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 REPLY BRIEF OF APPELLANT- RESPONDENT

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Appellant-Respondent Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, respectfully submits this reply to brief of Respondents-Appellants.

I. The PR's decision and efforts to pursue a division and sale of the Farm including the filing of a partition/declaratory judgment action, as opposed to simply filing a deed of distribution to the heirs, comported with Ms. Kay's testamentary intent and fulfilled his duty to the Estate and its beneficiaries because Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard, together owning 70% of the residuary interests of the Estate, expressed to the PR a desire to receive cash rather than an undivided interest in real estate.

Brown and Moses are unwilling to admit the undeniable fact in this case that none of the other beneficiaries of Ms. Kay's Estate wanted to own property as co-tenants with them. Other beneficiaries desired a distribution of cash as opposed to an undivided interest in real estate and expressed this desire to the PR. The allegations of Brown and Moses concerning excessive fees and expense are nullified by the desires and needs (and support of the PR's actions) of other beneficiaries whose interests in the Estate equal or exceed that of Brown and Moses. The Circuit court erred as a matter of law in affirming the probate court's ruling to require the PR to refund a substantial portion of his compensation because in addition to carrying out Ms. Kay's testamentary intent, he has a statutory right to seek partition in his discretion to aid the settlement of the Estate and in this case satisfy the needs and desires of a majority of the beneficiaries.[1]

Penny Arnold of the Presbyterian Home, a 10% residual beneficiary, testified that her organization did not want to be owners of real property and wanted and needed a cash distribution. Ms. Arnold, the point person for the Presbyterian Home, has been handling estate trusts and/or bequests since 1985, even prior to the Presbyterian Home. See, Hearing

[1] Replying to Argument I of Respondents-Appellants Moses and Brown Respondent Brief at page _____.

transcript 2/2/11, p. 212. She approved the PR's compensation and as well as the amount of legal fees and was pleased with the results. See, R pp. _____. Bart Heard, another a 10% residual beneficiary, testified in essence that he approved of the PR's actions to divide the Estate as well as the amount of the PR's compensation. [2]

As to the contention by Brown and Moses that the PR "has provided no proof" to sustain his position that the Church preferred cash over title to real estate, there is ample documentation in the record. There is testimony of the PR, that the Church did **not** want an undivided interest in real property and preferred a cash distribution. The PR testified without objection that, "Bart Heard and the church and the Presbyterian Home Session all told me that they wanted to be paid—they wanted cash. They could not – didn't want the dirt. And now I find out that the Presbyterian Home says they could not have taken the dirt, I'm sorry—an interest in the real estate." 2/2/11 transcript, page 48, lines 17 – 22.

The testimony related to the Church's expressed position is corroborated by the April 21, 2008 letter of Attorney Robert Fuller to Neely Blackmon, Clerk of Session of Lisbon Presbyterian Church, in response to a letter written by Church Reverend Hunter. Mr. Fuller quotes Reverend Hunter as stating, "the Lisbon congregation's hope is that the property in Marion's estate will be sold at the appraised value and the congregation will receive the cash value of the congregation's portion." PR Exhibit C-9. Attorney Fuller's letter goes on to explain how the congregational action should be memorialized by resolution with "[t]he stated objective is to realize the value of Ms. Kay's generosity for the benefit of the church." PR Exhibit C-9. (This correspondence was copied to the PR

[2] Marla Orias, also a 10% residual beneficiary, is the sister of Bart Heard. Ms. Orias did not testify in the case.

and Reverend Hunter.) Likewise, the purpose of the PR in seeking to divide and sell the Estate's interest in the Farm was "to realize the value of Ms. Kay's generosity for the benefit of the Church" and the other beneficiaries as well. The Church's position was expressed to the PR repeatedly through telephone conferences and meetings. The record shows that the PR met with the Church Session and Reverend Hunter on multiple occasions including May 23, 2008. PR Exhibit D, R.pp._____. In addition, the PR communicated with Reverend Hunter repeatedly via meetings, telephone conference and written correspondence:

1. June 20, 2007, PR Exhibit D, R.p. ___;
2. April 10, 2008, PR Exhibit D, R.p._____;
3. April 15, 2008, R.p.____;
4. May 13, 2008, R.p.____;
5. May 20, 2008, R.p.___;
6. June 25, 2008, R.p._____;
7. August 11, 2008, R.p.__;
8. September 4, 2008, R.p.___;
9. October 21, 2008, R.p.___;
10. February 25, 2010, R.p.____;
11. April 15, 2010, R.p.___;
12. December 3, 2008; R.p. ____;

Furthermore, Reverend Hunter met with (1) the PR and consultant John Wilson (July 25, 2007), PR Exhibit D, R. pp.___, and roughly a week later met with (2) the PR, Wilson, Appraiser, Penny Arnold of The Presbyterian Home, and Moses and Brown to discuss a proposed division of the property (July 31, 2007). See, Testimony of Appraiser Paul Major, 2/2/11 Transcript, Page 206, lines 9 – 11; Testimony of Penny Arnold, 2/2/11 Transcript, page 214, lines 3 – 21. R. pp. ____. It is undeniably clear that the Church desired a cash distribution from the Estate rather than an ownership in real estate. In fact, there is **no** evidence in the record otherwise. Given that Marla Orias, the sister of Bart Heard is not on record as to her wishes, no less than 70% of the residuary beneficial

interests in the Estate made it clear to the PR from the beginning of the estate administration that they wanted a cash distribution from the Estate rather than an ownership in real estate.

Perhaps the most compelling evidence of the incontrovertible fact that the other beneficiaries, including the Lisbon Presbyterian Church, wanted a cash distribution rather than an interest in undivided property is the admission of Respondent-Appellant Brown at the February 21, 2011 hearing in response to a direct question from her counsel, John Ferguson.

> Q. All right. And when you got to the meeting in Newberry, who was there?
>
> A. Mrs. Penny Arnold (phonetic), I believe is her name, and Reverend Hampton Hunter.
>
> **Q.** All right. These other parties who were there, the other heirs, **were they looking for land; or were they looking for money?**
>
> **A.** **Money.**

(emphasis added.) (Feb. 21, 2011 transcript at page 61, lines 6 – 13).

Accordingly, the PR acted reasonably in pursuing the partition action.[3] (Ms. Brown also contended at the hearing that she had wanted to divide the property before Ms. Kay's death too. 2/21/2011 transcript at page 108, lines 1 – 3.) In addition to the partition action, the PR also sought declaratory judgment relief as a separate cause of action to sort out the claims of the parties. In affirming the probate court's erroneous ruling that the PR should not have pursued a division and sale of the estate's property but should have simply

[3] Assuming arguendo that only one or none of the beneficiaries expressed a desire to partition the property, the PR properly exercised his right granted by South law governing estates in South Carolina. South Carolina Code section 62-3-911 provides that the PR or any beneficiary can seek partition. Further, these statutory rights are in addition to the powers granted by Ms. Kay's will.

deeded out the property to the beneficiaries (against the 70% majorities' wishes), the circuit court made a manifest error of law.[4]

II. The resistance by Brown and Moses to the PR's efforts to partition the Farm as well as Brown's ongoing claim for an interest in 5 acres created the delay and expense about which Brown and Moses now complain.

Brown and Moses allege the PR unnecessarily complicated the Estate. Yet it was their resistance to the PR's efforts to reach a fair and amicable resolution in dividing the Farm that created the delay in settling the Estate and thereby causing the expense that they now question.[5] In fact, they succeeded in preventing the division just as they had while Ms. Kay was alive. (See letters of Edward D. Sullivan as attorney for Marion M. Kay to Martha Brown and Mary Moses giving notice of Ms. Kay's desire to divide the Farm, PR Exhibit C-2. Also, see testimony of beneficiary Bart Heard, 2/2/11 transcript, p. 104, lines 12 – 16. "I hate that all this has happened. I feel that if the land was divided way back when before [Ms. Kay] passed away, all this could have been resolved. I don't object to any of Mr. Sullivan's fees that he's – that's accrued at all. . . .") Further, a June 21, 2010 letter from counsel for Moses and Brown regarding Brown's ongoing claim for an interest in approximately 5 acres of the Farm reflects their continued resistance to the efforts of the PR to divide the property and/or reach an amicable resolution to settle the Estate early and belies their contention that the claim for the approximate 5 acres was a non-issue.

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[4] Brown and Moses assert they own 60% of the Farm, citing as authority for this proposition Appellant-Respondent's brief at pp. 20-21. Brown and Moses, claiming title to an undivided half-interest as "The Heirs of H.W. Milam" together had an undivided 50% interest in the Farm. The Estate owned the other 50%. The argument advanced in Appellant-Respondent's brief is that <u>if</u> the PR had deeded out the Estate's interest in the Farm to the beneficiaries rather than selling it, the undivided interest of Brown and Moses <u>would have been</u> increased to 60% and the other beneficiaries would have been responsible for taxes and upkeep and faced with liability issues.

[5] Further replying to Argument I, Respondents-Appellants' Respondent Brief at page ___.

In attempting to reach an amicable resolution related to the Farm, the PR reached out to Brown and Moses and proposed a compromise whereby Charles Copeland would pay fair value for a portion of the Farm (ending his option) and they could then exercise the Right of First Refusal for the remaining acreage if they elected to do so. As an incentive, the PR agreed to ask for the co-operation of the other beneficiaries to approve the transfer of the Estate's interest in the approximately 5 acres (4.59 acres) claimed by Brown **free of consideration.** Sullivan letter to Brown and Moses dated May 2, 2008, PR exhibit C-11. Neither Brown nor Moses responded.

Later, the PR reached out to Brown and Moses, met with them and the appraiser and made a proposal for division of the Farm. Again, they never made a written response or proposal.

Brown and Moses contend that the "PR misstates the situation with the 5 acres" and "it was only asserted by Ms. Brown, who made no attempt to litigate the matter until the PR invited her to settle all issues with the Estate." Respondent –Appellant Brief at 6. This is factually incorrect. When the PR filed the partition/declaratory judgment action, Brown and Moses filed, among other things, a Counterclaim claiming an interest in the 5 acres. Answer to Amended Complaint and Counterclaim dated March 20, 2009, PR Exhibit C-12B.

Perhaps the most compelling evidence of the fact that Brown's claim regarding the 5 acres created an ongoing issue in the settlement of the Estate is that on June 21, 2010, her counsel John Ferguson wrote to counsel for the Estate:

> I am please [sic] to enclose for your file the executed consent and waiver documents you prepared for Martha Brown and Mary Moses. I hope that this will help you move things along. **I remind you that a condition precedent for my**

clients' cooperation was Rowland's[6] agreement with Martha about the portion of the property agreed to be hers. I am pleased that everybody wound up on the same page.

(emphasis added.) John Ferguson Letter dated June 21, 2010, PR Exhibit C-15.

III. In addition to the carrying out the intent of Ms. Kay and responding to the expressed desire of the beneficiaries to sell the property, the partition action cleared up title defects arising from various claims to the property as well as judgments against Moses.

The PR was advised by counsel, among other things, to pursue a partition action in order to clear up title defects. Brown and Moses are wrong when they assert the PR could have simply signed a quitclaim or a warranty deed because the probate code provides that a transfer of title from an estate to a beneficiary is reflected by a deed of distribution. As to the point that the PR ultimately signed a quitclaim deed, that conveyance was made to a third party and not a beneficiary of the Estate.

The Circuit Court affirmed the probate court finding "that this was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution." Although the PR could have handled the estate that way by dumping the undivided interest problem on 80% of the residuary interests of the Estate, he would have been ignoring the intent of Ms. Kay to sell and distribute cash to her beneficiaries. Perhaps just as importantly he would have been ignoring the expressed desire of at least 70% of the residual beneficial interests to receive a cash distribution as opposed to a minority ownership of an undivided interest in real estate and the obligations and risks that come with it. In basing its ruling for the PR to refund a substantial portion of his compensation on the finding that a deed of distribution would have been preferred given the intent of Ms.

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[6] Rowland Milam purchased the Estate's real estate. See, Deed, PR Exhibit C-16, R. pp._____.

Kay, the expressed desire of a majority of the beneficiaries, the authority granted by the will and SC law, the Court made a manifest error of law.

IV. The filings by the PR of the four interim accountings was provided to Brown and Moses and the other beneficiaries in accordance with the requirements of the Probate Code and made full and fair disclosure of the receipts and expenditures of the Estate to all , including the compensation paid to the PR.

Brown and Moses seek to convince the Court that the PR sought to have the heirs consent to a distribution and final settlement of the Estate without disclosing that amount he had been paid. That is false.

The first three interim accountings were filed prior to the Petition for Settlement and interim accounting 4 for the period ending November 12, 2010 was filed on November 15, 2010 together with the Petition for Settlement[7], Proposal for Distribution, and Notice of Right to Request a Hearing. Brown and Moses possessed all of these accountings and final documents when their counsel requested a hearing on December 6, 2010.

SC Code § 62-3-715(16) authorizes personal representatives to pay personal representative compensation. SC Code § 62-3-1001 provides that personal representatives file a final accounting with the probate court in accordance with the various time limitations as set forth therein. In this case, the PR sought, and received, extensions for the filing of the final accounting every six (6) months pending the sale of the real property. See, for example, 7/13/07 JPR Time Entry, R.p._____; 6/1/08 PKB Time Entry, R.p._____; 6/12/08 EDS Time Entry, R.p.____; 12/1/08 PKB Time entry, R.p._____; 12/22/09 PKB Time entry, R.p._____; 12/30/09 PKB Time entry, R.p._____; 6/16/10 EDS Time entry, R.p. _____.

[7] The Probate Code has been amended so that the "Petition for Settlement" is now "Application for Settlement".

Upon the sale of the real property, the PR filed interim accountings. Interim Accounting 1 for the period ended December 31, 2007 was filed October 18, 2010 (as well as a Supplemental Inventory and Appraisement). Interim Accounting 2 for the year 2008 was filed October 25, 2010. Interim Accounting 3 for the year 2009 was filed on or around November 1, 2010. Interim 4 for the period ending November 12, 2010 was filed on November 15, 2010. On November 15, 2010, the PR filed the Petition for Settlement and Proposal for Distribution and notified the beneficiaries of their right to a hearing as required by the probate code. Accordingly, at the time the beneficiaries received the Petition for Settlement, they had received a full accounting of the Estate receipts and expenditures, including the compensation for the PR paid to date. The PR did not "tr[y] to get the heirs to agree to his handling of the Estate without letting them know what he did and how much he paid himself" nor did he attempt to "persuade Brown and Moses to consent to unknown activities" (Respondent–Appellant Brief at 9). Furthermore, throughout the Estate administration, all beneficiaries were well aware of the efforts of the PR to divide and sell the real estate. PR Exhibit C-11, R.pp.___. Also, see Testimony of Penny Arnold, 2/2/11 transcript, page 213, line 1 – page 216 line 11. The allegations of Brown and Moses that the PR "looted the estate and tried to hide that from the heirs until the scheduling of a hearing made that impossible" are utterly false (Respondents-Appellants Brief at pages 9).[8]

[8] Replying to Respondents-Appellants' Respondent Brief, Argument IV. Throughout these proceedings, counsel for Brown and Moses has sprinkled his briefs and court correspondence with inflammatory language and unfounded accusations against the PR including "loot", "looted", "bilked", and "ill-gotten gains". These slurs are perilously close to a violation of the oath of civility required by those who practice law in the State of South Carolina. See, In the Matter of Anonymous Member of the South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011) where our Supreme Court quoting with approval from In

The PR is entitled to compensation and expenses from the requested hearings at which Brown continued to press their claim for acreage against the Estate. Despite the settlement of the litigation concerning the claims against the Estate in June 2010, Brown continued to press her claim against the Estate for 5 acres. See Testimony of Brown, 2/2/11 transcript, page 17, line 19 – page 80, line 4. The PR, with the aid of legal counsel, successfully contested this claim (again). Thereafter, in January 2012, counsel for Brown and Moses raised the claim again. Once again, the PR successfully, again with legal counsel, resisted this claim.

The PR was required to attend the hearings on his accounting, Petition for Settlement and Proposal for Distribution. SC Code § 62-3-720 provides that the PR is entitled to received from the estate his necessary expenses and reasonable expenses, including reasonable attorneys fees incurred if he defends or prosecutes any proceeding in good faith, whether successful or not. Item V (3) of Ms. Kay's will provides that the PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses. The PR attended the hearings in his capacity as personal representative; accordingly the PR is entitled to be paid for his services and reimbursed for expenses including attorneys fees. In addition to being required by law to attend the hearings on behalf of the Estate, he also defended against the ongoing claim of Brown for yet more of the Estate (the five acres). The Circuit Court erred in affirming the probate court's ruling that the PR was not entitled to be paid for his services or reimbursed for legal fees or costs of witnesses subsequent to the filing of the Petition for Settlement on

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Re Grande, 374 S.E.2d 496, 497 (1988) that a lawyer, "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client."

November 15, 2010 and therefore should be reversed and remanded for determination of the value of service of the PR, costs/expenses and reasonable attorney's fees.[9]

V. The Court overlooked or misapprehended the evidence substantiating the hours of the PR.

Contrary to the probate court's findings, the record contains evidence supporting the hours claimed by the PR. The probate court finds that the PR failed "to provide adequate proof for the hours he claims." In making this finding, the court ignores the documentation put into evidence at the hearing (and pointed out by the PR's Rule 59 motion. See Section IX below).[10]

A substantial portion of the PR's time in the administration of the Estate is reflected as "no charge" hours or offset by discounts. These hours are reflected by the Law Firm invoices admitted into evidence as PR Exhibit D (R.pp. _____). Furthermore, time sheets of the PR supporting these hours were submitted to the probate court as part of the PR's Rule 59 motion. R.pp. _____ . (See Section ___ below). An analysis of the Law Firm Invoices reflects the following:

File 1147.100 173.30 hrs (Ex. D, R.pp _) (PR Grounds for Appeal, R.pp._)
File 1147.101 76.40 hrs (Exh D., R.pp_) (PR Grounds for Appeal, R. pp._).

Total 249.70 hours

Unquestionably, this evidence supporting the PR's time in the administration is contained in the record. (Exhibit E included in the Affidavit of the PR reflecting an additional 216.10 hours including hours served after August 31, 2010 was also filed with the probate court administration and proffered to the court. See, Initial Brief of Appellant-Respondent, filed 4/7/2014, at p. 15). In affirming the probate court's finding that the PR

[9] Replying to Argument V
[10] Further Replying to Argument V

failed to substantiate his time, the Circuit Court erred in that there is no evidence to support the court's finding.

As to the allegations of Brown and Moses that the legal fees were too much for what should have been a simple estate, but for their ongoing unwillingness to co-operate the fees would have been much less. Furthermore, the PR only paid $13,499 in legal fees to the Law Firm prior to submitting the balance for approval to the probate court, which approval was received.

VI. Brown and Moses misstate the record concerning the hours charged by the PR during the administration of the Estate.

During the 3 years and 6 months of Estate Administration (May 3, 2007 – November 12, 2011), the PR worked 465.8 hours. The no-charge hours listed in 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. See PR Trial Exhibit D, August 17, 2010 invoice, 173.3 hours plus August 16, 2010 invoice, 76.4 hours totaling 249.70. In other words, these hours **were not** billed by the Law Firm. Brown and Moses misstate the record when they write "[h]e neglects to mention that his law firm billed the Estate for many hours of his time for which he now seeks compensation." See, Respondents-Appellants Brief at p. 8 filed on or around April 24, 2014.

Some of the PR's hours at the Law Firm were billed by the Law Firm during the administration, however, these hours are not included in the "no charge" hours noted

above.[11] Additionally, at the PR's request, there were $20,268.50 of Law Firm charges that were discounted or written off, which more than offset the PR time that is reflected as billed by the invoices (See PR Exhibit D, R.pp. ___), the net effect of which is that the Law Firm did not charge for the PR's services to the Estate. Lastly, the PR was an employee and not an owner or partner while working at the Law Firm. See 2/2/11 Transcript at page 143, line 9, as corrected by Transcript Corrections, R. p. _____ ("No, I was not a partner there. I was an employee.") The legal fees were paid to the Law Firm as opposed to the PR.

Brown and Moses claim that "the PR used 204.6 hours of paralegal time from his law firm to value personalty". Brief of Respondents-Appellants (Cross-Appeal) at page 5. Their position is both factually incorrect and without merit. They also misrepresent as their authority for that claim a finding of the probate court (Final Order, Para. 17). The probate court did not find that the PR used 204.6 hours of paralegal time from his law firm to value personalty nor did that occur. The court ruled, "I approve the previous payment of $13,499.58 to Collins and Lacey and find that Collins and Lacey is entitled to be paid an additional $12,306.80. Although, the Court questions the necessity of 204.60 hours of paralegal time, they should be compensated for their work." Order dated May 24, 2011, Para. 17, R.pp.____. Judge Hocker's ruling does not support their claim. Neither does the record.

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[11] November 26, 2007 invoice - $7,395.00; November 26, 2008 - $1,305.00; August 16, 2010 invoice - $522.00; August 17, 2012 - $319.00. These hours are not included in the 465.8 hours used in support of the PR's compensation.

Paralegals at the Law Firm **did not** spend 204.60 hours appraising personal property of the Estate as claimed by Brown and Moses.[12] Of the total paralegal time, 4.00 hours were spent related to the valuation of personal property. (See Exhibit 1 to Personal Representative's Reply to Addendum to Response of Appellants Moses and Brown. R.pp. ___). 1.70 of these hours were not billed. (See Exhibit 7, R.pp.____.) There was a .50 hour listed pertaining to determining the value of a vehicle. (.50 hours on June 25, 2007, R.pp.____)

The remainder of the paralegal time was spent on estate administration (131.70 hours), including contacting heirs, drafting probate court filings, analyzing Ms. Kay's extensive Memorandum of Personal Property to begin the distribution process to beneficiaries, preparing receipt and release forms for execution by beneficiaries, preparing forms to obtain federal identification number for the Estate, working with bankers concerning account information, obtaining and paying final bills of Ms. Kay, securing keys to Ms. Kay's home, paying pharmacy bills, corresponding with beneficiaries, finding addresses for beneficiaries, working with life insurance companies, seeking refunds of overpayments, retaining the service of a monument company, preparing contracts, reviewing invoices, transferred property to beneficiaries, reviewing plats, seeking to recover benefits from life insurance companies, and preparing correspondence to surveyors. Of these 131.7 hours, however, 28.6 hour were not billed at all. (R.pp. ____, reflecting 25.7 and 2.0 calculated at "0.00/hr"). Another 68.40 hours were related to the partition and declaratory judgment action. R.pp.____.

[12] Brown and Moses Initial Brief filed March 20, 2014, at page 5.

All of the time is reflected in detail in the Law Firm invoices, PR Exhibit D, R.pp. ____, so there can be no dispute as to how this time was spent.

Furthermore, the Supplemental Inventory and Appraisement reflects that of the $122,491 referred to by Brown and Moses as personal property, only $38,621 is actual tangible personal property subject to valuation. While the remaining balance is cash or cash and cash equivalents and life insurance of which valuation was not an issue at all since the amounts were simply listed on bank records. The tangible personal effects were appraised by qualified appraisers – not Law Firm paralegals. Furthermore, the personal representative's "reasonable compensation" should be determined by an analysis of several factors, not just the value of the estate. The PR has proposed a formula for making such a determination. See Appellant-Respondent Brief, R.pp._____. The PR's compensation is not a percentage-based commission because the will provides that he shall receive "reasonable compensation."

South Carolina Code Section 62-3-706 requires the personal representative to prepare and file with the probate court an inventory and appraisement of probate property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each item, its fair market value as of the date of the decedent's death. SC Code Section 62-3-707 authorizes personal representatives to hire qualified appraisers, which the PR in this case did. The ongoing allegation of Brown and Moses that the PR somehow used paralegals at the Law Firm to inflate valuation of personal property so as to increase his compensation is patently false and a misrepresentation of the evidence in the record.

In any event, the PR presented more than $12,300 of the Law Firm invoices to the probate court for approval **prior** to making payment. Amended Proposal for Distribution, R.pp. ____. The probate court approved these fees including the paralegal charges. Order dated May 24, 2011, R.pp. ____. Brown and Moses' complaint is without merit.

VII. Requiring the PR to refund compensation relating to services rendered in seeking to divide and sell the Farm would unjustly enrich those beneficiaries who requested those services.

The beneficiaries who held no less than 70% of the residuary interests of the Estate requested that the PR make cash disbursements rather than an interest in real estate. To require the PR to refund compensation relating to his services rendered in seeking to divide and sell the Farm would unjustly enrich those beneficiaries. See Appellant-Respondent Brief, Argument III, at page ____.

Brown and Moses state that the heirs (other than Bart Heard who has received advances) have not been unjustly enriched because they have yet to receive a distribution from the Estate. Respondents-Appellants Respondent Brief at 9. However, the Circuit Court's ruling requiring the PR to refund approximately $40,000 to the Estate because the court disagreed with the PR's actions to partition the Farm and seek a declaratory judgment on title issues would unjustly enrich the beneficiaries, all of whom benefitted from the PR's efforts and success in selling the Farm.[13]

[13] Of the approximately $40,000 refund, counsel for Brown and Moses would receive nearly half- $19,860 in attorney's fees - under the probate court's order. After deducting these fees and the cost of court reporter transcripts, Brown and Moses, 10% beneficiaries, each would net approximately $1,000 of the refunded amount.

Accordingly, the ruling of the courts below should be reversed and the case remanded.[14]

VIII. Brown and Moses misrepresent the testimony of the PR concerning the basis for his determination of "reasonable compensation."

In seemingly quoting from the record, Brown and Moses distort the testimony (and the record) of the PR concerning the basis for his determination of "reasonable compensation." First, the questions attributed to the probate judge (Respondent-Appellants' Brief at pages 6 and 7) were actually questions from opposing counsel. Secondly, the quoted testimony misleads because it omits crucial portions of the PR's testimony. The entire testimony of the PR to the questions of opposing counsel at this point in the hearing is as follows (the portion omitted from Respondents-Appellants' representation of the record is underlined):

> Q. So you were, as a Personal Representative, charging on an hourly basis?
> A. No, I wasn't.
> Q. Well what did you mean when you said you looked at the time you had into it to figure your charges?
> A. I looked at what I thought was a reasonable fee. And as we went down the road, I took draws, I guess you might say, toward what I thought was a reasonable fee, <u>given the amount of time that I had into it and the result that I expected</u>.
> Q. So you were charging on a time basis for your Personal Representative fees?
> A. No. I had a –I thought I knew what the bill--what a fair and reasonable fee would be for this administration as we started down the road. And I set, I guess, my draw, against that target. <u>And then as we went down the road and we got a bigger and better result, the final result was based on all the factors and the rule, the time, and the novelty of the issues.</u>[15]

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[14] Replying to Respondents-Appellants' Respondent Brief, Argument III, at page ____.

[15] Based on the PR's 465.8 hours (at $225 per hour), the total fee based on number of hours would be $104,805, more than $10,000 than actually paid. See Appellant-Respondent Brief, pages 14 – 16.

The PR consistently testified that he based his charges on several factors, including time, novelty and complexity of the issues, and results obtained. Contrary to Brown and Moses implication that the PR did little or no work ("he let Collins and Lacey [sic] handled the legal work and hired an accountant to do the accounting work"), the PR prepared pleadings, contracts, consents, and other legal documents, responded to discovery requests, met with counsel, met with appraisers and surveyors, researched courthouse records, researched legal issues, showed real estate to prospective buyers, settled a property claim with an insurance company, negotiated and received an excellent result for the real estate, prepared probate documents, included Inventory and Appraisement(s), and Accountings, all of which were in addition to his other duties in the administration of the Estate. See PR Exhibit D, and the various time entries of the PR describing his services to the Estate, R.pp.____.[16]

Brown and Moses nonsensically allege that "[b]fore [the PR's] representation really got underway and before anything was contested, he determined that his fee would consume the Estate's $60,500.00 in stocks and bonds" and rely upon an entry in the Inventory and Appraisement, Supplemental #1. See, Respondent-Appellant's Respondent Brief at p. _____. That is false and in no way supported by the referenced exhibit. Furthermore, the allegation that the value of the securities increased (and somehow correspondingly increased the PR's "fee") but that has not been accounted for is also false and without merit. The gain on the sale of securities is reflected in "receipts" on Interim Accounting 1. See, R.p. _____. Interest earned is also reflected in Interim Accountings 1 through 4 as receipts. See, R.p. _____.

[16] Replying to Argument II.

The PR provided valuable services to the Estate and is entitled to "reasonable compensation."

IX. The Court erred in affirming the Probate Court's Order Disposing of Post-trial motions.

The PR's Rule 59 motion for reconsideration cited various errors of law and oversight of evidence by the Probate Court. See Appellant-Respondent Brief at pages44 - 46. At a hearing on the Rule 59 motion, the Court allowed the PR to submit for its consideration certain time records in support of time entries of the PR contained (but not charged) in the Law Firm invoices. 1/11/12 transcript, page 24, line 11 – page 26. line 21. R.pp.____. These invoices were clearly in the record. The time sheets were submitted by the PR's counsel as allowed. See Letter of Daryl G. Hawkins dated January 20, 2012 to The Honorable Donald B. Hocker, together with enclosures. R.pp. _____. The time sheets reflect the contemporaneous entries by the PR of time devoted to the administration of the Estate. Nevertheless, the Court declined to re-consider its finding that the PR "failed to provide adequate proof for the hours he claimed." In affirming the probate court's finding, the Circuit Court erred and its order should be reversed.

X. Brown and Moses did not maintain a suit for the creation of a common fund or property and are not entitled to attorneys fees.

Brown and Moses did not maintain a suit for the creation, recovery, preservation, or increase of a common fund or common property. Accordingly, Brown and Moses are not entitled to attorneys fees pursuant to the common fund doctrine. See Layman v State, 376 S.C. 434, 658 S.E.2d 320 (2008). In addition to the numerous reasons previously provided by Appellant-Respondent precluding recovery of fees by Brown and Moses (Argument VI, Appellant-Respondent Brief, at p. ___), they simply requested a hearing

through their counsel on the PR's Petition for Settlement.[17] Counsel for Brown and Moses filed no pleadings. Brown and Moses did not follow the procedures outlined in SC Code Section 62-3-721 "Proceedings for review of employment of agents and compensation of personal representatives and employees of estate." Furthermore, at the hearing, he requested that the Court award Brown the monetary interest of Brown's alleged share of 5 acres once owned by the Estate. Not only did Brown and Moses not have a common interest with other beneficiaries, their interests as presented by their counsel were diametrically opposed. Finally, more beneficiaries testified in support of the PR's compensation and expenses (Heard and Arnold) than opposed (Brown). For these and other reasons previously stated, the common fund doctrine does not apply and neither Brown and Moses nor their counsel are entitled to legal fees and expenses they have requested. [18]

CONCLUSION

After 3 years and 6 months of estate administration, including negotiations and litigation to secure the liquidation of the Estate's real estate and make a cash distribution to the beneficiaries, the PR filed the required final settlement documents with the probate court. Brown and Moses requested a hearing. No pleadings were filed by Brown and Moses. Prior to the hearing, the PR filed a pre-hearing memorandum and a detailed Affidavit describing the Estate administration, the various issues and conflicting claims and competing interests of those named in the will, a timeline of events of the

[17] SC Code Section 62-3-1001 (a)(3) now provides for an "Application for Settlement" rather than a "Petition for Settlement", amended by 2013 Act No. 100, Section 1, eff. January, 1, 2014. "The 2010 amendment revised subsections (3) and (4) to conform to current practice allowing the personal representative to pursue informal proceedings to close the estate by filing an application rather than a petition." Reporter's Comment, Id.

[18] Replying to Argument VI, Respondent-Appellant Respondent Brief at page ____,

administration, a description of estate assets and accounting, the costs incurred including personal representative compensation and legal fees, the time devoted to the administration by the PR, and the factors used by the PR in determining his compensation. Supporting documentation attached as part of the affidavit included the will, the inventory and appraisement, 4 interim accountings from the beginning of the Estate through the date of the filing of settlement documents with the court, and supporting documentation describing the will, inventory and appraisement of estate assets, accountings, law firm invoices and other time records of the Personal Representative.

At the hearing, the personal representative testified as to the testamentary intent of Ms. Kay, the nature and amount of her assets, the methods involved in valuing the estate including the hiring of a surveyor and appraisers, valuation methods, estate beneficiaries, their expressed desires as to a distribution of cash rather than an undivided interest, the option granted to Ms. Kay's neighbor, Charles Copeland, the issues confronted including the various claims and competing interests of those named in the will, the efforts to reach a settlement of the estate, the reasons for filing the partition action/declaratory judgment action, his reliance on the advice of counsel, the litigation, the negotiation and sale of the real estate, the legal fees and his efforts to reduce the fees including a reduction in hourly rates and discounts, his hours devoted to the estate during the administration, the nature and amount of his services rendered to the Estate, and the factors relied upon in determining "reasonable compensation." In doing so, he responded to questions from both opposing counsel and the court. Beneficiary Bart Heard testified in essence to his regret that the Farm had not been divided during Ms. Kay's life and his approval of the PR's compensation. Penny Arnold testified as to the beneficiary Presbyterian Home's need for

a cash distribution as opposed to an interest in real estate and her approval of the PR's fees and expenses, including the legal fees. Two real estate experts testified as to the outstanding result obtained by the PR in selling the Farm. Rowland Milam, called by opposing counsel, testified as to the negotiations with the PR and the resulting agreement and purchase of the real estate. Exhibits were introduced into evidence including the inventory and appraisement of assets, accountings, appraisals, legal invoices, and time records.

On the other hand, Brown testified that the PR made the simple complicated - yet admitted that Lisbon Church and The Presbyterian wanted "money" not land.

In the face of all of this evidence and legal memoranda, the probate court found that that the PR failed to prove the necessity for his actions and that the PR should have simply deeded out the real estate to the beneficiaries, failed to prove the hours that he claimed, and did not present to the court a method for the determination of reasonable compensation. Based on these findings, the court ruled a reasonable fee would be $51,300, about 10% of the Estate, that the PR refund approximately $40,000 to the Estate, and that of this "common fund", opposing counsel who requested a hearing be paid nearly $19,860 pursuant to the common fund doctrine. The court also ruled that the PR should not be paid for preparing for and attending the hearing and further ordered that the PR bear the costs of his counsel, the expert witnesses, and the cost of the court reporter and transcripts (later revised so that Brown and Moses pay one-half of the court reporter and transcripts). In affirming these findings and rulings, the Circuit Court erred because the factual findings of the probate court are not supported by the overwhelming evidence presented at the hearing

in support of the PR's actions, his compensation and expenses. Furthermore, the rulings of the probate court are in direct conflict with South Carolina statutory and case law.

Now, 3 years and 6 months after filing the settlement documents, the PR and his counsel have spent untold hours filing and responding to briefs, filing and responding to motions, traveling out of town to attend hearings, meeting with beneficiaries, attempting to resolve the issues so that the Estate can be concluded, bearing the responsibility and duties of being the personal representative, all the while enduring the ongoing insults and slurs of counsel for Brown and Moses.[19] This is a gross injustice that must be addressed.

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, including attorney's fees, 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.

---

[19] Throughout these proceedings, counsel for Brown and Moses has sprinkled his briefs and court correspondence with inflammatory language and unfounded accusations against the PR including "loot", "looted", "bilked", "ill-gotten gains" and "shockingly ignorant of the law". These slurs violate the oath of civility required by those who practice law in the State of South Carolina, are not taken lightly, and should not be tolerated by the courts of this State. See In the Matter of Anonymous Member of the South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011). "Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath" (in reference to language of opposing counsel constituting "fighting words"). Id. at 336.

Respectfully submitted,

LAW OFFICE OF DARYL G. HAWKINS, LLC

May 27, 2014

By: _____
Daryl G. Hawkins

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Edward D. Sullivan, as PR
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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.

DESIGNATION OF MATTER OF APPELLANT-RESPONDENT IN CROSS-APPEAL TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant-Respondent proposes the following to be included in the Record on Appeal:

1. Probate Court Order dated May 24, 2011 (Judge Hocker)
2. Probate Court Order dated March 27, 2012 (Judge Hocker Disposing of Post-Trial Motions)
3. Circuit Court Order dated August 20, 2013 and filed August 21, 2013 (Judge Addy Affirming Order of Probate Court)
4. Circuit Court Order dated September 30, 2013 and filed October 1, 2013 (Judge Addy Reaffirming Order of Probate Court and Denying PR and Brown/Moses' Motions to Alter or Amend)
5. Petition for Settlement dated November 12, 2010
6. Proposal for Distribution dated November 12, 2010
7. Correspondence dated December 6, 2010 to Judge Fridy requesting hearing on final accounting
8. Amended Proposal for Distribution dated January 13, 2011
9. Personal Representative's Rule 59 Motion to Re-open Record, Accept Additional Evidence, and/or to Alter or Amend Judgment dated June 6, 2011 and filed June

8, 2011

10. Personal Representative's Grounds for Appeal dated May 11, 2012 and filed May 14, 2012
11. Transcript of Proceedings – February 2, 2011
12. Transcript of Proceedings – February 21, 2011
13. Transcript of Proceedings – January 11, 2012
14. Transcript of Proceedings - July 19, 2013
15. Exhibit A to Transcript of February 2, 2011 - Curriculum Vitae of Personal Representative
16. Exhibit B to Transcript of February 2, 2011 – Last Will and Testament of Marion M. Kay
17. Exhibit C-1 to Transcript of February 2, 2011 – Statement of Issues and Facts/ Summary of Personal Representative's Testimony
18. Exhibit C-2 to Transcript of February 2, 2011 – Two (2) Letters dated October 23, 2003 and January 6, 2004
19. Exhibit C-4 to Transcript of February 2, 2011 – Option Agreement dated December 28, 1972
20. Exhibit C-5 to Transcript of February 2, 2011 – Letter from Copeland dated April 16, 2008
21. Exhibit C-6 to Transcript of February 2, 2011 – Appraisal 330 acres dated February 25, 2008 by Major & Company
22. Exhibit C-7 to Transcript of February 2, 2011 – Appraisal 6 acres dated July 25, 2007 by Palmetto Heritage
23. Exhibit C-8 to Transcript of February 2, 2011 – Appraisal 4 acres dated July 25, 2007 by Palmetto Heritage
24. Exhibit C-9 to Transcript of February 2, 2011 – Letter from Attorney Fuller dated April 21, 2008
25. Exhibit C-11 to Transcript of February 2, 2011 – Letter from Personal Representative dated May 2, 2008
26. Exhibit C-12A to Transcript of February 2, 2011 – Amended Complaint dated March 3, 2009 and filed March 4, 2009
27. Exhibit C-12B to Transcript of February 2, 2011 – Answer to Amended Complaint and Counterclaim dated March 20, 2009
28. Exhibit C-13 to Transcript of February 2, 2011 – Letter from Personal Representative dated March 1, 2010
29. Exhibit C-14 to Transcript of February 2, 2011 – Three (3) Contracts of Sale all dated May 4, 2010
30. Exhibit C-15 to Transcript of February 2, 2011 – Consents and Ferguson Letter dated June 21, 2010
31. Exhibit C-16 to Transcript of February 2, 2011 – 2 Quitclaim Deeds dated July 9, 2010
32. Exhibit C-17 to Transcript of February 2, 2011 –Personal Representative Filings including Petition for Settlement, Proposal for Distribution, Amended Proposal for Distribution, Supplemental Inventory and Appraisement, Interim Accountings 1, 2, 3, and 4, and Notice of Hearing
33. Exhibit C-18 to Transcript of February 2, 2011 – Personal Representative's Time

Since 11/12/2010 Filing

34. Exhibit D to Transcript of February 2, 2011 – Invoices and Discounts from Collins & Lacy
35. Exhibit E to Transcript of February 2, 2011 – CV of John Wilson
36. Exhibit F to Transcript of February 2, 2011 – Rowland W. Milam correspondence dated October 19, 2009
37. Exhibit G to Transcript of February 2, 2011 – Personal Representative correspondence dated October 27, 2009
38. Exhibit H to Transcript of February 2, 2011 – Emails dated November 2, 2009 and November 4, 2009
39. Exhibit I to Transcript of February 2, 2011 – Personal Representative correspondence dated November 9, 2009
40. Exhibit J to Transcript of February 2, 2011 – December 14, 2009 emails
41. Exhibit K to Transcript of February 2, 2011 – December 15, 2009 emails
42. Exhibit L to Transcript of February 2, 2011 – Correspondence dated December 16, 2009
43. Exhibit M to Transcript of February 2, 2011 – Email dated March 16, 2010
44. Exhibit N to Transcript of February 2, 2011 – Wilson Forestry & Appraisal invoice
45. Exhibit O to Transcript of February 2, 2011 – Clifton D. Bodiford invoice
46. Exhibit P to Transcript of February 2, 2011 – Brown, Massey, Evans, McLeod & Haynsworth, LLC invoice
47. Exhibit Q to Transcript of February 2, 2011 – Major & Company invoice
48. Exhibit R to Transcript of February 2, 2011 – Law Office of Daryl G. Hawkins, LLC invoice
49. Exhibit S to Transcript of February 2, 2011 – Personal Representative's additional time
50. Personal Representative's Memorandum in Support of Petition for Settlement filed with Probate Court on February 1, 2011
51. Personal Representative's Post Trial Brief dated March 28, 2011
52. Brown and Moses Revised Return to Motion dated December 28, 2011
53. Attorney Fee Affidavit of Daryl G. Hawkins dated January 23, 2012
54. Personal Representative's Response to Brief of Appellants Moses and Brown dated July 12, 2013
55. Personal Representative's Reply to Addendum to Response of Appellants Moses and Brown dated July 29, 2013 and filed August 1, 2013
56. Personal Representative's Response to Request for Attorneys Fees by Counsel for Appellants Moses and Brown dated August 9, 2013
57. Daryl G. Hawkins Letter of January 20, 2012 to The Honorable Donald B. Hocker together with enclosures

[Signature Next Page]

I certify that this designation contains no matter which is irrelevant to this appeal.

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May 27, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

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 Reply Brief of Appellant-Respondent with Designation of Matter via U.S. Mail upon:

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

LAW OFFICE OF DARYL G. HAWKINS, LLC

Sheri Neely

Sheri H. Neely, Legal Assistant

May 27, 2014

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SC Court of Appeals

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May 27, 2014

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
PO Box 11629
Columbia, SC 29211-1629

RE: *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 v.
Martha Brown and Mary Moses, Respondents-Appellants
Laurens Co Circuit Court Appeals File No. 2012-CP-30-258
Laurens Co Probate Court File No. 2007-ES-30-208
SC Court of Appeals Tracking No. 2013-2319

Dear Ms. Kitchings:

Enclosed for filing with your office are the originals and one copy each of:

1. Initial Reply Brief of Appellant-Respondent; and
2. Designation of Matter.

I would appreciate your returning a clocked copy of each in the return envelope provided for your convenience.

By copy of this letter to counsel for the Respondents-Appellants, I am herewith serving a copy of each of the above upon him.

Sincerely,

Sheri Neely

Sheri H. Neely
Legal Assistant to Daryl G. Hawkins

Enclosures
cc: John R. Ferguson, Esquire

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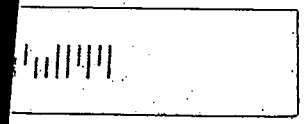

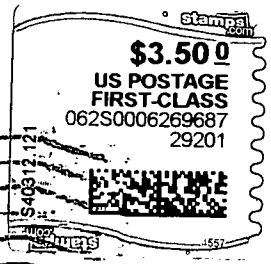

COLUMBIA SC 292

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