

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRYCOUNTY
COURT OF COMMON PLEAS

RALPH P. STROMAN, SPECIAL REFEREE

APPELLATE CASE NO. 2014-002593

Dewey Lee Small,.....Respondent,

v.

Maxine Johnson a.k.a. Maxine McQueen a.k.a. Maxcine Johnson,
Ernestine Small Bass, Rose Small a.k.a. Rosemary Mary McQueen,
Kassandra D. Odom a.k.a. Kassandra D. Shea, Michelle D. Odom
a.k.a. Michelle D. DeLa Cort, Queenie Small a.k.a. Queenie B
Arnold a.k.a. Qunnie Arnold, Lewis Filton Small, Jr , a.k.a Pete
Small, William Franklin Small, a.k.a. Danny Small, Patsy Ann
Small a.k.a. Patsy Small Crock a.k a Patsy Ann Small Pierick
Crock a.k.a. Patsy Pierick, Donald Lee Small, Janava Small,
a.k.a. Janava Small Lonneux a.k.a. Candy Small, Daisy Dean
Small, a.k.a. Dean Small, Sandra Small, a.k.a. Sandra Howard,
Jacqueline L. White, Jimmy Prince, Jr., Veretta Norman, Venata
Small Olivera, Marcus Johnson, Jr., Dewey Jerome Johnson,
John Doe, and Jane Doe, Representatives of any unknown Heirs,

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FEB 09 2013

SC Court of Appeals

In Re: The Estate of Lewis Small, Defendants,

of whom Patsy Ann Crock and Fulton Louis Small, are.....Appellants.

INITIAL BRIEF OF APPELLANTS

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February 3, 2015
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TABLE OF CONTENTS

	Page(s)
Table of Cases, Statutes and Other Authorities	iii
Issues on Appeal.....	iv
Statement of the Case.....	1
Statement of Facts.....	3
LEGAL ARGUMENTS.	6
CONCLUSION... ..	19

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

	Page(s)
<u>CASES</u>	
<u>Blumberg v. Nealco, Inc.</u> , 310 S.C. 492, 427 S.E.2d 659, (S.C., 1993)	1
<u>Daniel v. White</u> , 272 S C. 477, 252 S.E.2d 912 (1979)	16
<u>Collins v. Collins</u> , 239 S.C. 170, 122 S.E.2d 1 (1961)	16
<u>Taylor v. Medenica</u> , 331 S.C. 575, 580, 503 S.E. 2d 453, 461 (1998)	16
<u>STATUTES OF SOUTH CAROLINA</u>	
Section 15-61-10, et seq., Code of Laws of South Carolina, 1976 as amended	15
Section 15-61-50, Code of Laws of South Carolina, 1976 as amended	15
Section 15-61-110, Code of Laws of South Carolina, 1976 as amended	2, 7, 15, 19
<u>SOUTH CAROLINA RULES OF CIVIL PROCEDURE</u>	
Rule 71(d), South Carolina Rules of Civil Procedure	11, 15
Rule 17(f), South Carolina Rules of Civil Procedure	13

STATEMENT OF ISSUES ON APPEAL

- I. DOES THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014, EXCEED THE SCOPE OF THE PLEADINGS BY REQUIRING THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY “CROSS-OVER DEEDS” AS A CONDITION OF RECEIVING AN UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY SUBJECT TO THE PARTITION ACTION?
- II. IS A PORTION OF THE AWARD OF ATTORNEY FEES NOT SUPPORTED IN THE RECORD AND INEQUITABLE TO THE PARTIES, AS WELL AS MAJORITY OF THE EXPENSES AWARDED, AND IS THE CONCURRENT APPROVAL OF THE PROBATE COURT REQUIRED AS A CONDITION FOR THE DISTRIBUTION OF A PORTION OF THE ATTORNEY’S FEES AND A MAJORITY OF THE EXPENSES REFLECTED IN THE FINAL ORDER FILED OCTOBER 16, 2014?

STATEMENT OF THE CASE

This appeal involves real property owned by Lewis Small, the administration of the Estate of Lewis Small which was first opened in 1984 and thereafter closed without full administration, the subsequent administration of the Estate of Lewis Small thereafter re-opened in 2012, and an action commenced in the Court of Common Pleas to quiet the title to and partition one (1) tract of land by private sale, one (1) of two (2) tracts wholly owned by Lewis Small at his death. The action to quiet title and to partition the single tract filed in the Court of Common Pleas did not attempt to partition other tracts owned as tenants in common by the heirs at law of Mattie Small, an undivided two-thirds interest, and by the devisees named in the Last Will and Testament of Lewis Small, or their devisees and/or heirs at law, an undivided one-third interest. The action to quiet title and to partition the single tract in the Court of Common Pleas follows an action filed in the Probate Court to sell the same single tract, presumably in aid of assets, an action which was later dismissed.

The findings and conclusions of the Special Referee are reflected in a Final Order filed October 16, 2014, which amends a Final Order filed June 19, 2014, following arguments on a Motion to Alter or Amend the first of two final orders. The issues in the case center on the partition sale of this single tract for a gross sales price of \$1,800,000.00, the conditions imposed on each devisee named in the Last Will and Testament of Lewis Small by the Special Referee to obtain payment of an undetermined portion of the net proceeds remaining following the distribution of attorney's fees and reimbursable expenses ordered to be paid from the gross sales proceeds generated by the partition sale of this single parcel.

In the Motion to Alter or Amend the Final Order filed June 19, 2014, the trial attorney, a person other than the undersigned, asserted the action filed in the Court of Common

Pleas, hereinafter “the Quiet Title and Partition Action”, was one to quiet title to one specific tract of land, 60 acres, more or less, as described in the Complaint, hereinafter “the Subject Property”, and to partition the Subject Property by sale; therefore, he argued, the only issues before the Special Referee were the ownership of the tract, the partition of the tract, and equitable attorney’s fees and costs of the action as determined pursuant to S.C. Code Ann §15-61-110, Code of Laws of South Carolina, 1976 as amended.

In the Motion to Alter or Amend the Final Order filed June 19, 2014, the trial attorney asserted the Special Referee granted relief well beyond and outside the two (2) causes of action reflected in the Complaint insofar as the Final Order filed June 19, 2014:

- a. Orders the devisees reflected within the Last Will and Testament to execute deeds which convey their interests in real properties which are not the subject of the partition as a condition precedent to receiving an undetermined portion of the gross funds generated by the sale of the Subject Property (following the distribution of excessive attorney’s fees and reimbursable expenses which are questioned); and
- b. Orders the payment of excessive attorney’s fees to the attorney for the plaintiff, and excessive and wholly unsubstantiated reimbursable expenses to Dewey Lee Small (which are either time barred or unrelated to the Quiet Title and Partition Action); and
- c. Orders the payment of charges, expenses, and fees exclusively within the jurisdiction of the Probate Court without first requiring the issuance of an order from the Probate Court; and
- d. Orders the payment of attorney fees and costs without supportive findings of fact or conclusions of law as required by Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659, (S.C., 1993), and the plethora of case law that follows that case.

In the Motion to Alter or Amend the Final Order filed June 19, 2014, the trial attorney specifically requested the Special Referee to amend the order to (a) delete all provisions which were not consistent with the pleadings and the law, (b) order only the payment of a

reasonable attorney fee to the attorney for the Plaintiff based on the evidence presented at the hearing and the costs of the instant action, (c) order the sale of the Subject Property in accordance with a signed contract of sale, (d) order the proceeds of sale and all fees and expenses payable from the fund generated by the sale of the Subject Property to be paid into an estate account subject to the jurisdiction of the Probate Court because any agreement made by the personal representative, as well as all costs, reimbursements, fees, and other expenses are to be determined and needed to be approved by the Probate Court in accordance with the Probate Code, and (e) to provide such other relief as may be appropriate.

The Special Referee amended the Final Order filed June 19, 2014, as reflected by a Final Order filed October 16, 2014. This appeal follows, and Appellants respectfully asserts the Final Order filed October 16, 2014, should be reversed and remanded as outlined herein.

STATEMENT OF FACTS

Mattie Small and Lewis Small were married, and together had fourteen (14) children. Prior to the death of Mattie Small, one (1) of the children of Lewis Small and Mattie Small, a child named Lucille Small, passed away without leaving a spouse or a child. Mattie Small died intestate on November 1, 1965, as reflected in an Estate indexed in the Office of the Probate Court for the County of Horry under File Number 2-5-31. At the time of her death, the property owned by Mattie Small was inherited and owned by her husband, Lewis Small, an undivided one-third interest, and by two (2) children fathered by a person other than Lewis Small, and by thirteen (13) children fathered by Lewis Small, an undivided two-third interest. Mattie Small died intestate and at the time of her death, her sole heirs at law were (a) her husband, Lewis Small, and (b) Maxine Johnson McQueen, a child of Mattie Small and Mr

Johnson, and (c) Marcus Johnson, a child of Mattie Small and Mr. Johnson, and (d) Venata Small Olivera, a child of her pre-deceased child, Velma Ray Small, a child of Mattie Small and Lewis Small, and (e) the living children of Mattie Small and Lewis Small - Patsy Ann Crock, Fulton Louis Small; Dewey Lee Small; Mildred Isadora Small Ortega; Mazie Diane Small Odom; Queenie Small Arnold; Donald Lee Small; Janava Small Lonneau; Daisy Dean Small; Sandra Small Howard, and Geneva Katherine Small Prince.

All the heirs at law of Mattie Small, with the exception of two (2) heirs at law of Mattie Small, her children with Mr Johnson, are identical to the heirs at law of Lewis Small. Lewis Small inherited an undivided one-third interest in and to the probate estate of his wife, Mattie Small, and died on May 13, 1983, leaving a Last Will and Testament. The Estate of Lewis Small was opened in 1984 in the County of Horry, State of South Carolina, and is indexed under Case No. 1984-ES-26-752, hereinafter "the Estate." Dewey Lee Small, a child of Mattie Small and Lewis Small, is named as the personal representative within the Last Will and Testament of Lewis Small. Dewey Lee Small was appointed as the personal representative for the Estate in 1984, and the Estate was administratively closed and LETTERS DISMISSORY filed on September 6, 1989, without being fully administered.

The Estate was thereafter re-opened at the request of Dewey Lee Small by the filing of an APPLICATION FOR SUBSEQUENT ADMINISTRATION on September 14, 2013, after which Dewey Lee Small was re-appointed to serve as personal representative. At all times relevant to this appeal, Dewey Lee Small was the duly appointed fiduciary for the Estate.

At the time of her death, Mattie Small owned the following parcels located in the County of Horry.

<u>Tract</u>	<u>Tax Parcel</u>	<u>Size</u>
Tract One	197-00-01-023	8.1
	197-00-01-071	1.34
	197-00-01-072	1.39
	197-00-01-073	<u>2.27</u>
		13.1
Tract Two	190-00-05-003	<u>11.40</u>
		24.50

At the time of his death, Lewis Small, the husband of Mattie Small, inherited an undivided one-third interest in and to Tract One and Tract Two, and the children of Mattie Small, her remaining heirs at law, inherited an undivided two-thirds interest in and to Tract One and Tract Two.

At the time of his death, Lewis Small owned an undivided one-third interest in and to the property owned by his wife, as well as the following parcels located in the County of Horry:

<u>Tract</u>	<u>Tax Parcel</u>	<u>Size</u>
Tract Three	194-00-02-063	5.0
Tract Four	194-00-02-036	61.5

Dewey Lee Small, as personal representative of the Estate, commenced an action to sell Tract Four, the Subject Property, in the Probate Court for the County of Horry, hereinafter “the Action to Sell Land.” Thereafter, Dewey Lee Small, individually and not as personal representative of the Estate, commenced an action to partition and sell the Subject Property in the Court of Common Pleas for the County of Horry, hereinafter “the Quiet Title and Partition

Action.” The Action to Sell Land filed in the Probate Court, was dismissed as reflected on an ORDER OF DISMISSAL WITHOUT PREJUDICE filed on September 5, 2013.

A Special Referee was appointed in the Quiet Title and Partition Action, a hearing was held, and an order styled “FINAL ORDER (Ending Action)” was executed by the Honorable Ralph P. Stroman, Special Referee, and filed on June 19, 2014; thereafter, a Motion to Alter or Amend the Final Order filed June 19, 2014, was filed which resulted in its amendment as reflected by an order styled “FINAL ORDER (Ending Action)” executed by the Honorable Ralph P. Stroman, Special Referee, filed on October 16, 2014, in the Office of the Court of Common Pleas.

LEGAL ARGUMENT

I. THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014, EXCEEDS THE SCOPE OF THE PLEADINGS BY REQUIRING THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY “CROSS-OVER DEEDS” AS A CONDITION OF RECEIVING AN UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY SUBJECT TO THE PARTITION ACTION.

A Civil Action Cover Sheet, Summons and Complaint dated December 17, 2012, together with exhibits, were filed in the Court of Common Pleas for the County of Horry on December 19, 2012, the Quiet Title and to Partition Real Property. The Subject Property is specifically referenced in Paragraph Numbers 1 and 2 of the Complaint. The Complaint contains two (2) causes of action. The First Cause of Action is framed as one to quiet title to the Subject Property; the Second Cause of Action is framed as one to partition the Subject Property by sale. The second cause of action includes a request for the Court to “set attorney’s fees as may be equitable against all parties in interest herein and that these attorney’s fees and costs be paid first

from the proceeds from the sale before distribution.” See Paragraph 28, Complaint. The prayer of the Complaint requests an order quieting title to the Subject Property, partitioning the Subject Property by sale, dividing the sale proceeds into fourteen (14) equal shares, and establishing fees and expenses to “be paid first from the proceeds of the sale before distribution to the heirs.” There are no counterclaims and the pleadings filed in the Quiet Title and Partition Action reflect the only issues properly before the Special Referee were the ownership of the Subject Property, the partition of the Subject Property, the distribution of the proceeds from the partition sale, and the award of equitable attorney’s fees and costs of the action pursuant to S.C. Code Ann §15-61-110, Code of Laws of South Carolina, 1976 as amended.

Under the Final Order filed October 16, 2014, the Special Referee concluded Dewey Lee Small, as personal representative for the Estate, was fully authorized to effectuate the sale and transfer of the Subject Property to a third party for the sum of \$1,800,000.00, and concluded all of the fees and reimbursement expenses as outlined within the order were to be “taken from the gross sale at closing with the net proceeds going into an interest bearing estate account ” Under the Final Order filed October 16, 2014, the Special Referee also concluded the Last Will and Testament of Lewis Small contained a number of defects which were unenforceable; specifically, the Special Referee refused to enforce the “forfeiture clause wherein if the parties refused to sign over cross deeds, the parties would not receive any funds.” See Final Order filed October 16, 2014.

The properties owned by Mattie Small, and the heirs at law of Mattie Small, are mentioned within but are not the subject of the Quiet Title and Partition Action which focuses only on the Subject Property, a parcel wholly owned by Lewis Small, even though it was then

clear another parcel was wholly owned by him, as was an undivided one-third interest in and to the properties inherited from his wife, Mattie Small. The scope of the causes of action filed in the Quiet Title and Partition Action are limited, and the Final Order filed October 16, 2014, goes well beyond the scope by requiring the devisees to convey their interests in and to these other properties which are not the subject to the Quiet Title and Partition Action as a condition of receiving yet undetermined portions of the proceeds.

The relief awarded is necessarily founded on an interpretation of a Last Will and Testament of Lewis Small, and Appellants assert the Special Referee is without the requisite subject matter jurisdiction to interpret the Last Will and Testament of Lewis Small based on the pleadings filed in the Quiet Title and Partition Action; to the extent this occurred, his findings and conclusions of the Special Referee are jurisdictionally fatal and erroneous

Dewey Lee Small, as personal representative of his father's Estate, first attempted to sell the Subject Property in a proceeding commenced in Probate Court, presumably in aid of assets, hereinafter "the Action to Sell Property". The Action to Sell Property was first filed in the Probate Court; thereafter, the filing of the Quiet Title and Partition Action in the Court of Common Pleas followed at which time the Action to Sell Property was dismissed at the request and on the motion of the duly appointed personal representative. The Last Will and Testament of Lewis Small was introduced into evidence at the Quiet Title and Partition Action, a document which reflects amendments which appear to have been made and initialed by the testator. The terms of the Last Will and Testament of Lewis Small, with emphasis and footnotes added by Appellants, are reflected below:

First, and principally, I commit my soul into the hands of Almighty God, and my body to the earth to be decently buried according to rituals of the Christian faith

Second, I direct my executor, hereinafter named, to pay all of my just debts, funeral expenses and other bills as soon after my death as shall be practicable.

Third, I give, devise and bequeath unto my children here named Maxine Johnson, Isadore Small, Mazie Diane Small, Queenie B. Small, Lewis Small, Jr., William Small, Patsy Small, Donald L. Small, Janava Small, Daisy Dean Small, Sandra Sanda Small, Dewey Small, and Geneva Small, and Velma Small **all of the real and personal property**, to have and to hold in fee simple, absolute, share and share alike, and to be divided equally. These children shall not sell this land unless it is sold to one another. **The real property of this devise is located in Socastee Township of Horry County, South Carolina, and is located on the McDowell Short Cut Road, and containing sixty (60) acres**, more or less, and my deed is recorded in the Horry County Courthouse in Deed Book _____, Page _____, and dated December 20, 1947. This land shall be divided up as soon as possible after my death. It shall be surveyed into fourteen equal tracts and the numbers of each tract shall be places in a hat and drawn out by each legatee. I **request** that Dewey Small shall get cleared land and the tobacco acreage attach to his share so he can pay the taxes on all of the land. What number each of the other persons draws out of the hat, that person shall receive that piece of land and I devise that piece of land to him or her.

Fourth, I give, devise and bequeath unto my children here named, Willie Small, Sarah Small, Shirley Small and Ralph Small all of the real property that I own in Socastee Township, Horry County, South Carolina, facing S.C. Highway 544, and near the Georgetown County line.¹ This is the land in which was conveyed to me by William Oliver on September 2, 1932, and the deed is recorded in the Horry County Courthouse in Deed Book O-6, Page 11. These legatees shall share and share alike in this piece of land. This is the land across the branch and being a piece of the Oliver tract.

Fifth, I give, devise and bequeath unto Dewey Small **five (5) acres of the ten (10) acre tract my wife, Mattie Small, left me.**² The five (5) acres shall be around where his mobile home is now located. He shall designate the five (5) acres. **I give the balance of the ten (10)**

¹ On information and belief, this conveyance occurred prior to the death of Lewis Small

² Lewis Small only inherited and undivided one-third interest in this ten (10) acre tract

acres, being five (5) acres, to Donald Small, William Small, and Lewis Small, Jr. If any of these children decide to sell his or her share they shall sell to the other heirs. I **am directing** that my children, namely Maxcine Johnson, Isadore Small, Mazie Diane Small, Queenie B. Small, Lewis Small, Jr., William Small, Patsy Small, Donald L. Small, Janava Small, Daisy Dean Small, Sandra Small, Dewey Small and Geneva Small and Velma Small **deed whatever interests they may have in this land** to the said Dewey Small, Donald Small, William Small and Lewis Small, Jr. If any child refuse to give a deed as I direct, I hereby disinherit him or her and give whatever share he or she would have gotten to all of the persons that sign without any trouble.³

Sixth, I give, devise and bequeath unto my children, namely, Maxcine Johnson, Isadore Small, Mazie Diane small, Queenie B. Small, Lewis Small, Jr., William Small, Patsy Small, Donald L. Small, Janava Small, Daisy Dean Small, Sandra Small, Dewey Small, Geneva Small, Velma Small and Marcus Johnson, **the fifteen (15) acres in which I inherited from my wife, Mattie Small, to share and share alike.**⁴ I **direct that my children divide this land** as soon after my death as shall be practicable, and if a person decide to sell, he or she shall sell to the other heirs. **I direct that my heirs hereto shall give cross deeds to each other.**⁵

Seventh, I give, devise and bequeath unto my children, namely, Maxcine Johnson, Queenie B. Small, Mazie Diane Small, and Daisy Dean Small, Sandra Small and Geneva Small **all of that certain three (3) acre tract of land that I inherited from my wife, Mattie Small**, to share and share alike. I direct that all of my children with an interest in this tract sign deeds over to these children and if they do not, I hereby disinherit any one of them that don't sign the deeds.⁶

Eighth, I give, devise and bequeath unto my children, namely, Dewey Small, Donald Small, William Small, and Lewis Small, Jr., to share and share alike, the two and one-half (2 ½) acres and in which I inherited from my grandmother, Sarah Small. From this tract of land, I give and devise the tobacco acreage unto Dewey Small.

³ The meaning of this sentence, the interpretation of this language within this Will, lies exclusively within the province of the Probate Court

⁴ Lewis Small only inherited an undivided one-third interest in this tract, and can only devise his interest in the tract, not the entire tract

⁵ Arguably, again an issue involving the interpretation of a will, this reference to "cross deeds" is limited to this tract

⁶ Lewis Small only inherited and undivided one-third interest in this tract, not the entire tract

Ninth, I give, devise and bequeath unto my son, Dewey Small, all of the tobacco acreage and allotment on the 2 ½ acre tract, 10 acre tract, 3 acre tract. **He shall use the money from this tobacco acreage to pay the taxes.**

Tenth, I give and devise and bequeath unto my son, Dewey Small, all of my farm machinery and equipment.

Eleventh, I give and bequeath my automobile unto my daughter, Sandra Small.

Twelfth, I hereby nominate, constitute and appoint Dewey Small, the executor of this my Last Will and Testament without requiring him to give any bond, security or surety, whatsoever.

A review of the document will reflect the genesis of the potential need for “cross-deeds” is rooted in the Last Will and Testament of Lewis Small, the interpretation of which is best left and jurisdictionally assigned to the Probate Court in this case. Appellants respectfully assert a fair reading of the Last Will and Testament reflects Lewis Small and, perhaps, the scrivener of the document, believed Lewis Small inherited all the property wholly owned by Mattie Small at her death, to the exclusion of her children and remaining heirs at law. If this is the case, it is an error in the mind of the testator and, perhaps, the scrivener of his Last Will and Testament.

Mattie Small died intestate, and some or all of her heirs at law are named as parties in the Quiet Title and Partition Action. Lewis Small then died testate and his devisees and some or all of the heirs at law of his devisees are likewise named as parties in the Quiet Title and Partition Action. Only one tract is made the subject of the Partition Action in violation of Rule 71(d)(1), SCRCP, and Rule 71(d)(2), SCRCP, which, with emphasis added, state:

(d)(1) Parties to Partition Actions In addition to the requirements of these rules for the joinder in an action of all parties in interest, pursuant to Rule 17(f) no partition of real property of a deceased person shall be had unless the

legal representative or representatives of such deceased person be made parties to the action **and** it be made to appear to the court that the debts of such deceased person are fully paid or that the personal estate in the hands of the personal representative or representatives is sufficient for the payment of the debts of such deceased person. If the partition action involves real property of a deceased person whose estate has not been administered or is not being administered at the time of the bringing of the action, then all known encumbrancers of the estate of the deceased person shall be made parties to the action and no decree in partition shall be entered unless due provision is made for the payment of the debts found due such encumbrancers. In all actions for partition, all heirs at law or devisees of the deceased person shall likewise be made parties.

(2) *Partitioning Several Tracts.* Where **several tracts** or parcels of land lying in this State are **owned by the same persons as tenants in common, no separate action shall be brought for partition of a part thereof without the consent of all the cotenants.** If such action be brought without such consent, the share or shares of the plaintiff(s) may be charged with all of the costs of the action.

The conditions of these rules have not been met. The Subject Property is one of two tracts wholly owned by Lewis Small at his death, and Lewis Smalls owned, in addition thereto, as a tenant in common, an undivided one-third interest in and to the tracts owned by his wife at her death and inherited by him. The Quiet Title and Partition Action was commenced by Dewey Lee Small, individually, and touches and concerns only one of two tracts wholly owned by Lewis Small, and excludes other tracts wholly owned by Mattie Small, undivided portions of which were inherited by Lewis Small following the intestate death of his wife, Mattie Small.

At the time the Quiet Title and Partition Action was filed and commenced, Dewey Lee Small knew or should have known all the properties owned as tenants in common by the heirs at law of Mattie Small, and the devisees and heirs at law Lewis Small, were not included within the partition. The failure to include these other properties is tantamount to the erroneous sale of one of many parcels of property in aid of assets, and triggers the need for Probate Court to address abatement and apportionment of fees and expenses among the owners of the properties.

Further, respectfully, all the heirs at law of Mattie Small, and all the heirs at law of Lewis Small, subject to the interpretation of the Last Will and Testament of Lewis Small, own several tracts as tenants in common, and they have not consented to the separate action being commenced, as reflected by the pleadings filed.

The commencement of the Partition Action also violates Rule 17(f), SCRCP, which, with emphasis added, states:

Actions for Partition of Real Estate of Deceased Person. In an action for partition of real estate of a deceased person, **the legal representative shall be a party to the action** unless the estate of the deceased person has been closed and the legal representative discharged or it appears to the court that there are no debts chargeable against the estate of the deceased. **In all actions for partition all tenants in common shall be parties, but if the consent of anyone who should be joined cannot be obtained, he may be made a defendant.**

Dewey Lee Small, as personal representative of the Estate, and Dewey Lee Small, individually, at the time the Quiet Title and Partition Action was commenced, knew Velma Ray Small, Mildred Isadora Small Ortega, Mazie Diane Small Odom, Daisy Dean Small, and Geneva Katherine Small Prince were deceased, and his or her Heirs at Law or Devisees were unknown with judicial certainty, and there was a need to appoint a Special Administrator for his or her estate.

These procedural irregularities have assisted to create the cross-over between the Court of Common Pleas and the Probate Court, and the need to have the concurrence of the Probate Court to the distribution of the proceeds was jurisdictionally required. Appellants therefore assert the need on remand to have the ability to claw back some of the distributions made to Dewey Lee Small following the sale and closing of the Subject Property, some of the expenses which were “pre-paid by several of the Defendants and the Plaintiff over the past thirty

(30) years,” as reflected within the Final Order filed October 16, 2014. Some of the expenses are wholly unrelated to the Quiet Title and Partition Action, and/or are time barred and/or are inappropriate and should not have been paid and/or reimbursed without the concurrent approval of the Probate Court. The expenses in question are more particularly reflected as “Reimbursed Expenses” on Exhibit A attached to the Final Order filed October 16, 2014.

The Special Referee authorized these expenses to be paid at the time of closing, and Appellants assert this relief is either outside the scope of the pleadings, and/or outside the subject matter jurisdiction of the Special Referee, and/or first subject to approval by the Probate Court. At the same time, following these deductions, the gross proceeds generated by the sale of the Subject Property, less distributions required by the Final Order filed October 16, 2014, are to be paid over and made subject to proceedings in the Probate Court.

Under the Final Order filed October 16, 2014, the Special Referee required the personal representative of the Estate to “coordinate with all the heirs to the property for the execution of the cross-over deeds pursuant to the Lewis Small Estate, and shall further coordinate the distribution of the appropriate sums of money from the net Estate Account for each person’s interest as set forth in Exhibit H of this Order.” Appellants assert the Special Referee lacks the subject matter jurisdiction and/or authority to impose this relief, or erred when he required the execution of the cross-over deeds, and erred when he allowed attorney’s fees and expenses to be distributed without first obtaining the concurrent approval of the Probate Court.

II. A PORTION OF THE AWARD OF ATTORNEY FEES IS NOT SUPPORTED WITHIN THE RECORD, AND IS INEQUITABLE TO THE PARTIES, AS ARE A MAJORITY OF THE REIMBURSABLE EXPENSES AWARDED, AND THE CONCURRENT APPROVAL OF THE PROBATE COURT WAS REQUIRED AS A CONDITION PRECEDENT FOR THE DISTRIBUTION OF A PORTION OF THE ATTORNEY’S FEES AND A

**MAJORITY OF THE EXPENSES REFLECTED IN THE FINAL ORDER
FILED OCTOBER 16, 2014.**

Section 15-61-10, et seq., Code of Laws of South Carolina, 1976 as amended, is the statutory complex which establishes the right of partition in the State of South Carolina.

Section 15-61-10, Code of Laws of South Carolina, 1976 as amended in pertinent part, states:

All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

Section 15-61-50, Code of Laws of South Carolina, 1976 as amended, confers jurisdiction upon the Court of Common Pleas ". . . to make partition in kind or by allotment [and] in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties."

Section 15-61-110, Code of Laws of South Carolina, 1976 as amended, states "[t]he court of common pleas may fix attorney's fees in all partition proceedings and, as may be equitable, assess such fees against any or all of the parties in interest." The statute clearly states the fixing and assessing of attorney's fees is a matter within the discretion of the Special Referee, the exercise of which will not be disturbed absent a showing of abuse thereof. In addition, Rule 71(d)(3), South Carolina Rules of Civil Procedure, states as follows:

Attorneys' fees and costs may be awarded the attorney for any party(s) from any common fund generated by the partition to the extent that attorney's efforts benefitted all parties; otherwise, his fee shall be paid by the party(s) he represents or from the party(s) share(s) only. The court may order the payment of costs from the proceeds of sale of the common property or may equitably assess the costs against shares of the parties.

There are six (6) factors to consider in determining an award of attorney's fees - the nature, extent, and difficulty of the legal services rendered; the time and labor devoted to the case; the professional standing of counsel; the contingency of compensation; the fee customarily charged in the locality for similar services, and the beneficial results obtained. Consideration is generally given by the trial court to all six factors, and none of the factors is controlling. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E. 2d 453, 461 (1998). No consideration was given to the six (6) factors to consider in determining an award of attorney's fees.

A fee award must also be based upon a reasonable hourly fee. When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record with regard to the salient factors which control this relief. These findings are absent from the Final Order filed October 16, 2014, and reliance is placed exclusively on the Contingency Fee Agreement executed by Dewey Lee Small, as personal representative of the Estate, whereby he agreed to pay a contingency fee equal to ten percent (10%) of the gross sales price of the Subject Property.

The amount of the award to be borne by the prevailing party is limited to an amount which compensates the attorney for the work which was helpful to the prevailing party. See Daniel v. White, 272 S.C. at 482, 252 S.E.2d 912 (1979). The discretion of the court will control this question, and the statutes and rules of civil procedure do not restrict the class of persons who may claim attorney's fees, save by the requirement for the assessment to be "equitable". Appellants respectfully assert the relief reflected in the Final Order filed October

16, 2014, should be weighed against the Affidavit of Attorney's Fees filed August 27, 2014, which reflects the hours expended on the case.

The Final Order filed October 16, 2014 does not apply the six factors to determine an appropriate fee award and relies solely on the percentage reflected in the Contingency Fee Agreement signed by a fiduciary in the Estate. The reasonableness of the hourly rate is not addressed, nor is the professional standing of counsel, or the customary legal fees for similar services. No analysis of any sort was applied to either the fees or the costs submitted for payment. The reasonableness of the number of hours billed is generally determined according to the nature, extent, and difficulty of the case, and the time necessarily devoted to the case. These factors are absent in the Final Order filed October 16, 2014. The remaining factors, "contingency of compensation" and "beneficial results obtained" are generally considered in determining whether an award should be made. The abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living are generally considered, but not in the Final Order filed October 16, 2014.

Under the Final Order filed October 16, 2014, in the event any party refuses to execute a cross-over deed or cannot be located, the Clerk of Court for Horry County is authorized to execute the cross-over deed for that party and the execution of that deed "will constitute a valid and legal transfer of that party's interest" The effect of the Final Order filed October 16, 2014 was not stayed, the Subject Property was sold for \$1,800,000.00, and the "net proceeds" generated by the closing are being held in an escrow account maintained by the attorney for the personal representative for the Estate. Under the Final Order filed October 16, 2014, the parties to the action are required, as a condition of receiving an unknown portion of the

net proceeds in the Estate account, to execute “appropriate cross-over deeds” at which point the personal representative “is entitled to distribute to the parties who have executed the cross-over deeds, their percentage of the net proceeds from the closing.” To the extent the Final Order filed October 16, 2014 is reversed, Appellants are in need of an order of reformation to allow them the ability to equitably and/or legally recover that portion of attorney’s fees paid under Exhibit A in the amount of \$282,106.34 which is not found to be “equitable”, and those expenses paid under Exhibit A in the amount of \$113,159.13, which should either not have been allowed, or allowed only with the concurrent authority of the Probate Court.

Appellants recognize the existence of statutory authority for the payment of attorney’s fees and expenses in partition actions. Dewey Lee Small, acting as a fiduciary, agreed to a “contract rate” whereby the Estate would be “be compensated by a contingency fee of ten (10%) percent of the gross sales price of 62 acres of land. The payment is to be made at the time of the real estate transaction closing. The Plaintiff’s attorney was not successful in consummating a sale, there would be no fees ” Appellants contend the authorized payment immediately following closing of ten percent (10%) of the sales price of the Subject Property, as attorney’s fees for the attorney for Dewey Lee Small, and the authorized payment of all the expenses need to be addressed. This is especially true of the hourly rates charged, and the following amounts paid directly to Dewey Lee Small, a fiduciary, with no support in the record:

Latimer’s Funeral Home – Lewis Small Funeral:	\$ 3,047.00
Rezoning Fee:	\$ 100.00
Surveys:	\$ 1,468.00
Bryan & Haar – Partition Suit – Heirs of Lewis:	\$ 7,705.00
Horry County Property Taxes – 1983 to 2003:	\$ 15,547 51
Coastal Monument – Mattie Head Stone:	\$ 1,260.00
Property Up Keep – 60 acres – Bush Hog, clear roads, etc.:	\$ 31,000.00
Property Up Keep – All other parcels – Bush Hog, clear roads, etc.:	\$ 27,670 00

Lewis Small – Loan (Balance at time of death):	\$ 4,885.81
Lewis Small – Medical Bills:	\$ 299.00
Ralph Wilson, Attorney at Law:	\$ 975.00

Appellants assert a portion of the attorney’s fees and a portion of the reimbursable expenses are excessive and to this extent, that portion which is excessive requires the approval of the Probate Court to the extent the source of the funds for payment is an asset of the Estate. Appellants take issue with the amounts awarded as “equitable” attorney’s fee, and reimbursable costs pursuant to S.C. Code Ann. §15-61-110, Code of Laws of South Carolina, 1976 as amended. Appellants take issues with the condition of signing deeds conveying their interests in inherited properties as a condition of receiving funds from the sale of real property devised to those persons named in the Last Will and Testament of Lewis Small. Appellants take issue with the Special Referee erroneously interpreting the Last Will and Testament of Lewis Small, and then imposing his interpretation within relief which falls outside the pleadings. The Final Order filed October 16, 2014 should therefore be reversed for want of very specific requirements called for by law and in equity, and the necessary evidence, findings of fact, and conclusions of law.

CONCLUSION

Some of the heirs at law of Mattie Small and some of the devisees of Lewis Small have passed away, both prior to and since the commencement of the Quiet Title and Partition Action. The heirs at law of Mattie Small and Lewis Small need to be determined with certainty, and it is necessary to appoint fiduciaries to administer the Estates of these deceased persons. Further, the Last Will and Testament of Lewis Small needs to be jurisdictionally and judicially interpreted because its interpretation controls the ownership of a substantial amount in liquid

assets and real property. Appellants therefore raise the need for a comprehensive and enforceable order, on remand, which:

- a. Interprets the Last Will and Testament of Lewis Small as it relates to the ownership and/or entitlement to all and portions of all the funds generated from the sale of the Subject Property, including any amount which may have to be disgorged depending on the results of the appeal of the order issued in the Quiet Title and Partition Action, the Final Order filed October 16, 2014; and
- b. Directs and controls the apportionment of the expenses between the heirs at law of Mattie Small and the devisees of Lewis Small which recognizes funds used from the sale of the Subject Property are being used to fund the expenses related to properties whose ownership is uncertain, and the abatement of the assets under the Last Will and Testament of Lewis Small; and
- c. Interprets the Last Will and Testament of Lewis Small as it relates to the property wholly owned by Mattie Small, and the property wholly owned by Lewis Small; and
- d. Reflects the terms and conditions to be imposed on the distribution of funds generated from the sale of the Subject Property; and
- e. Reflects the ownership of the remaining property wholly owned by the heirs of Mattie Small, and the devisees of Lewis Small.

Respectfully submitted.

Dated at Georgetown, South Carolina, this 3rd day of February, 2015.

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By:  (L.S.)

Charles Owen Nation, II, Esquire
Attorney for Appellants

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM HORRYCOUNTY
COURT OF COMMON PLEAS**

RALPH P. STROMAN, SPECIAL REFEREE

APPELLATE CASE NO. 2014-002593

Dewey Lee Small,.....Respondent,

v.

Maxine Johnson a.k.a. Maxine McQueen a.k.a. Maxcine Johnson,
Ernestine Small Bass, Rose Small a.k.a. Rosemary Mary McQueen,
Kassandra D. Odom a.k.a. Kassandra D. Shea, Michelle D. Odom
a.k.a. Michelle D. DeLa Cort, Queenie Small a.k.a. Queenie B.
Arnold a.k.a. Qunnie Arnold, Lewis Filton Small, Jr., a.k.a. Pete
Small, William Franklin Small, a.k.a. Danny Small, Patsy Ann
Small a.k.a. Patsy Small Crock a.k.a. Patsy Ann Small Pierick
Crock a.k.a. Patsy Pierick, Donald Lee Small, Janava Small,
a.k.a. Janava Small Lonneux a.k.a. Candy Small, Daisy Dean
Small, a.k.a. Dean Small, Sandra Small, a.k.a. Sandra Howard,
Jacqueline L. White, Jimmy Prince, Jr., Veretta Norman, Venata
Small Olivera, Marcus Johnson, Jr., Dewey Jerome Johnson,
John Doe, and Jane Doe, Representatives of any unknown Heirs,

In Re: The Estate of Lewis Small, Defendants,

of whom Patsy Ann Crock and Fulton Louis Small, are.....Appellants.

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SC Court of Appeals

PROOF OF SERVICE

I, the undersigned employee of the attorney for the Appellants, certify I have served a copy of the **Initial Brief of Appellant** and **Designation of Matter to be Included in Record on Appeal** dated February 3, 2015, by regular mail on February 3, 2015, on Respondent, Dewey Lee Small, by depositing a copy of these documents in the United States Mail, postage prepaid, **addressed to** N. David Durant, Esquire, Law Offices of N. David Durant and Associates, Post Office Box 14722, Surfside Beach, SC 29587, attorney of record for Dewey Lee Small, **and to** the Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, P.O. Box 11629, Columbia, SC 29211, on January 27, 2015.

Dated at Georgetown, South Carolina, this 3rd day of February, 2015.

Nation Law Firm, P.C.:

By:  _____ (L.S.)

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February 3, 2015

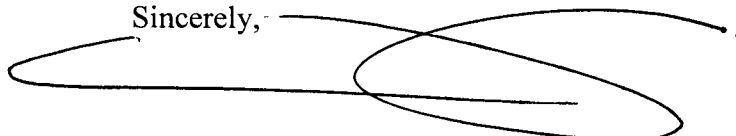
Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re Dewey Lee Small vs. Lewis Filton Small, Jr., et al
Civil Action Number 2012-CP-26-9832
APPELLATE CASE NO. 2014-002593

Dear Ms. Kitchings:

I am enclosing one (1) original and one (1) copy of the **Initial Brief of Appellant, Designation of Matter to be Included in Record on Appeal, and Proof of Service**. By copy of this correspondence and its enclosures I am informing opposing counsel of this transmittal. Please return a time stamped copy of these enclosures in the pre-addressed stamped envelope also enclosed for your convenience. Thank you very much for your time and attention to these matters. Assuring you at all times of my best personal care and attention, and with best regards, I am

Sincerely,



Charles Owen Nation, II

CON,II:clc
Enclosures

pc: N. David Durant, Esquire, Attorney for Respondent

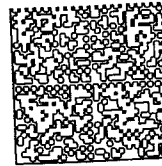
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