a PR when the will provides for "reasonable compensation". There is neither a statutory standard nor case law which defines this standard. The formula chosen by the PR in determining compensation where a will directs "reasonable" compensation should be adopted by this Court.

The Probate Court erred in limiting the PR's compensation to essentially 10% of the Estate and in not setting forth a standard, basis or method for evaluating and determining reasonable compensation. The Probate Court referenced SC Code § 62-3-719, which provides that, unless otherwise approved by the Probate Court for extraordinary services, a PR shall receive compensation not to exceed five percent of the personal property of the probate Estate plus the sales proceeds of real property. However, SC Code § 62-3-719 (c) provides that "the provisions of this Section do not apply . . . where the will otherwise directs." In this case Item V(3) of the will provides "For [his] services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses. (See Will, PR Trial Exhibit B, page 3). Reasonable compensation should be determined by an analysis of various such as the law relating to legal fees in South Carolina. Other jurisdictions have used such factors as the law pertaining to compensation for PRs. See, for example, Fla. Stat. § 733.617 (1973).

Also, see Estate of Painter v. First National Bank of Greeley, 567 P.2d 820 (1977) providing:

> The percentage method which existed in the statute prior to enactment of the [Colorado Probate Code] was based on the premise that the amount of work required in Estate administration is directly proportion to the value of the asses. See In re Estate of Bloomer, 43 N.J. Super, 414, 129 A.2d 35; In re Robinson's Will, 202 Misc. 231, 109 N.Y.S.2d 67. The General Assembly recognized the error of the premise when it enacted the CPC, accepting the reality that the duties of a PR and those employed by him if any, vary greatly depending upon numerous factors, only one of which is the monetary value of the Estate. Id at 822.

This Court should adopt a standard for determining reasonable compensation for a PR, and consider the following factors which are based upon the laws pertaining to compensation of a PR in Florida (Fla. Stat. § 733.617), as well as Rule 1.5 of the South Carolina Rules of Professional Conduct:

1. Time and labor required,
2. Time limitations imposed by client and/or circumstances,
3. Novelty and/or difficulty of questions/issues presented,
4. Skill required to perform the service properly,
5. Results obtained,
6. Nature and value of the assets that are involved,
7. Complexity or simplicity of the estate involved,
8. Promptness, efficiency, and skill with which the administration was handled by the personal representative,
9. Benefits or detriments resulting to the estate or its beneficiaries from the PR's services,
10. Responsibilities assumed by and potential liabilities of the PR,
11. Experience, reputation, and ability of the PR performing the service,
12. If the PR is a member of the South Carolina Bar and has rendered legal services in connection with the administration of the estate,
13. Other professional education, experience, or accolades of the PR
14. Likelihood that attorney's employment as PR will preclude other employment by the attorney,
15. Fees customarily charged in the locality for similar legal services by a personal representative with like skill, knowledge and experience,
16. Extraordinary services performed by the PR including, but not limited to sale of real or personal property, conduct of litigation on behalf of or against the estate, involvement in proceedings for the adjustment or payment of any taxes, carrying on

of the decedent's business, any special services which may be necessary for the PR to perform,

17. Any delay in payment of the compensation after the services were furnished,
18. Such other factors as a court may determine as reasonable to consider in a particular case.

If the above factors are applied by this Court, it will lead to the inevitable conclusion that the PR in the instant case exceeded the standards as set forth by Florida and Colorado law, and Rule 1.5 of the South Carolina Rules of Professional Conduct

Perhaps the strongest evidence presented supporting the reasonableness of the fees claimed by the PR's compensation and the difficulties in administering the Estate was the testimony offered by Penny Arnold.

Ms. Arnold was the only witness with experience in PR's fees and Estate work. Ms. Arnold was the Director of Charitable Foundation and Church Relations for The Presbyterian Home, one of the Estate beneficiaries. 2/2/2011 transcript, page 211, lines 15 – 25. In this role, she was the person that signed Release forms and receipts and worked with attorneys, bank trust officers and PRs. Ms. Arnold testified as follows that the Presbyterian Home preferred cash as opposed to an interest in land.

> The Board of Trustees . . . would have had quite a discussion and deliberation on receiving property with other heirs. We do not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds. And the proceeds from Marion Kay's Estate, would actually, at this point, pay for five days of resident aid for our residence [sic] who have simply lived longer than their resources have lasted. 2/2/2011 transcript, page 213, line 12 – page 214, line 2.

When asked if she had at any time been dissatisfied with Mr. Sullivan in his role as PR, Ms. Arnold responded:

> No, sir. We were really excited when we heard the amount of the sale of the property because that, as I said, that meant that we

would receive enough for the resident aid. Transcript, page 216, line 1 – 7.

When asked if she had any objection to the fee that the PR requested for his services, she responded, "No, sir." Later, when asked by opposing counsel if she was aware of the legal fees paid by the Estate, she responded, "Yes, sir." Transcript, page 216, lines 9 – 11, 18 – 25.

Ms. Arnold had seen first hand the difficulty faced by the PR in working with Brown and Moses to resolve the claims involving the property, as described by this exchange:

> Q. Ms. Arnold, did you ever attend any meeting with the other heirs to try to work out the . . . Was there a point in time when you recognized that there was a problem with taking the bequest and turning it into cash?
>
> A. Yes, sir. The heirs were all invited to the meeting that Mr. Major indicated that we had in July in Newberry. And Reverend Hunter and I took the opportunity to meet the opportunity to meet with the other heirs in Mr. Major's office at that time. No, we were not well received as being there at that time. And, unfortunately, we didn't know whether the meeting was going to happen or not because some of the other heirs were not happy that Reverend Hunter and I had been invited and were there. And, of course, as beneficiaries, we have a vested interest and we have to do due diligence also and hold up the interest of our entity, that is the beneficiary. And so it—things did not get off to a good start. Transcript, page 214, lines 3 – 21.
>
> Q. Let me ask it differently. Was it the ladies to my right, Ms. Brown and Ms. Moses?
>
> A. Yes. They—they were unhappy. They didn't know we were going to be there.
>
> Q. When you returned to your office, did you give any kind of a report to the other people there that were involved in this, the Board or others, about your perception of where things now stood?
>
> A. With the President of our organization. I just shared with her what had happened and the discomfort and that I was really sorry about that. And I said I

didn't believe this would be a short resolution. That we might not ever see any funds from this Estate.

Q. And if I understand it, you deal with Estates and PRs, it's part of your business as a daily occurrence? More or less, a regular occurrence?

A. Yes, sir.

2/2/2011 Transcript, page 215, lines 2 – 19.

Thereafter, beneficiary Martha Brown testified afterward as follows:

Q. Did you hear Ms. Arnold testify at the first hearing?
A. Yes.
Q. Did you hear her testify that she's been working with Estates and PRs as her job professionally since 1985.
A. Right. I did hear that.
Q. She does it on behalf of varies [sic] groups but within the Presbyterian Home setting as regard to (inaudible)
A. Right (inaudible).
Q. And didn't she help with dozens, hundreds, perhaps, of PRs in the state? Did you hear that testimony?
A. Right.
Q. But she didn't have any objection to the fees that Mr. Sullivan has asked to be compensated for in this case. Did you hear that testimony?
A. Yes. And, I guess we've got a difference of option [sic].
Q. Well, you would agree that she has a lot more experience dealing with Estates than you do, wouldn't you?
A. Probably so.

Transcript, 2/21/2011, page 115, line 11 – page 116, line 9.;

B. The PR's method for determining reasonable compensation was proper and should have been allowed because the amount was based upon several factors including time, novel issues, extraordinary services including litigation and sale of real Estate, skills required, and results achieved.

The Probate Court erred in finding that the PR "failed to provide any legitimate basis for fees he claimed and instead testified that he had no method or formula for determining the amount of the four draws he gave himself other than pulling a figure out of the air." Order dated May 24, 2011, page 3, paragraph 8. Furthermore, the court makes a manifest error of law and misstates the record in finding that he failed to provided the

[c]ourt with an alternate proposal for valuing his services." Final Order, page 4, Paragraph 13. The Probate Court misstates the testimony as the PR did in fact provide a legitimate basis for determination of compensation. The PR based his compensation on numerous factors including "the time [he'd] spent and the effort [he'd] put into it and the results that were obtained." 2/2/2011 Transcript, page 144, lines 5 – 8. " . . . The final [amount] was based on all the factors and the rule, the time, and the result obtained, and the novelty of the issues." (See, 2/2/2100 transcript page 144, line 19 – page 145, line 3.) When alluding to the "rule", the PR, a lawyer, was referring to factors used by our courts in determining a reasonable fee for lawyers. He also relied on probate law in Florida for factors to determine reasonable compensation. He consulted with Alan Medlin of the USC Law School and other counsel to determine reasonable compensation. 2/2/2011 transcript, Page 145, line 11 – page 146, line 9. (The court also misstates the number of draws. See, 2/2/2011 transcript, page 173, line 10 - 174, line 1, R. pp. ___.)

The PR testified in direct response to one of the Probate Court's questions that he had devoted more than 450 hours to the Estate administration and explained to the court how the hours were reflected in various exhibits, including the Law Firm invoices. (See, 2/2/2011 transcript, page 172, line 2 – page 172, line 16; _____. (See, PR Trial Exhibit D.) Based on these hours and a billing rate of $225 per hour, the amount earned on a lodestar basis was $101,250, $7,475 more than was actually paid to the PR. Here the PR had another factor for consideration regarding the relationship with the client. In this case, the PR belonged to the same small church as Ms. Kay and had represented her for nearly ten years at the time of her death.

In determining reasonable compensation, the PR relied in part, for guidance on Rule 1.5 of the Rules of Professional Conduct governing fees for lawyers, which lists the following factors (in addition to being a CPA, the PR is an attorney licensed to practice in South Carolina and with an LLM in Tax).

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The time involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

Rule 1.5, RPC, Rule 407, SCACR.

In addition, the PR used by analogy what courts in other jurisdictions consider to be extraordinary service in determining "reasonable compensation". As noted, the PR took into consideration a Florida statute, §733.617 Fla. Stat (1973), governing reasonable compensation of PRs. (See, Testimony of Edward D. Sullivan, 2/2/2011 Trial Transcript, Page 144, line 5 – Page 146, line 9.) These factors are similar to the Rule for Fees for lawyers in South Carolina but include litigation and the sale of real property. This Estate administration included routine matters dealing with personal effects, but more importantly, both litigation and the sale of real property. In this case, the PR filed a partition/declaratory judgment action to resolve the issues described above and finally negotiated and sold real estate, achieving an outstanding result, which effectively ended the litigation and resolved the issues. In doing so, the PR provided extraordinary service to the

Estate. Contrary to the Court's finding that the PR "pulled an amount out of the air," the PR weighed all of the foregoing factors to determine reasonable compensation for his services as provided by the will. (See, 2/2/2011 Transcript, including, Pages 144, Line 19 – Page 146, line 9; Page 174, lines 8 - 25.)

The lower courts erred in apparently overlooking that legal fees for Collins and Lacy were discounted by more than $20,000 at PR's request (PR Trial Exhibit D) and apparently gives that fact little, if any, weight or consideration. The Court also does not seem to give consideration to the PR's sale of the real estate without incurring a real estate commission of $36,700 (10% of $367,000). (The PR is also a licensed real estate broker and showed the real property to two potential purchasers before selling the Estate's interest to Rowland Milam.) (See, PR Trial Exhibits A and C-1, Paragraph 34 Item n.)

In addition, many of the issues were novel and the questions involved were very difficult to resolve among the parties involved. In addition, to the "usual" duties and responsibilities such as gathering and distribution of personal effects and filing tax returns, the PR in this case dealt with the competing claims of various individuals for over three and one-half years. He was faced with a will that provided an "Option to Purchase" with co-tenants that claimed a "right of first refusal". In fact, the co-tenants challenged the very right of the decedent to leave her interest to anyone other than them. They also claimed that five acres or so that were a part of the undivided tract should be deeded outright to them. The PR had the tract surveyed and appraised. He met with the co-tenants. He met with the appraiser and the co-tenants in an effort to reach an agreement on a division of the property. Finally, after 18 months, he was forced to file a partition action and a declaratory judgment action to divide the property and/or determine the rights of the parties. He

consulted with a title attorney. He was faced with judgments filed against one of the co-tenants which could have affected title to the tract.

The Probate Court erred in finding there were no novel issues in the administration of this Estate. The PR was confronted with competing interests of an Option to Purchase, a Right of First Refusal, and a claim to five acres by certain beneficiaries. See Will, Item XIV, PR Trial Exhibit B); and PR Exhibit C-4. The PR was advised that the Right of First Refusal may be void by the Rule against Perpetuities. (2/2/2011 Transcript 39, lines 7 – 20). These issues, if not novel, certainly added to the complexity and difficulty of settling the Estate in such a manner as to clear title to the real estate and to distribute sales proceeds to the beneficiaries.

Based on the evidence, the Probate Court made a specific finding that "[t]he [PR] did an excellent job in securing the sales price for the real estate . . . ". Final Order, Page 3, Item 6. The PR should be compensated accordingly because he achieved an outstanding result for the Estate by liquidating the real estate for an excellent price so that cash could be distributed to the beneficiaries in accordance with the intent of Ms. Kay and the preference of 70% of the residuary interests of the Estate.

By way of further analogy to legal fees, the South Carolina Supreme Court has held that under the state action statute a lodestar analysis is the proper method for determining an award of "reasonable" attorneys' fees and can be used by analogy for the services of a PR. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case and [initially] is calculated by multiplying a reasonable hourly rate by the reasonable time expended." Layman at 57. In this case, an hourly rate of $225 for an attorney with The PR's exemplary credentials is reasonable. Given the complexities

involved in partitioning the property and selling the real estate, 465.80 hours is also reasonable. (The PR worked three and one-half years to partition the property and sell the real estate, a period of approximately 175 work weeks or 875 work days. 465.80 hours spread over 875 work days is .53 hours or only about 30 minutes per day on average the PR devoted to the administration of the Estate.) The lodestar calculation is therefore $105,367.50. Using this lodestar calculation as a starting point for a reasonable enhancing the lodestar figure, though a multiplier is necessary to reflect the exceptional result. (Id., holding that a multiplier of 1.25 was appropriate to arrive at a reasonable fee). In this case, using a multiplier of only 1.10 would yield a fee of $115,904.25 or $22,129.25 more than the paid to the PR.

Lastly, the PR has in excess of 25 years practicing law, having been admitted to the South Carolina Bar in 1988. In addition, he is a Certified Public Accountant with several years of business, tax and accounting experience, and has a Master of Accountancy degree and an LL.M.-Taxation degree. The PR is also a licensed real estate broker. His billing rate of $225 per hour is reasonable, and his total compensation of $93,775 through November 12, 2010, is reasonable when the relevant factors as outlined above are taken into consideration.

C. The PR's testimony concerning the time spent administering the Estate is substantiated by other evidence including exhibits provided to the court, testimony of beneficiaries and the PR's efforts achieving an excellent sales prices for the real estate. . . . . .

Contrary to the court's ruling, the evidence supports that the PR worked more than 450 hours on the Estate. The Law Firm invoices reflect some of the services provided and the number of hours that the PR worked for the Estate. 249.7 of these hours were "no charge" by the law firm because they were performed by the PR. (See, PR Trial Exhibit D,

August 17, 2010 invoice, 173.3 hours plus August 16, 2010 invoice, 76.4 hours, R. pp. _____.) These "no-charge" hours are also set forth in Grounds for Appeal, Appendix B, R. pp. _____.

On the day before the hearing, the PR provided to the Probate Court and opposing counsel a comprehensive affidavit with supporting exhibits setting forth the issues confronted during the administration of the Estate, a detailed analysis of the PR's time spent administering the Estate and the basis for his compensation. Included in this affidavit was Exhibit E reflecting 216.10 hours of time spent on the Estate in addition to the 249.7 listed above. These hours were referenced by the PR in response to questions from the Probate Court. See 2/2//2011 Transcript, Page 172, Line 15 – Page 173, Line 9. See aforementioned "Exhibit E", Grounds for Appeal, Appendix C, R. pp. ___. The court denied to admitting the affidavit into evidence requiring the PR to testify. It was intended that all of the exhibits attached to the affidavit be admitted into evidence during his testimony, however, "Exhibit E" pertaining to a portion of the PR's time during administration of the Estate was apparently inadvertently omitted. Exhibit E was referenced in the PR's Post Trial Brief clearly reflecting that it was believed to have been admitted into evidence during the hearing. (Post-trial Brief, R.pp.___.)

It is error for the court to find that it was not presented with a basis for determining the PR's compensation. In addition to his testimony, the PR provided a pre-hearing brief which clearly sets forth in detail the PR's method (or formula) for determination of his compensation. (Memorandum in Support of Petition for Settlement, R. pp.____) The testimony in the hearing was consistent with the brief.

The PR testified in detail for several hours about his education and work experience, degrees, the results achieved and the factors used in determining his compensation. Why the Court ignored this testimony in its ruling is unknown.

During direct examination by the Probate Court about his time, the PR made references to time reflected on an exhibit as the time spent in addition to that listed as "no charge" on invoices, trial Exhibit D. (2/2/2011 Transcript, Page 172, line 2 – Page 172, line 9). The Court did not inquire further. It is error for the Court to find the PR's time is unsubstantiated.

The Probate Court did not seem to recognize the entries on the Law Firm bills as documenting time of the PR's administration of various aspects of the Estate. "Exhibit E" is documentation of time recorded by the PR on other matters related to the Estate. This was an Exhibit to the Affidavit of the PR submitted but not accepted by the Court prior to the hearing. The Court should have considered this documentation as substantiating the time spent on behalf of the Estate.

The Probate Court's ruling that the PR did an excellent job in securing the sales price for the real estate does support in part the reasonableness of the amount of compensation paid to the PR. While result is not the only factor in determining a reasonable fee, it should be given great weight. The result obtained by the PR was in fact outstanding and exceeded the market by $147,000 or more. It appears, however, this fact, was given very little, if any, weight by the Court.

III. The Circuit Court erred in affirming the erroneous ruling by the Probate Court because a refund of monies by the PR to the Estate would unjustly enrich one or more of the Estate beneficiaries who requested cash from the Estate and have benefitted from the services of the PR.

"Restitution is a remedy designed to prevent unjust enrichment". Sauner v Public Service Authority of South Carolina, 354 SC 397, 409, 581 S.E.2d 161, ____ (2003) citing Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984). "To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value". Id. citing Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct.App.1988).

In this case, a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly the Probate Court's ruling unjustly enriches these beneficiaries. In addition, the unwillingness of Brown and Moses to co-operate with a division of the Estate's property is the primary reason the Estate was not settled almost two years earlier. If not for their contentiousness, including the ongoing claims relating to rights of first refusal, a claim for five acres, the unwillingness to join in a sale of a portion of land to Copeland or to agree to, or propose a division of the property, or the matter concerning unsatisfied judgments against Moses, the administration would not have taken three years and six months requiring additional devotion of time and expense on the part of the PR. Ultimately, the real estate was sold at a high value and all title issues were cleared up by the PR avoiding possible future claims against the beneficiaries.

The PR conferred a non-gratuitous benefit on the beneficiaries by liquidating the real estate so that cash distributions could be made, avoiding title issues and claims against the real estate and securing an excellent price for the real estate. All of the beneficiaries

realized value from the benefit of the PR's' services. It would be unjust and inequitable for these beneficiaries to retain the benefit of the PR's services without just payment for the reasonable value of the services. In this regard, a refund of compensation by the Persona Representative would unjustly enrich all of the beneficiaries.

Additionally, all of the beneficiaries were aware of the PR's actions and desire to effect the intent of Ms. Kay to divide and sell the real estate for years, yet no one, including Brown and Moses who were represented by counsel, ever asserted any challenge to the PR's actions in Probate Court. Any position taken against the amount of the PR's fees based solely on his actions are waived and precluded by the doctrines of estoppel and ratification.

IV. The Circuit Court erred in affirming the Probate Court's erroneous ruling requiring the PR to refund a portion of his compensation because Brown and Moses did not petition the Probate Court to review the PR's compensation.

SC Code Section 62-3-721(a) provides the procedure seeking the review of PR compensation. This section provides "[a]fter notice to all interested persons, on petition of an interest person, ... the reasonableness of compensation determined by the PR for his own services, may be reviewed by the court. Any person who has received excessive compensation from an Estate for services rendered may be ordered to make appropriate refunds." SC Code Section 62-1-201 (34) provides "'Petition' means a complaint as defined by the rules of civil procedure adopted for the Circuit Court. A petition requires a summons and is governed by and subject to the rules of civil procedure adopted for the Circuit Court and other rules of procedure in this title." SCRCP 8(a), Claims for Relief, provides, "a pleading which sets forth a cause of action . . . shall contain (2) a short and

plain statement of the facts showing that the pleader is entitled to relief and (3) a prayer or demand for judgment for the relief to which he deems himself entitled."

Moses and Brown did not follow this procedure for requiring a review and a refund. No pleadings were filed an accordingly the PR was not given reasonable notice as to claims of Moses and Brown. Had they followed the proper statutory procedure, additional testimony and other evidence could have and would have been presented, including the testimony of title counsel Teri Stomski, if proper procedures had been followed for purposes of requesting a refund. (See, Affidavit of Teri K. Stomski, Rule 59 Motion, R. pp. ___.) Accordingly, the PR was denied due process rights to reasonable notice and an opportunity to be heard on the issues that were raised.

V. The Circuit Court erred in affirming the Probate Court's erroneous ruling that the PR was not entitled to be reimbursed for fees and expenses as additional compensation for attending the hearing on the Petition for Settlement and the ongoing efforts to settle the Estate.

A. The will provides for the PR to be reimbursed for reasonable costs incurred during the administration of the Estate.

Pursuant to the express provisions of the will, the PR is entitled to reimbursement for costs incurred as well as reasonable compensation for ongoing services provided to the Estate. Counsel for PR at a hearing requested by two heirs on PR's Petition for Settlement should be included as reasonable – particularly the expert witness fees of Real Estate Appraiser, Paul Major. At the hearing, when the PR sought to introduce evidence on appraisal, Counsel for Brown and Moses insisted that he be allowed to examine Mr. Major about Mr. Major's real estate appraisal. See 2/2/2011 Transcript P. 55, Line 3 – Page 58, Line 18. Neither the will nor SC Law require a PR to "prevail" at a settlement hearing as a

pre-condition to the Estate paying reasonable costs including attorney's fees, expert costs, witness fees, and expenses.

B. The probate code provides for the PR to be reimbursed for reasonable costs incurred during the administration of the Estate.

SC Code § 62-3-720 provides, "[if] any PR or person nominated as PR defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the Estate his necessary expenses and disbursements including reasonable fees incurred." Brown and Moses continuously pursued a claim for five acres from the Estate, successfully resisted by the PR. He was required to attend hearings on behalf of the Estate. In doing so, he appropriately chose to be represented by counsel. The Probate Court made a specific finding that the PR did not act in bad faith during the administration of the Estate. The Probate Court denied the PR's request for reimbursement of costs and ordered that he be responsible for legal fees incurred in connection with the hearing as well as witness fees and half of the court reporter costs. SC Code Section 62-3-720, however, entitles the PR to be reimbursed for these legal fees and costs. Accordingly, the Probate Court erred in ruling otherwise and in holding that the PR needed to "prevail" in order to have attorney's fees, costs and expenses paid by the Estate.

C. Preparing for, and attending the hearings on the Petition for Settlement, as well as retaining counsel for the hearing, are reasonable costs incurred by the PR.

The Probate Court erred in denying fees and reimbursement of costs to the PR for preparation for and attendance on the petition for settlement as this is in direct contravention of the provisions of the will. A hearing on the PR's Petition for Settlement was requested by two interested persons, Brown and Moses. As such, the PR was required to be there and be prepared to present his Petition for Settlement.

Furthermore, the Probate Court erred in disallowing PR's trial expenses as the will provides for reimbursement of reasonable expenses. See Will, PR Trial Exhibit B, Item V(3). The PR did not have an alternative. Once the hearing was requested it necessitated both his appearance and preparation for the appearance. SC Code Section 62-3-1001 (a) (3) provides in part " a PR must file with court . . . a petition for settlement of the Estate . . ." Furthermore, Section 62-3-1—1(c) provides " . . . if any interested person files with the court a demand for hearing . . . , the court may enter its order or orders only after notice to all interested persons and hearing." Accordingly, the PR had to give notice of the hearing to all of the interested persons as required by the court, prepare for the hearing, and travel from his home in Columbia, SC to Laurens, SC and attend the hearing. His attendance was mandatory, and he is entitled to compensation for services rendered and reimbursement for reasonable expenses, including legal fees, witness fees, court reporter expenses and travel costs. (See, PR Trial Exhibits, N-S.)

Furthermore, PRs are justified in incurring necessary and legitimate expenses in the defense of their course of procedure in good faith when attacked while in office. Estate of Breeden v Gelfond, 87 P.3d 167 (2003) citing In re Estate of Phipps, 713 P.2de 412 (Colo. App. 1985), Tuckerman v. Currier, 54 Colo. 25, 129 P. 210 (1912) and Weidlich v Comley, 267 F.2d 133, 134 (2d Cir. 1959) ("When the [PR's administration of the assets is unjustly assailed it is a part of his duty to defend himself, for in so doing he is realizing the [decedent's] purpose). The Probate Court made a specific finding that the PR did not act in bad faith. Furthermore, Brown and Moses continued to make a claim for five acres of the Estate's property (or its monetary equivalent), successfully resisted by the PR, until the Probate Court ruled otherwise almost one and a half years after the Petition for Settlement

was filed. Accordingly, the PR is entitled to be reimbursed for his expenses, including legal fees, witness fess, and court reporter costs.

VI. The Probate Court erred in awarding fees to Counsel for Brown and Moses.

The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintain a suit for the creation, recovery, preservation, or increase of a common fund or common property. Layman,, 368 SC at 452.. However, because the PR compensation was reasonable in this case, the common fund doctrine is not applicable because there is no common fund.

Furthermore, Brown and Moses have not maintained a suit for the creation, recovery, preservation or increase of a common fund or common property. By letter to the Probate Court, they requested a hearing on the Petition for Settlement. While the probate code provides for actions for the disgorgement of fees or expenses by the filing of a petition, Brown and Moses did not do so. They filed no Petition.

Additionally, the common fund doctrine provides for fees for those whose efforts are made for the benefit an entire group or class. In this case, Moses and Brown were motivated by their self-interest as evidenced by their ongoing pursuit of their claim for five acres from the Estate.

Counsel for Brown and Moses submitted an invoice that goes back to January 2008. In fact, the charges appear to include 18.30 hours ($3660) that pre-date the Petition for Settlement and are not related to the Petition for Settlement or the request for hearing in this matter. Furthermore, it appears from a review of the invoice that Counsel for Brown and Moses also included in his charges at least .60 hours (4/4/11 – 4/5/11 entries) or $120

for time related to preparation of a "Motion to replace PR", clearly an inappropriate charge since this motion was to benefit his clients only and subsequently denied.

It is inequitable and unjust for the Probate Court to award counsel for Brown and Moses in March of 2011, $19,800 for representation in this proceeding which was only requested in December 2010 while the PR worked for the Estate since May 2007, achieved an excellent result and would receive only $51,300 under the Court's ruling. Further, the fees awarded include time, in December 2008 related to the Declaratory Judgment/Partition Action.

The Probate Court erred in accepting an affidavit of counsel for Brown and Moses in support of his requested fees but refusing to accept the PR's affidavit resulting in manifest injustice and unfairness.

The Probate Court erred in awarding fees to counsel for Brown and Moses and ordering the PR to refund a substantial portion of his fee because in doing so the disparity between the awards to counsel for Brown and Moses and the PR is manifestly unjust given the respective length of engagements, efforts, and results of their services.

VII. The Circuit Court erred in affirming the Probate Court's erroneous denial of PR's Rule 59 Motion.

A. The Probate Court ruling that the time claimed by the PR was not substantiated is erroneous as a matter of law.

"The denial of a motion for a new trial is within the trial judges' discretion and will not be reversed on appeal absent an abuse of discretion." Waring v Johnson, 341 S.C., 248,256, 533 S.E.2d 906, 910 (Ct. App. 2000). However, "the exercise of that discretion must be in accord with sound legal principles and practice." Harrington v. Nicholson, 182 S.C. 38, 41, 188 S.E. 372, 373 (1936). "An abuse of discretion arises when the trial court

was controlled by an error of law or when the order is without evidentiary support." Miller v Miller, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting Townsend v . Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003). (See also, PR's Rule 59 Motion and Supporting Memorandum, R. pp. _____.)

The trial court's order is without evidentiary support in that the PR's time devoted to the Estate was substantiated by his testimony, the time entries included on Trial Exhibit D, and "Exhibit E" which were referenced by the PR in response to the court's direct examination but inadvertently omitted from admission into the record. In order to prevent manifest injustice, the trial court should have taken into consideration the time reflected in Exhibits D and E, as well as the time sheets which were submitted to the Court. The court should have also considered the Affidavit of Teri K. Stomski who advised the PR during the administration about title issues surrounding the Estate's property and the need to clear title by filing the partition action.

B. The Probate Court's rulings were controlled by errors of law.

The trial court also abused its discretion because it was controlled by errors of law in its misinterpretation and misapplication of SC Code § 62-1-102 pertaining to discovering and making effective the intent of decedent, SC Code § 62-3-719, pertaining to compensation of PRs and SC Code § 62-3-720, pertaining to reimbursement of PRs for expenses as well as the express provisions of Ms. Kay's will providing for reasonable compensation and reimbursement for reasonable expenses, and failing to recognize that SC Code § 62-3-911 expressly allowed for the filing of a partition action. Accordingly, the trial court should have taken into account the errors cited by the PR's Rule 59 Motion, considered the additional evidence, approved the Petition for Settlement, and approved the

PR's request for compensation for additional services as well as reimbursement for legal fees and costs.

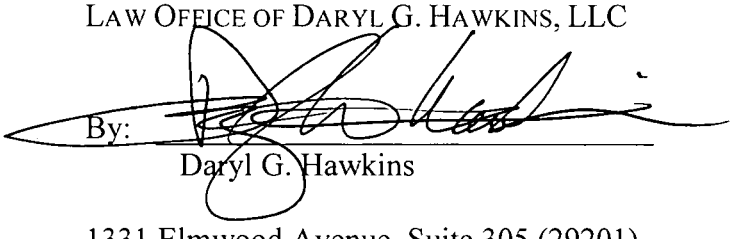
CONCLUSION

For the foregoing reasons, the orders below should be reversed to the extent they require a refund of compensation by the PR and deny payment for additional services to the Estate and reimbursement for the fees and costs incurred by the PR, and the Petition for Settlement and Proposal for Distribution approved subject to the further award of fees and costs to the PR in accordance with the terms of the will, and the case remanded and orders vacated insofar as they are inconsistent with the foregoing. The case should be remanded for final accounting/settlement and distribution of remaining assets.

Respectfully submitted,

LAW OFFICE OF DARYL G. HAWKINS, LLC

April 4, 2014

By: 

Daryl G. Hawkins

1331 Elmwood Avenue, Suite 305 (29201)
Post Office Box 11906
Columbia, South Carolina 29211
803.733.3531 Tel
803.744.1949 Fax

Attorneys for Appellant-Respondent
Edward D. Sullivan, as PR
of the Estate of Marion M. Kay

Calculation of Result Obtained by Personal Representative
in Selling the Estates' ½ interest in 330 Acres

Sales Price per Acre	$ 1,629	
Comparable sales price	(1,112)	per Wilson testimony, Transcript p. 191, line 1-15
	$ 517	
	÷ 2	to account for ½ undivided interest
	258	
	X 330	Acres
	$ 85,300	Gross amount above comparables before consideration of Market Discount due to undivided interest per Wilson testimony

Sales Price	$ 292,500	
	(85,300)	Calculation above
	$ 207,200	Market Value
	30%	Market Discount per Major testimony, Transcript p. 204, Line 15
	$ 62,160	30% Market Discount

Sales Price	$ 292,500	
	(85,300)	Calculation above
	$ 207,200	Market Value
	35%	Market Discount per Major testimony, Transcript p. 204, Line 15
	$ 72,520	35% Market Discount

Discounted Market Value with 30% Discount	Discounted Market Value with 35% Discount
$ 207,200 Market Value (62,160) 30% Market Discount $145,040 Discounted Market Value	$207,200 Market Value (72,520) 35% Market Discount $134,680 Discounted Market Value

Excess of Sales Price above Discounted Market Value (30% Discount)	Excess of Sales Price above Discounted Market Value (35% Discount)
$292,500 Sales Price (145,040) 30% Discounted Market Value **$ 147,460**	$292,500 Sales Price (134,680) 35% Discounted Market Value **$ 157,820**

The price obtained by the PR exceeded the market by approximately $147,460 - $157,820 despite the downturn in real estate sales and the worst economic recession since 1933.

APPENDIX A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-002319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

Civil Action No. 2012-CP-30-258
The Honorable Frank R. Addy, Circuit Court Judge

In the Matter of the Estate of Marion M. Kay

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

vs.

Martha Brown and Mary Moses..... Respondents-Appellants.

PROOF OF SERVICE

I certify that I served the Initial Brief of Appellant-Respondent via U.S. Mail upon:

John R. Ferguson, Esquire
Cox Ferguson & Wham LLC
PO Box 286
Laurens, SC 29360-0286

LAW OFFICE OF DARYL G. HAWKINS, LLC

Sheri H. Neely, Legal Assistant

April 4, 2014