THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

In the Matter of the Estate of Marion M. Kay

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

v.

Martha Brown and Mary Moses,. . . . . Respondents/ Cross-Appellants

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CROSS-APPELLANTS'/RESPONDENTS' INITIAL BRIEF

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I. The courts below did not err in requiring the Personal Representative to refund a portion of what he had paid himself without authorization.

The Personal Representative (PR) is apparently of the opinion that the Probate Court does not have the power to judge his exercise of discretion. Initial Brief of Appellant-Respondent (hereinafter Appellant's Brief), p.17, para.1. He then makes the incredible claim that "There is no evidence that the PR abused...the powers granted under the will or acted in bad faith in any way." Appellant's Brief, p. 17. This ignores the numerous findings to the contrary made in the Judge Hocker's Final Order (Tr. >). See also Summary of Position of Defendants Moses and Brown (Tr. >) and Addendum to Response of Appellants (Tr. >).

Although it is true that courts seek to carry out the intent of the testatrix, the PR's conclusion that it was Ms. Milam's intent that he loot her estate and deprive her beneficiaries of her bequests to them beggars belief. Any powers she granted the PR were for the purpose of benefitting those she loved enough to make her beneficiaries, not for the enrichment of the PR at their expense. Without court approval or notice to the beneficiaries the PR secretly paid himself $ 93,775 and brazenly sought an additional $ 13,447.05 once he had to defend his administration in court (Final Order, Tr. p. >). Nothing supports his conclusion that such self-dealing was the decedent's intent.

In support of his extremely expensive handling of what should have been an uncomplicated estate (Final Order, # 2 and # 3, Tr. >), the PR says without pointing to anything in the will that the decedent, Marion Kay, wanted him to drag her relatives to court. He based this upon a conversation 3 ½ years before she died asking him to explore voluntary partition with Ms. Brown and Ms. Moses (Plaintiff's Ex. C-2). They were not receptive, and Ms. Milam chose not to pursue the matter further.

Although the PR professes his dedication to the will, he totally rewrote its grant of an 8 month option to Charles Copeland to purchase all the Estate's half interest in a farm. "The PR

unnecessarily complicated the Estate by converting an eight month option to purchase the Estate's one half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will." (Final Order # 3, Tr. >). He also dragged his feet beyond the 8 month period to get an appraisal (Appellant's Brief, p. 19, para. 1), but this would not have delayed Copeland's making a bid. The PR dragged out the option for years as an excuse not to settle the estate and to generate fees. Then he required Mr. Copeland's consent before he would close out the Estate long after the option had expired and suggested that Mr. Copeland sue the Estate. (Plaintiff's Ex. C-15, Tr. >).

To advance his position, the PR repeatedly misstates the support he has among the beneficiaries by claiming that 70% of the residuary beneficiaries support his position (Appellant's Brief, pp. 21, 34 and 38). Pages 6-7 of Appellant's Brief correctly set forth the shares of the beneficiaries, and the PR has provided letters indicating that Presbyterian Home and Bart Heard support his proposed division (Tr. >). Together they own 20% of the residuary estate, not 70%. The PR claims that Lisbon Presbyterian Church supports his approach (Appellant's Brief, p. 9), but he has provided no proof to sustain this conclusion, and the church has not endorsed his position. It is also worth noting that Respondents/Cross-Appellants Brown and Moses owned a total of 60% of the farm at issue (Appellant's Brief, pp. 20-21).

The PR attempts to justify his prolonged failure to bring the Estate to a conclusion by an alleged concern about a possibly defective title, the existence of a right of first refusal, the refusal of the option holder to consent to the sale, a dispute concerning a 5 acre parcel and his right to do whatever he wanted to do because he gave himself broad powers in the will he wrote.

As to the claim that the PR was compelled to launch his lawsuit to clear title in preparation for a sale of the property, S.C. Code Section 62-3-910(A) provides that anyone buying from the Estate "takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested persons, whether or not the distribution was proper or supported by court order...." This protects the buyer; and if the buyer is protected, he

(and anyone taking through him) has no reason or ground to sue the PR. A deed of distribution would also not have created any liability because a deed of distribution is not an instrument of conveyance (Appellant's Brief, p. 25). As an alternative, the PR could have signed a quitclaim deed (which he ultimately did), or he could have signed a warranty deed which listed as exclusions the items he was concerned about. The potential liability issue is baseless.

"This was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution." (Final Order, #2, Tr. >). Filing suit instead violated the PR's obligations under S.C. Code Section 62-3-703 to settle the estate expeditiously and efficiently and consistent with the Estate's best interests. He should not be rewarded for that.

The PR did not need the consent of the option holder to convey the real estate in the Estate. Under the terms of the will, the option holder had 8 months to exercise the option; and he did not attempt to do so during that time (Grice Tr.114/7-8, Tr. >). Time is of the essence in exercising options to purchase land. *Faulkner v. Millar*, 319 S.C. 216, 460 S.E.2d 378 (1995). In fact, the option holder never offered to exercise what the will's option granted him, the right to buy an undivided one half interest in the farm. It was only because the PR attempted to rewrite the option that a problem arose. "The PR unnecessarily complicated the Estate by converting an eight month option to purchase the Estate's one half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will." (Final Order, # 13, Tr. >)

The PR wrongly argues that only he could partition the farm. First of all, any partition under S.C. Code Section 62-3-911would have involved only what the estate owned, i.e., an undivided one half interest. The PR overlooks that the heirs could have managed a partition themselves much more cheaply than the $ 93,775 (and counting) he paid himself.

Had the PR really been serious about getting the agreement of Ms. Brown and Ms. Moses, he would not have ambushed them with the other heirs at what was supposed to have been a private meeting to discuss settlement. (See the first 2 questions and answers of the quoted

testimony on p. 29 of Appellant's Brief.) And he would not have attempted to impose the boundaries he wanted. His treatment of Cross-Appellants was designed to prevent settlement, and it worked. He reluctantly admitted, though, that when it came time to sell the farm, Ms. Brown and Ms. Moses went along without any problems (Grice Tr. 82/6-8, Tr. >).

As to the PR's alleged concern about the right of first refusal, the simple and quick way to deal with this is to grant the right. If the offer is not accepted, the right has been satisfied.

The PR misstates the situation with the 5 acres. This was not a joint claim by Ms. Brown and Ms. Moses; it was asserted only by Ms. Brown, who made no attempt to litigate the matter until the PR invited her to a hearing to settle all the issues with the estate. The PR has stated, "([N]o one, including Brown and Moses...ever asserted any challenge to the PR's actions in Probate Court." Appellant's Brief, p. 39, para. 1). Ms. Brown's claim, which was supported by Defendants' Ex. 8-12, is not part of this appeal.

II. The courts below correctly found that the PR paid himself excessive compensation.

Under S.C. Code Section 62-3-719 the standard commission is 5%. Respondents/Cross-Appellants reject the PR's entitlement to this because of his flagrant violation of his fiduciary duty to the Estate for the purpose of unjustly enriching himself at the Estate's expense. That Code section provides for an increased fee where the judge finds "extraordinary services". The PR has admitted that the probate judge not only did not find extraordinary services, he also failed to make any findings in support of a large fee (Personal Representative's Grounds for Appeal, Tr. >). ("The Probate Court erred in...not setting forth a ... basis... for... determining reasonable compensation." Appellant's Brief, p. 26) The PR now claims he is entitled to a fee of $ 225 per hour because of his education, but he let Collins and Lacey handle the legal work and hired an accountant to do the accounting work. The PR testified that he was not charging as an attorney (Grice Tr. 142- 143/7, 145/5-8, Tr. >) and that there was very little attorney work to be done (Grice Tr. 176/6-7, Tr. >). (But his law firm was paid $ 25,806.38 for this very little work.)

The probate judge questioned the PR on his charges:

Judge: So you were, as a Personal Representative, you were charging on an hourly basis?

PR: No, I wasn't.

Judge: Well what did you mean when you said you looked at the time you had into it to figure your charges?

PR: I looked at what I thought was a reasonable fee. And as we went down the road, I took draws...toward what I thought was a reasonable fee....

Judge: So you were charging on a time basis for your Personal Representative fees?

PR: No. ...I thought I knew what...a fair and reasonable fee would be for this administration as we started down the road. And I set... my draw against that target. (Garber Tr. 144/9-16, 19-24, Tr. >).

The probate judge found that most of the PR's charges were not related to the litigation surrounding his final accounting (Final Order, # 12, Tr. >). The Estate should not pay him for needless work and expertise he did not use for the Estate, and the Estate had no unusual issues requiring legal or accounting expertise (Final Order, #7, Tr. >).

The PR attempts to get around Code Section 62-3-719 by pointing out that the will provides for reasonable compensation. What is reasonable is a matter for the probate judge to decide, and the judge quite rightly started with the statute. The PR's attempts to add to the record documents and arguments not part of the record below is improper. What he told the judge in his testimony was that he did not charge a percentage and he did not charge by the hour. Instead, he decided in the beginning what he was going to pay himself and busily set about making that happen without regard to other factors (Grice Tr. 144, 14-16, 21-24; 175/1-4, 16-20; Tr. >). Before his representation really got underway and before anything was contested, he determined that his fee would consume the Estate's $ 60,500 in stocks and bonds (Plaintiff's Ex. C-17). The value of these securities increased (Grice Tr. 86/21- 87/7, Tr. >) so the PR's fee was even more inflated than the number in the Final Order, but there has been no accounting for that.

The lengths to which the PR will go to justify his fee are almost comical. He tells us that

we should be grateful that the nearly $ 26,000 paid to his law firm for work of questionable necessity (Final Order # 17, Tr. >) was not worse (Appellant's Brief, p. 33, para. 1). He goes on to inform us we should be grateful that he did not grab a broker's fee for selling the real estate (Appellant's Brief, p. 33, para. 1), even though he was not selling the property as a broker. He neglects to mention that his law firm billed the Estate for many hours of his time for which he now seeks compensation. See Addendum to Response of Appellants, p. 8 (d), Tr. >).

Throughout the case the PR has tried to improve his position by adding materials after the record has closed. See Order Disposing of Post-Trial Motions, Tr. >. Even with this Court, he has made numerous references to a document he calls "Exhibit E", although this document was never introduced into evidence and is not a proper part of the appellate record. Throughout the case he has also attempted to gain an advantage through the use if hearsay. He tried to substitute an affidavit for his testimony (the infamous Exhibit E) and unsuccessfully attempted to introduce affidavits of a Teri Stomski and of a Professor Medlin, whose only knowledge of the facts came from what the PR told them, in lieu of their testimony. This was contrary to Rules 801 and 802, SCRE, and to Respondents/ Cross-Appellants' due process right to confront the witnesses against them.

The judges below correctly denied the PR costs and attorney fees, because he would be entitled to reimbursement under S.C. Code Section 62-3-720 only if he had incurred these costs on behalf of the Estate. Instead they found that these costs and fees were incurred by the PR in an attempt to benefit himself (Final Order, # 19, Tr. >), which diminished the Estate.

Finally, the PR has benefitted from a mistake in the probate judge's calculation of the value of the Estate. In Paragraph 10 of the Final Order (Tr. >), Judge Hocker valued the Estate at $ 513,491.00, but this used the PR's inflated value of the personal property ($ 122,491.00) even though he questioned the necessity of the 204.6 hours of paralegal time (at $ 90/hr.) used to generate this number (Final Order, # 17, Tr. >).

III. Affirming the rulings of the courts below requiring that the Personal Representative refund his excessive compensation would not result in unjust

enrichment.

Except for Bart Heard, the heirs have not received any distribution from the Estate. They have therefore not been unjustly enriched. The findings of the judges below about how the PR mismanaged the Estate assets for his own benefit destroy any equitable argument the PR might make. The probate judge correctly found, "The commissions sought by the PR are clearly excessive...." (Final Order # 13, Tr. >). Making the PR to disgorge his excess commissions cannot result in unjust enrichment. Far from being a sign of "contentiousness", the Respondents/Cross-Appellants' devotion to the interests of all the heirs prevented the PR from further looting the estate; and this came at the expense of considerable time, effort and money. See also Grice Tr. 82/6-8, Tr. > where the PR admits that Ms. Moses and Ms. Brown readily consented to the sale of the farm once a suitable buyer was found.

The PR makes the incredible assertion that Ms. Brown and Ms. Moses are precluded from getting relief because "no one, including Brown and Moses..., ever asserted any challenge to the PR's actions in Probate Court." (Appellate's Brief, p. 39, para. 1). The Court's attention is directed to the Summary of Position of Defendants Moses and Brown (Tr. >), to the Probate Court's Final Order (Tr. >) and to Rule 3.3(1) of the S.C. Rules of Professional Conduct.

IV. The Probate Court had the power to consider and rule upon the Personal Representative's request that his compensation be approved.

The PR had tried to get the heirs to agree to his handling of the Estate without letting them know what he did and how much he had paid himself (Grice Tr. 155/11-16, Tr. >). Because he was unable to persuade Ms. Moses and Ms. Brown to consent to his unknown activities, he was forced to make known to them their right to have a hearing at which the PR would justify his handling of the Estate (Tr. >). Ms. Brown and Ms. Moses accepted his offer (Tr. >). The PR did not provide or request pleadings, and given that he was the moving party under S.C. Code Section 62-3-1001and that it was his burden to justify his handling of Estate assets, none were required from Ms. Moses and Ms. Brown. There was an intermission of more

than two weeks during the trial (Appellant's Brief, p. 3, para. 3), so the PR had plenty of notice of the issues and time to prepare. The PR himself made detailed advance notice of the issues almost impossible by dumping on the heirs three and a half years' worth of accountings not long before the hearing was to take place (Final Order # 9, Tr. >), but he did know that attorney fees were an issue (Grice Tr. 93/3-7, Tr. >). As to the PR's duty of timely full disclosure see *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) and *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013). See also S.C. Code Section 62-3-712 concerning the PR's liability for the improper exercise of his power.

The PR did not make a contemporaneous objection to the hearing he offered to the heirs and then set up, so he can not now be heard to say that the court did not have the power to consider the issues he presented, including his compensation. At the very least this issue was argued by consent, so the PR has waived his right to claim that S.C. Code Section 62-3-721(a) is the exclusive method to review PR compensation and he is estopped to assert this position.

V. The courts below properly ruled that the Personal Representative was not entitled to be reimbursed for attorney fees and costs expended in pursuit of his own private interests.

The courts below did not find that a PR is entitled to fees and costs only if he prevails as the PR alleges (although that should be an equitable consideration). They considered the reasonableness and the necessity of what the PR wanted to charge the Estate and whether the Estate benefitted. The reason the PR had the costs and attorney fees he did was because he looted the estate and tried to hide that from the heirs until the scheduling of a hearing made that impossible. This was not service to the Estate for which he could seek reimbursement. See Final Order's Conclusions of Law, # 5, Tr. >).

S.C. Code Section 62-3-720 provides that a PR can seek reimbursement for <u>necessary</u> expenses and disbursements. The Estate should not be required to pay for a PR's defense of his own malfeasance and misfeasance which damaged the Estate. As the *Weidlich v. Cromley*, 267 F.2d 133, 134 (2nd Cir. 1959) case cited by Appellant states, reimbursement is appropriate "When

the [PR's] administration of the assets is *unjustly* assailed...." The Final Order below (Tr. >) shows that this is most definitely not the case here. A court of Equity cannot allow the PR to be the beneficiary of his own wrong. See *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920).

The PR's ultimate problem is quite simply that he did not prove the existence and the necessity of the 468.6 hours he claimed to have worked (Final Order, para. 1, Tr. >). He sought a total of $ 157,179 in fees and costs (Final Order, p. 2, Tr. >) for what was not a complicated estate (Final Order, # 2, Tr. >) and failed to provide any legitimate basis for the fees he claimed (Final Order, #8, Tr. >). There were no novel issues (Final Order, # 7, Tr. >), and the probate judge rightly found that the PR's commissions were "clearly excessive" (Final Order, # 13, Tr. >). Even his claim to have gotten a good price for the farm from the buyer Respondent Mary Moses dropped into his lap requires the Court to ignore that the purchase price was $ 24,000 less than the appraisal (Plaintiff's Ex. C-14 and C-17, Tr. >).

VI. The Probate Court and the Circuit Court correctly determined that Counsel for Brown and Moses is entitled to attorney fees.

The heirs of the Marion M. Kay Estate are $ 42,475.00 (plus post-judgment interest) better off because of the efforts of the counsel for Ms. Moses and Ms. Brown. His efforts have led to the creation and preservation against post-trial attack of a common fund. (Final Order, Conclusions of Law # 4, Tr. >).

The PR attempts to make a technical argument about whether a petition had been filed, but the PR himself brought the matter to court with an informal petition for settlement. Ms. Brown and Ms. Moses made known that they would be seeking costs and attorney fees, and the issue of attorney fees and costs for both sides was argued without objection. See Grice Tr. 93/3-7, Tr. > for the PR's admission that he knew that attorney fees were an issue. Counsel for the PR did not object to the introduction of the undersigned's time sheet, examined the undersigned under oath about his charges and has raised a question about only 0.6 of an hour. The PR has waived his objection and is estopped to assert it.

As to the definition of suit, cause and action, see 33 S.C. Digest2d 5, "Action". As to the

inherent power of courts to do all things reasonably necessary to insure that just results are reached to the fullest extent possible, see *Simpson v. Simpson*, 404 S.C. 563, 579, 746 S.E.2d 56 (Ct. App. 2013).

The undersigned's work on the case began in January of 2008, and that work proved crucial for unraveling how the PR had abused his position and determining that a hearing was necessary. The probate judge correctly found that an attorney fee was warranted and that the undersigned had "necessarily devoted 99.3 hours to this case to date (all of which appears related to the merits of the matter)...." and he stated that he had considered all the *Glasscock* factors. (Final Order, # 21, Tr. >). The undersigned should likewise be compensated for post-trial work.

VII. The courts below correctly disposed of the Personal Representative's Rule 59 motion.

The PR correctly states that the reversal of the denial of his request for relief under Rule 59 requires that he establish an abuse of discretion. He has not done so.

The PR's discretion is not unbounded. He is a fiduciary and must direct his efforts to advancing the interests of the Estate, not his own private interests. *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004); S.C. Code Section 62-3-703.

The court below found wrongdoing when it delicately noted that the sale of the real estate was not necessary but that it generated proceeds for the PR (Final Order, # 4, Tr. >), when it found that the commissions sought by the PR were "clearly excessive" (Final Order, para. # 13, Tr. >), and when it found that the PR charged the Estate for work he allegedly did for the Testatrix before she died (Final Order, para. 5, Tr. >). The PR claimed payment for more hours than the evidence supported (Final Order, para. # 8, Tr. >), and the bases he provided for his charges were not legitimate (Final Order, para. # 8, Tr. >).

Though the Estate was non-taxable and most of the personalty of value was individually designated to go to particular people, the PR spent vast quantities of time and money valuing property to increase his compensation, vastly expanded the Copeland option and filed an unnecessary partition action instead of signing a deed of distribution, which resulted in litigation

profitable to the PR. The record shows that the PR was far more dedicated to his own gain than to the welfare of the Estate. Contrary to granting the PR post-trial relief, the judges below should have found a breach of fiduciary duty and forced him to disgorge more of his ill-gotten gains. See *In the Matter of Hanna*, 301 S.C. 310, 391 S.E.2d 728 (1990) and *In the Matter of James*, 267 S.C. 474, 229 S.E.2d 594 (1976). If a PR improperly exercises his power in connection with the estate, he is liable. *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013), citing S.C. Code Section 62-3-712. It must also be noted that by defying the Probate Court's direction in its May 24, 2011 Final Order that he return $ 42,475.00 to the Estate (Final Order, # 14, Tr. >), the PR has had the use of the Estate's money for three years and should pay for that.

Conclusion

The Personal Representative is not entitled to relief. His compensation must be greatly reduced or eliminated to reflect the damage he has done to the Estate by his flagrant violation of his fiduciary duty. What the Respondents/Cross-Appellants and their counsel have received thus far should be affirmed with post-judgment interest. The additional relief due Respondents/ Cross-Appellants should come from the PR and not from the Estate, but if the relief is to come from the Estate, the payments to heirs Bart Heard and Presbyterian Home should be limited to what they agreed to in the documents they signed, which were filed with the court. The PR and not the Estate should pay all fees and costs associated with this appeal.

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April 24, 2014

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson & Wham, LLC and that on the 24 day of April, 2014 she served the Cross-Appellats'/Respondents' Initial Brief herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

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April 24, 2014

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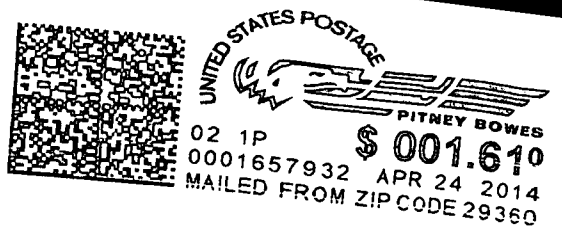

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