

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. KayAppellant-Respondent,

vs.

Martha Brown and Mary Moses Respondents-Appellants.

**RESPONDENT'S INITIAL BRIEF OF
APPELLANT- RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in affirming the Probate Court's decision that the Personal Representative's good faith efforts to settle the estate, his exemplary credentials and good standing in the Bar, his excellent work in securing a sales price for real estate, and approval by beneficiaries support an award of compensation for services rendered as intended by the will?
- II. Did the Circuit Court err in affirming the Probate Court's decision to award the PR compensation for services rendered as intended by the will because the findings of the Probate Court offered by Brown and Moses to negate the award were not supported by the evidence and applicable law?
- III. Did the Circuit Court err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all costs associated with the appeal or post-judgment interest?
- IV. Did the Circuit Court err in affirming the Probate Court's decision to limit its award of legal fees to counsel for Brown and Moses?
- V. Did the Circuit Court err in not addressing the effect of the PR's settlement with three beneficiaries which was not properly before the Court?

INTRODUCTION

This case involves rulings by the Probate Court and Circuit Court on appeal related to compensation of the Personal Representative (PR), the costs of the proceeding and appeals, awards or denials of attorney's fees and Respondents-Appellants Brown and Moses attempts to raise some issues on appeal not properly raised below.

Respondents-Appellants Martha Brown and Mary Moses were bitterly disappointed when they learned they did not inherit the entire estate of Marion M. Kay. See, 2/2/2011 Transcript, page 44, line 19 – page 45, line 21; 2/21/2011 Transcript page 94, line 2 – page 95, line 13; PR Hearing Exhibit C-3, Item 9. Ms. Kay chose to leave half of her estate to her church and its Cemetery Fund (25% to Lisbon Presbyterian Church and 25% to its Cemetery Fund), 10% to a retirement community center, The Presbyterian Home of South Carolina, and 10% each to her step-grandchildren Bart Heard and Marla Orias. Brown and Moses were also each named as 10% beneficiaries. Ms. Kay also granted an option on real estate to a neighbor, Charles Copeland. See, Will, PR Trial Exhibit B, Item IV. This case is about the disputed claims to Ms. Kay's property, the efforts of the PR to sort out these claims and carry out Ms. Kay's testamentary intent, and the amount of compensation as provided by the will to be paid to the PR for his successful efforts.

Ms. Kay owned a ½ undivided interest in a 330 acre tract in Mountville, SC (the "Farm"). See, PR Trial Exhibit C-17, Supplemental Inventory and Appraisement; Brown and Moses together owned the other ½ undivided interest.¹ See, PR Trial Exhibit C-1, Item 1. Upon learning of the testamentary intent of Ms. Kay, Brown and Moses made

¹ The ownership of the Farm was actually listed in the register of deeds and county records as "Marion M. Kay and The Heirs of W.H. Milam." Brown and Moses claim their interest as the heirs of W.H. Milam. See, PR Exhibit, C-1, Par. 1.

various claims relating to the Farm, including first refusal rights, that Ms. Kay had no right to leave her interest in the Farm to anyone other than them, and a claim for an unspecified five acres in the Farm that allegedly were due to be given to Brown. See, 2/2/2011 Transcript, Page 44, line 19 and Page 45, line 21; PR Trial Exhibit C-1, Item 10. During the administration of the Estate, Brown and Moses resisted the good faith efforts of the PR when he attempted to carry out the testamentary intent of Ms. Kay to divide the Farm and liquidate and distribute proceeds to all of the Estate beneficiaries. See, 2/2/2011 Transcript, Page 44, line 19 - 49, line 11; Page 67, line 14 – page 72, line 22. The resistance of Brown and Moses was time consuming and costly to the Estate.² To try and resolve the competing interests and clear title to the property, the PR initiated a declaratory judgment action including a claim to partition the disputed Farm. The PR was ultimately able to resolve the various claims to the Estate's interest in the Farm and sell the Estate's interest at an outstanding price (approximately 94% of the 2007 appraised value though sold in the post-economic crash of real estate values) so that the proceeds could be distributed to the estate beneficiaries. See, 2/2/2011 Transcript page 192, lines 5 – 15; page 203, line 14 – 24.

Upon the PR's filing of the Petition for Settlement, Brown and Moses requested a hearing. The hearing(s) resulted in the Probate Court finding that the PR should not have pursued liquidation of the Farm and other real estate and simply deeded the property to the estate beneficiaries, despite the powers granted to the PR by the will and statutory provisions and the desires of at least 70% of the residual interests in the Estate. Based on

² The PR sent a letter to Brown and Moses on May 2, 2008 outlining a compromise proposal. See, PR Trial Exhibit C-11. The Estate had been opened less than 1 year. The amount of PR compensation paid through December 31, 2007 was \$7,500. Attorney's fees paid through December 31, 2007 were \$12,196.

this finding, the Court ordered the PR to refund approximately \$40,000 of compensation and denied his request for fees in preparing for and attending the hearing(s) and his request for reimbursement of expenses relating to the hearing(s), including legal fees and expert witness fees. The Court also ruled that counsel for Brown and Moses was entitled to be paid \$19,860 in legal fees from the Estate pursuant to the Common Fund Doctrine. After a hearing on the PR's Rule 59 motion, the Court ordered Brown and Moses to pay one-half of the transcript costs incurred during the litigation. The net gain to Brown and Moses from the litigation based on the Court's orders is approximately \$1,000 each.

The PR appealed the orders of the Probate Court as well as the orders of the Circuit Court affirming the Probate Court. This Respondent's Initial Brief of Appellant-Respondent is offered in the cross appeal of Brown and Moses.

STATEMENT OF THE CASE

Marion M. Kay died on May 3, 2007. On November 12, 2010, 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 hearing, the PR testified as to the complexity of the issues confronted in the administration, the hours he had devoted to the administration, the results achieved, and his method for the determination of his compensation. The PR based his compensation on several factors, including his time, billing rate, the issues confronted, the work involved, his relationship

with Ms. Kay, and the results achieved. The PR also presented the estate inventory and accountings, invoices for legal fees and expenses, and addressed questions and provided explanations about the amount of and need for the charges, including the miscellaneous charges by the Collins and Lacy Law Firm (“Law Firm”) questioned by Brown and Moses that were offset by more than \$20,000 in discounts and charge-offs, and the hours of the PR that were reflected in the invoices but not charged as legal fees.

The hearings resulted in the Probate Court’s order ruling that (1) the PR is entitled to a reasonable fee of \$51,300, which equated to about 10% of the Estate value; (2) the PR is 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); (3) the PR is not entitled to compensation for preparing for and attending the hearing and additional services, or reimbursement of legal fees and witness fees; and (4) counsel for Brown and Moses is 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 timely 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.³ After a hearing on the Rule 59 motion, the Court upheld its earlier decision and declined to re-open the record to

³ 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 timely filed Rule 59 motion.

allow in certain timesheets offered by the PR as well as allow testimony or 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 an interest in an unspecified five acres of the Farm 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 pursuant to statute. 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 timely filed and served his notice of appeal in this matter on or about October 24, 2013. He later timely filed and served an amended notice of appeal on October 30, 2013. Brown and Moses served a notice of cross-appeal on October 29, 2013.

A more comprehensive Statement of the Case is set forth in the Initial Brief of Appellant-Respondent in his appeal and is incorporated herein by reference in its entirety.

STATEMENT OF FACTS

A comprehensive Statement of Facts is set forth in the Initial Brief of Appellant-Respondent and is also incorporated herein by reference in its entirety.

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). “An action in accounting sounds in equity.” Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 696 S.E.2d 599 (S.C. App. 2010) citing Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009).

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

As a matter of law, PR's are given both specific and general authorities in the administration of Estates. See, generally, SC Code § 62-1-100, et seq., and more specifically, SC Code § 62-3-715. (Transactions authorized for personal representatives) and 62-3-911 (allowing partition actions by a PR where two or more persons would have undivided interests in real property). The failure to recognize and give weight to those authorities is an error of law.

I. The Circuit Court did not err in affirming the Probate Court's decision that the Personal Representative was entitled to compensation for services rendered as intended by the will because the Personal Representative used his good faith efforts to settle the Estate, is well qualified, achieved an excellent sales price for the real estate, and his amount of compensation was approved by beneficiaries.

Item V(3) of Ms. Kay's 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 factors such as the law relating to legal fees in South Carolina. See, Rule 1.4, RPC, Roy 407, SCAR. Also See, Layman, supra. Other jurisdictions have used such factors as the law pertaining to compensation for personal representative. See, for example, Fla. Stat. § 733.617 (1973).

In this case, the Probate Court made specific findings supporting an award of reasonable compensation of \$51,300 despite his disagreement with PR's actions to liquidate the estate based on the PR's understanding of Ms. Kay's intent and the desire of 70% of the residuary interests. These findings include (1) the outstanding result in the sale of real estate; See, May 24, 2011 Order, page 3, Para. 6. (2) the approval of beneficiaries; See, Order, page 4, paragraph 14; (3) the exemplary credentials of the PR; See, Order, page 4, para 15; and (4) the good faith efforts of the PR. See, Order, page 4, para. 16. There is substantial evidence in the Record to support the Probate Court's award of fees.⁴

The evidence is clear and well supported factually in the Record that the PR acted in good faith. He sought and relied upon legal counsel and other advisors. See, PR Trial Exhibit C-3, Para. 15, 34-z, 2/2/2011 Transcript, page 145, line 23 – page 146, line 9; page 159, lines 16 – 24; page 174, lines 8 – 25. He attempted to address all claims to the real estate, first through negotiation and compromise and secondly by filing a partition/declaratory judgment action. See, PR Trial Exhibits C-11, C-12A, C-3, para. 23. At his request, his legal counsel reduced their normal billing rates. See, 2/2/2011 Transcript, page 63, lines 14 – 22. He also requested and received substantial discounts to legal fees incurred. See, Transcript, page 64, line 15 – 65, line 7.

⁴ Appellant has argued in his own brief why the award should be increased but here merely responds to Repellants-Appellants' arguments for a decrease in the fee.

Likewise, the PR achieved what two expert witnesses stated to be an outstanding result in the sale of the real estate and performed numerous tasks to enhance the value of the Estate. The PR showed the property. He negotiated with the Purchaser who paid approximately 94% of the fair market value of the property, most of which was for a one-half undivided interest. See, PR Trial Exhibit C-3, Para. 29, 30. Based on those negotiations, he received an excellent price in the opinion of experts. See, 2/2/2011 Transcript page 192, lines 5 – 15; page 203, line 14 – 24. A licensed real estate broker, he did not charge a sales commission. See, Transcript, page 77, lines 13 – 25; page 78, line 20 – page 79, line 16. The PR's efforts to liquidate the sale were desired by no less than 70% of the residuary beneficiaries of the Estate, including Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard; See, PR Trial Exhibit C-9; See Initial Brief, pages 28 – 30; and 2/2/11 Transcript, page 103, line 22 – 105, line 10.

Finally, the Probate Court determined that the PR has “exemplary credentials and good standing in the Bar”. See, Final Order, May 24, 2011, p. 4 (Judge Hocker). The Record shows he is an attorney with more than 25 years experience practicing law, a Certified Public Accountant, has a Master of Accountancy degree and an LL.M. Taxation degree. See, CV, PR Trial Exhibit A.

For these reasons, the Court did not err in affirming that the PR is entitled to compensation as provided by Ms. Kay's will and argued in the PR's appeal, the fees allowed should be increased not decreased.

Respondents-Appellants erroneously rely on SC Code § 62-3-719 (a) as serving to limit the compensation to five (5%) percent. Such reliance is misplaced. SC Code § 62-3-719(c) provides that “[t]he provisions of this section do not apply . . . where the will

otherwise directs . . . “ In this case, the will does otherwise direct and provides “the individual personal representative shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses.” (Emphasis added) Since the will “otherwise directs”, the 5% limitation of Section (a) does not apply.

Nevertheless, assuming arguendo, that Section (a) did apply, even that provision expressly authorizes the Court to approve greater amounts for extraordinary services— which the Probate Court in this instance obviously elected to do based on the aforementioned factors of outstanding result, approval by beneficiaries and exemplary credentials of the PR, and despite its disagreement with the efforts of the PR to liquidate the Estate and distribute the proceeds in the manner specifically allowed by law (e.g. filing of a partition action).

The Respondents-Appellants make reference to the “unclean hands doctrine”. This issue was not ruled upon in the Lower Courts. In any event, the unclean hands doctrine does not apply because the Probate Court affirmed by the Circuit Court made a finding that the PR did not act in bad faith.

II. The Circuit Court did not err in affirming the Probate Court’s decision to award the Personal Representative compensation for services rendered as intended by the will because the findings of the Probate Court offered by Brown and Moses to negate the award are not supported by the evidence and applicable law.

The Probate Court’s findings upon which the Court based its ruling to reduce the PR’s compensation from \$93,775 to \$51,300 and now relied upon by Brown and Moses seeking to further reduce an award of reasonable compensation are not supported by the evidence and applicable law. The evidence does in fact support the number of hours claimed, the necessity for the hours, the desire of the beneficiaries to partition the property, complexity of the issues, including the option to purchase and the right of first refusal, and

the number of draws and method used by the PR to determine reasonable compensation, all more fully discussed in Appellant's Brief in support of the PR's appeal.

As to Item 5 of the Court's order, the "Court does not understand why the PR began charging the Estate before the Testatrix died on May 3, 2007 and before he was appointed PR on May 16, 2007," the PR explained that the one four (4) hour charge consisted of services rendered on behalf of Ms. Kay 3 days before she died and was related to a Power of Attorney for Ms. Kay. A file could have been opened for this matter and a claim made against the estate and the effect would have been the same. It should be noted that the charges of Law Firm, overall, were discounted by more than \$20,000 so the net effect was that the entry was not material to any aspect of the PR's fees.

Respondents-Appellants argue in their brief that they did not have knowledge of the PR's fees until he filed his Petition and suggest by innuendo that some accounting or report should have been earlier provided. However, S.C. Code §§ 62-3-704 (d) and 62-3-1001 do not require interim accountings. The final accounting was extended by the Probate Court pending the sale of the real estate. See, 2/2/2011 Transcript at page 154, line 22 – page 155, line 11. All disclosures were timely made and in total compliance with the Probate Code.⁵

Brown and Moses repeatedly misstate and mischaracterize the record. The PR did not bill the Estate for 3.3 hours spent preparing and summarizing all the decedent's documents. An item appears on the Law Firm invoices for another law firm employee. To

⁵ Item 10 of the Order seems to take issue with math related to the Supplemental Inventory. The difference is simply that the Supplemental Inventory values the real estate at its fair market value based on the appraisals rather than sales proceeds. In addition, the Inventory, which is a valuation at date of death, does not include additional income that came into the Estate after the date of death.

the extent this item is contestable, it is more than offset by \$20,000 in discounts requested and received from the Law Firm by the PR. Again, the PR did not charge the Estate 6.9 hours for "putting the Estate files back in order"; it was a Law Firm employee who performed this task. Again this charge was more than absorbed by the discounts: The trips to Laurens are all accounted for and explained as noted in the exhibits offered at trial. See, Exhibit D, R.pp _____ and the PR's testimony 2/2/2011 transcript at p.147, line 22 – page 151, line 13.

The Appellant-Respondent contends the Probate Court abused its discretion in making these findings now cited by Brown and Moses to reduce the compensation of the PR and that in many instances there is no evidence to support the conclusion.

The Court 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 personal representatives and SC Code § 62-3-720, pertaining to reimbursement of personal representatives 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 Circuit Court did not err in affirming an award of compensation to the PR to the extent that the Court did not give weight to the aforementioned erroneous Probate Court findings which are not supported by the evidence and were controlled by errors of law. Again, while the PR has argued on appeal that the compensation should be increased, the Circuit Court had substantial evidence to allow the fees and costs found by the Probate Court to be appropriate to stand and be affirmed.

III. The Circuit Court did not err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all costs associated with the appeal or post-judgment interest.

The Probate Court properly required Brown and Moses to pay a portion of the cost pursuant to its plenary powers. The Circuit Court did not err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all of the costs. On the other hand, the Court's ruling to deny a recovery of legal fees and costs by the PR was improper because both the will and statutory law provide for such recovery by the PR. Item V (3) of the will provides that the PR "shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." In addition, SC Code § 62-3-720 provides "[i]f any personal representative or person nominated as personal representative 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 attorneys' fees incurred." See, Brief at _____.

Post-judgment interest was not raised in the Respondents-Appellants' Grounds for Appeal.

IV. The Circuit Court did not err in affirming the Probate Court's decision to limit its award of legal fees to counsel for Brown and Moses.

"It is recognized generally by the Courts that the allowance of counsel fees from a fund is capable of great abuse, and should be exercised with the most jealous caution and circumspection with regard to the rights of litigants, lest thereby the administration of justice be brought into reproach." Johnson v. Williams, 196 S.C. 528, 14 S.E.2d 21 (1941). "Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." Id. citing Sprague v. Ticonic National Bank, 307 U.S. 161,

59 S.Ct. 777, 83 L.Ed. 184 (1939). The Court did not err in denying the request of Brown and Moses for legal fees beyond that already awarded because the amount awarded is nearly 50% of the “common fund.” As such the amount already awarded by the Court, \$19,860, exceeds a “reasonable fee.” More important, however, is that Brown and Moses are not similarly situated and in fact their interests conflict with the other beneficiaries because during the litigation they sought to take 5 acres or the monetary equivalent from the Estate. In addition, beneficiary Bart Heard was represented by counsel during some of the proceedings. See, 1/11/2012 Transcript, page 2: lines 16 - 19. Penny Arnold, Director of Charitable Foundations and Church Relations with The Presbyterian Home of South Carolina and Heard testified in support of the PR’s efforts and compensation paid. See, Initial Brief, pages 28 – 30; 2/2/11 Transcript, page 103, line 22 – 105, line 10; Page 102, line 24 – Page 105, line 5. This is not a case where members of a general class “stood aloof and without counsel”. See, Johnson at 193. Also, as noted by Brown and Moses, three of the beneficiaries have reached a settlement with the PR. (See, Section VI, infra). Therefore, the Common Fund Doctrine is not applicable in this case.

Lastly, because the Court below erred in ordering a refund of compensation from the PR, there should not be a common fund and therefore **no** fees awarded to Brown and Moses. See, Initial Brief of Appellant-Respondent, Argument VI.

V. The Circuit Court did not err in not addressing the effect of the PR’s settlement with three beneficiaries as this issue is not properly before Court.

Brown and Moses raise for the first time on appeal the issue of the PR’s settlement with three beneficiaries (Heard, Orias, and The Presbyterian Home) post-trial. After the litigation was initiated and long after the present appeals had been noticed, these

parties essentially agreed to a settlement and distribution as outlined in a Petition for Settlement and waiving further claims against each other. This settlement was not before the Courts below so the Lower Courts did not err in addressing the effect of the settlement on the distribution of the Estate. Nevertheless, the effect of the proposal settlement with the three beneficiaries certainly does not benefit Brown and Moses. Rather, the settlement is for the benefit of the PR and the other three respective parties to the settlement, the purpose of which is to limit the risk of loss to the PR and the other three respective parties from the ongoing litigation pursued by Brown and Moses for little or no gain to themselves.

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,

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APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

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vs.

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April 21, 2014