THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

REPLY BRIEF OF APPELLANT-RESPONDENT

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ARGUMENT

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]

[1] Replying to Argument I of Respondents-Appellants Moses and Brown Respondent Brief at page 3.

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. (R. p. 242, Lines 12-25). She approved the PR's compensation and as well as the amount of legal fees and was pleased with the results. (R. p. 246, Lines 1-11 and 18-25). 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] (R. p. 133, Line23; R. p. 105, Line 10).

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." (R. p. 78, 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

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

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." (R. p. 630). 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." (R. p. 631). (This correspondence was copied to the PR 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. (R. p. 782). In addition, the PR communicated with Reverend Hunter repeatedly via meetings, telephone conference and written correspondence:

1. June 20, 2007; R. p. 736;
2. April 10, 2008; R. p. 779;
3. April 15, 2008; R. p. 779;
4. May 13, 2008; R. p. 782;
5. May 20, 2008; R. p. 782;
6. June 25, 2008; R. p. 783;
7. August 11, 2008; R. p. 784;
8. September 4, 2008; R. p. 784;
9. October 21, 2008; R. p. 785;
10. December 3, 2008; R. p. 755;
11. February 25, 2010; R. p. 791; and
12. April 15, 2010; R. p. 792.

Furthermore, Reverend Hunter met with (1) the PR and consultant John Wilson (July 25, 2007) (R. p. 747), 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 (R. p. 236, Lines 9–11); Testimony of Penny Arnold (R. p. 244, Lines 3-21). 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 **<u>no</u>** 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, **<u>were they looking for land; or were they looking for money</u>**?

A. **<u>Money</u>**.

(emphasis added.) (R. p. 310, 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. (R. p. 357, 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 deeded out the property to the beneficiaries (against the 70% majorities' wishes), the circuit court made a manifest error of law.[4]

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[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. S.C. Code Ann. § 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.

[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 if 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 would have been increased to 60% and the other beneficiaries would have been responsible for taxes and upkeep and faced with liability issues.

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. (R. pp. 566-567). Also, see Testimony of Bart Heard (beneficiary). (R. p. 134, 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. (R. p. 685).

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

[5] Further replying to Argument I, Respondents-Appellants' Respondent Brief at page 3.

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. (R. pp. 632-633). 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 asserted only by Ms. Brown, who made no attempt to litigate the matter until the PR invited her to settle all issues with the Estate." Brief of Appellant-Respondent at Page 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. (R. pp. 657-663).

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

[6] Rowland Milam purchased the Estate's real estate. See, Deed (R. pp. 686-693).

up on the same page.

(emphasis added.) See, John Ferguson letter dated June 21, 2010 (R. p. 685).

III. In addition to 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. 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 the 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.

S.C. Code Ann. § 62-3-715(16) authorizes personal representatives to pay personal representative compensation. S.C. Code Ann. § 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, PR Exhibit D; 7/13/07 JPR Time Entry (R. p. 745); 6/11/08 PKB Time Entry (R. p. 783); 6/12/08 EDS Time Entry (R. p. 783); 12/1/08 PKB Time entry (R. p. 786); 12/22/09 PKB

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

Time entry (R. p. 790); 12/30/09 PKB Time entry (R. p. 790); 6/16/10 EDS Time entry (R. p. 790).

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" (Brief of Appellant-Respondent at Page 9). Furthermore, throughout the Estate administration, all beneficiaries were well aware of the efforts of the PR to divide and sell the real estate. (R. pp. 632-633). (See also, Testimony of Penny Arnold (R. p. 243, Line 1 - p. 246, 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 (Brief of Appellant-Respondent at Page 10).[8]

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; R. p. 326, Line 8 - p. 329, Line 4) (See also, Revised Return to Motion, R. p. 991). 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. (R. p. 444, Lines 15 - p. 450, Line 9). Once again, the PR successfully, again with legal counsel, resisted this claim. (See, Order Disposing of Post-trial Motions; R. p. 18).

The PR was required to attend the hearings on his accounting, Petition for Settlement and Proposal for Distribution. S.C. Code Ann. § 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

[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 Re Goude, 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."

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 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

[9] Replying to Argument V.

[10] Further replying to Argument V.

by the Law Firm invoices admitted into evidence as PR Exhibit D (R. pp. 729-795). 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. 993-1204). (See, Section IX. below). An analysis of the Law Firm Invoices reflects the following:

File 1147.100 173.30 hrs (R. pp. 794-795) (R. pp. 1278-1298; 1279-1291)
File 1147.101 76.40 hrs (R. p. 775) (R. pp. 1278-1298; 1292-1298)

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, Brief of Appellant-Respondent at Pages 33-35). In affirming the probate court's finding that the PR 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, August 17, 2010 invoice, 173.3 hours (R. pp. 794-795); plus August 16, 2010 invoice, 76.4 hours (R. p. 775), 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, Brief of Appellant-Respondent at Page 8).

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 (R. p. 729), 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 (R. p. 173, Line 9), as corrected by Transcript Corrections (R. p. 29) ("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 (R. pp. 10-11, Paragraph 17). The probate court did not find that the PR

[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.

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." (R. pp. 10-11). Judge Hocker's ruling does not support their claim. Neither does the record.

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. p. 1460). 1.70 of these hours were not billed. (See Exhibit 7 (R. p. 1528). There was a .50 hour listed pertaining to determining the value of a vehicle. (.50 hours on June 25, 2007 (R. p. 1469).

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,

[12] Respondents-Appellants' Respondent Brief at Page 8.

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 hours were not billed at all (R. p. 1482), 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. p. 1508).

All of the time is reflected in detail in the Law Firm invoices (R. pp. 729-795), 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, Brief of Appellant-Respondent at Pages 25-27). The PR's compensation is not a percentage-based commission because the will provides that he shall receive "reasonable compensation."

S.C. Code Ann. § 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. S.C. Code Ann. § 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. See, Amended Proposal for Distribution (R. pp. 26-27). The probate court approved these fees including the paralegal charges (R. pp. 10-11). 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, Brief of Appellant-Respondent, Argument III at Pages 35-37).

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. (See, Respondents-Appellants'

Respondent Brief at Page 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]

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 (See, Brief of Appellant-Respondent at Page 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.

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[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.

[14] Replying to Respondents-Appellants' Respondent Brief, Argument III, at Page 9.

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, given the amount of time that I had into it and the result that I expected.

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. 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.[15]

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

[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 Brief of Appellant-Respondent at Pages 14-16).

administration of the Estate. See, PR Exhibit D, and the various time entries of the PR describing his services to the Estate (R. pp. 729-795).[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, Brief of Appellant-Respondent at Page 7). 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. (R. p. 714). Interest earned is also reflected in Interim Accountings 1 through 4 as receipts. (R. pp. 714-720).

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, Brief of Appellant-Respondent at Pages 44-46). 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. (R. p. 401, Line 11 – p. 403, Line 21). These invoices were clearly in the record.

[16] Replying to Argument II.

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. 993-1204). 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 (See, Brief of Appellant-Respondent at Page 40, Argument VI), 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 S.C. Code Ann. § 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

[17] S.C. Code Ann. § 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.

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 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

[18] Replying to Argument VI, Respondents-Appellants' Respondent Brief at Page 11.

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 Home 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 10 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. 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.

[Signature Page to Follow]

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September 26, 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.

CERTIFICATE OF COUNSEL

Counsel for the Appellant-Respondent certifies that the Reply Brief of Appellant-Respondent complies with Rule 211(b).

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PROOF OF SERVICE

I certify that I served the following via U.S. Mail upon:

John R. Ferguson, Esquire
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1. Brief of Appellant-Respondent (BLUE) with accompanying Certificate of Compliance;
2. Respondent's Brief of Appellant-Respondent (RED) with accompanying Certificate of Compliance; and
3. Reply Brief of Appellant-Respondent (GRAY) with accompanying Certificate of Compliance.

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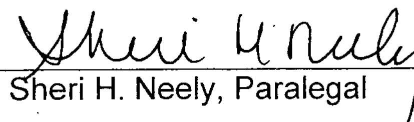

Sheri H. Neely, Paralegal

September 26, 2014