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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RESPONDENTS' INITIAL RESPONSE TO APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This case involves the rectification of a Personal Representative's looting of a decedent's estate. It is all the more egregious because the PR is a member of the Bar and the author of the will he used to loot the estate.

In his Respondent's Initial Brief of Appellant-Respondent (hereinafter PR's Brief) at page 2, paragraph 2 the PR asserts that Ms. Brown and Ms. Moses were so bitterly disappointed with the Testatrix's will that they were unalterably opposed to any settlement; but the fact is that they did not make any effort to contest the PR's handling of the estate until his malevolent breach of his fiduciary duty became clear, and they consented to the sale of the Estate's interest in the farm to a legitimate buyer. This case is about the efforts of Cross-Appellants to unravel the PR's wrongdoing and to bring to light what he has tried to hide so that equity and justice could prevail.

Once the Cross-Appellants requested that the PR file for a hearing to justify his handling of the Estate, he was forced to disclose that he had paid himself $ 93,775 for what the probate judge found to be an uncomplicated estate. When he was pressed to justify this, he revealed that he did not base his charges on his time or the amount of the Estate assets, but rather he gave himself what he in his discretion thought he was due. Ultimately, the probate judge, while not finding bad faith, determined that the PR's charges were clearly excessive and had no legitimate basis. As a result, he ordered the PR to return $ 42,475 to the Estate (which the PR has refused to do) and awarded Cross-Appellants' counsel a fee pursuant to the common fund doctrine.

Cross-Appellants' are appealing the large fee the PR was awarded and seeking post-trial compensation for their attorney. The probate judge determined that much of the PR's work was unnecessary, and he boosted the value of the Estate with what the probate judge found to be an unnecessary and expensive valuation of the personalty by paralegals in his law firm. This bloated value was then used by the probate judge to compute the PR's compensation. The probate judge did not state the basis for his award to the PR, and it is the position of Cross-Appellants that this award does not have a sufficient factual basis.

ARGUMENT

I. The courts below erred in granting the Personal Representative excessive compensation after findings negating a large award and a lack of findings supporting the award.

The PR points to the will's provision for reasonable compensation. The Final Order does not elucidate how the probate judge arrived at the large number he chose, and this number is without factual support. The PR has hunted through the Final Order to find anything he can to support his fee award and presents a meager list.

The first is the supposedly outstanding result in the sale of the real estate. This sale was made to a buyer sent to the PR by Cross-Appellant Mary Moses. The "outstanding result" was the sale of the property for $ 24,000 less than its appraised value (Cf. Plaintiff's Ex. C-14 and C-17, Tr. >), so this finding is without sufficient factual support.

As to the approval of the beneficiaries factor, the PR has produced proof that only three of the beneficiaries having a total of 30% interest agreed with his proposed settlement, and one of these had been given substantial advances by the PR. The PR's oft-repeated assertion that 70% of the heirs approved his proposal is quite simply untrue. As the letter of Trinity Presbytery's attorney states (Tr. >), in order for Lisbon Presbyterian Church to agree to the PR's proposal for dividing the Estate, there would have to be a congregational vote, and this has not occurred.

The "exemplary credentials" of the PR are irrelevant, because the PR hired others to do the legal and the accounting work. The probate judge found that the PR's assertion that there were novel issues was without basis (Final Order, # 7, Tr. >), and the PR testified that there was very little legal work to be done on the Estate (Grice Tr. 176/6-7, Tr. >). In short, he did not use his "exemplary credentials" to advance the interests of the Estate, so they avail him not.

What that leaves is the PR's demand that he be paid $ 51,300 plus $ 13,447.05 (See Final Order, # 14, Tr. >) for his supposed good faith . He wants to be paid $ 64,747.05 more for a duty he already owed to the Estate. (See S.C. Code Section 62-3-703(a).) Perhaps we should call it a tip instead of payment for legitimate work.

The finding of good faith is on appeal, and with good reason. The courts below found that the PR failed to prove the existence and the necessity of the 468.6 hours he claimed to have worked (Final Order, para. 1, Tr. >), that there were no novel issues supporting a large fee (Final Order # 7, Tr. >) and that the PR's secret payments to himself ($ 93,775) were "clearly excessive" (Final Order, #13, Tr. >) and without a legitimate basis (Final Order, # 8, Tr. >). It is an abuse of discretion to call this conduct good faith.

In attempting to justify his handling of the Estate, the PR makes the claim (PR's Brief, p. 4) that "The net gain to Brown and Moses from the litigation based on the Court's orders is approximately $ 1000 each." This is another attempt of the PR to mislead the Court. In order to understand what the PR had done and to prevent its approval, Ms. Brown and Ms. Moses hired counsel who devoted a considerable amount of time to the case. They are obligated to pay their attorney for his efforts, and the Final Order offset their obligation by $ 19,860 (Final Order, # 21, Tr. >). There was nothing frivolous about their decision to call the PR to accounts.

The PR again misleads the Court on p. 14 of his Brief when he claims 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." Only Ms. Brown made that claim, and she did not push it until the PR offered her a hearing to resolve all the issues with the Estate. Ms. Brown's claim is not a part of this appeal.

The PR also misleads the Court (PR's Brief, p. 3, para. 2) with his assertion that beneficiaries with interests in the residuary estate totaling 70% have agreed to this proposed distribution. He has provided documentation only that Heard, Orias and Presbyterian Home, who each have a 10% interest in the residuary estate, support his proposal. The PR never obtained the consent of Lisbon Presbyterian Church, so it was wise that later in his Brief he backed off his claim to have the agreement of 70% of the heirs for his proposed distribution (PR's Brief, pp. 14-15).

It is also worth noting that, having claimed a benefit in his briefs from his post-trial

settlement with Heard, Orias and Presbyterian Home, the PR has sought to block the inclusion of their acceptances of his offer into the appellate record. These documents are admissions against interest by those heirs and should be considered by whatever court determines the shares of the various heirs. The PR himself gave these documents to this Court as Exhibits F-1, F-2 and F-3 attached to his Return to Motion for Escrow of Funds (pp. 39-51).

The PR has also attempted to block the inclusion into the record of his letter inviting Ms. Brown and Ms. Moses to request a hearing and of their letter to the Probate Court in response accepting his offer. Both these letters were filed with the Probate Court and the latter document was filed with this Court by the PR as an attachment to his Return to Motion for Escrow of Funds (p. 37). They should be part of the appellate record. Though in his previous brief the PR states that the issue of his fees could not have been ruled on by the Probate Court because no petition was filed, in his Brief (p. 4) he refers to "the PR's Petition for Settlement".

II. The record supports the denial of fees and costs to the Personal Representative at trial and on appeal.

The PR tells this Court that "reasonable compensation" is what he says it is, and no judge should get between him and his pay check. Because the will does not define "reasonable compensation", this is a matter for judicial construction by a court of Equity. The ultimate result should be well-supported by factual findings.

As both sides have observed, the probate judge did not set out his reasoning for giving the PR a large fee after making numerous findings supporting a conclusion that the PR was looting the Estate and violating his fiduciary duty. The judge denied an award of fees and costs to the PR, because he rightly found that the PR's efforts at the hearing were directed toward benefitting himself rather than the Estate (Final Order, # 19 and Conclusions of Law # 5, Tr. >).

III. The Circuit Court erred in affirming the Probate Court's decision to limit its award of legal fees to counsel for Brown and Moses.

The probate judge awarded the undersigned a fee pursuant to *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) for his work to the end of the hearing. This case allows a fee to an

attorney whose efforts have led to the creation or preservation of a common fund. The common fund in this case is the $ 42,475 in excess compensation which the PR was ordered to return to the Estate (although he has refused to do so). The PR has made repeated attempts (including this appeal) to destroy that common fund, but the undersigned has successfully preserved it after causing it to be brought into existence. He is entitled to be paid for his efforts.

It must be noted that the PR is not seeking to benefit the Estate. If he prevails, the Estate will not increase; the extra money will go into his pocket. If the Cross-Appellants prevail, the Estate will benefit. This is especially true if the Court directs that more money come from the PR's pocket. The PR's appeal is to benefit himself, and it is causing post-judgment interest which he and not the Estate should pay.

IV. The Circuit Court erred in failing to address the effect of the Personal Representative's settlement with three beneficiaries.

The PR has taken contradictory positions concerning his settlement with Bart Heard, Marla Orias and Presbyterian Home. On the one hand he claims a benefit from this, but on the other hand, he asserts that the Court cannot see the documents on which he bases his claim. These documents were filed by the Personal Representative multiple times, most recently as Exhibits F-1, F-2 and F-3 to his Appellant/Cross-Respondent's Return to Motion for Escrow of Funds filed with this Court. While it is true that they were generated after the Probate Court hearing, they constitute admissions against interest which the court considering division of the Estate must take into consideration, and the PR has waived any objection to their inclusion by his providing them to this Court.

CONCLUSION

The PR is not entitled to any of the relief he seeks, and his claims must be denied. The claims of the Cross-Appellants are well-supported by the record and should be granted.

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April 30, 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 30th day of April, 2014 she served the Respondents' Initial Response to Appellants' Brief herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
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Susan M Hodges

April 30, 2014

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April 30, 2014

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S.C. Court of Appeals
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Re: In the Matter of the Estate of Marion M. Kay, 2013-002319

Gentlemen:

With this letter I am enclosing for filing an original and a copy of Respondents' Initial Response to Appellant's Brief and an original and a copy of the Certificate of Service on opposing counsel. Please file the originals and mail me clocked copies in the envelope provided.

Thank you for your assistance.

Sincerely,

John R. Ferguson

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

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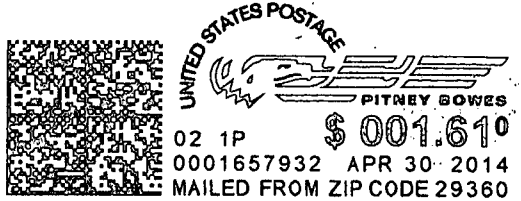

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