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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Laurens County
Court of Common Pleas

Civil Action No. 2012-CP-30-258
The Honorable Donald B. Hocker, Probate Court Judge
The Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5414
Heard June 3, 2016 – Filed June 15, 2016
Case Tracking No. 2013-2319

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.

APPELLANT-RESPONDENT'S PETITION FOR REHEARING

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Appellant-Respondent Edward D. Sullivan respectfully petitions this Court for rehearing in the instant case.

INTRODUCTION

In arriving at its decision in this case, the Court applied an "action at law" standard of review but should have applied an "action in equity" standard. It also considered the weight of the evidence not from the point of view as to whether or not "facts" were against the preponderance of the evidence, but by whether or not there was any evidence to support a finding. The Appellant – Respondent argues that the decision makes errors of law in interpreting the South Carolina Probate Code, and seemingly gives weight to probate code provisions that are not applicable to this case. Because the Court overlooked and misapprehended these points, the Appellant – Respondent respectfully requests the Court to grant rehearing and reconsider its opinion.

LAW/ANALYSIS

I. The Court Erred and Misapprehended the Standard of Review By Applying the Standard of Review for Reviewing Actions at Law, Rather Than the Applicable Standard for Review of Actions in Equity.

The case before the Court began with Appellant's filing of a Petition for Settlement for the Estate of Marion M. Kay on November 15, 2010 pursuant to SC Code Ann. Section 62-3-1001 (a)(3). R. p. 722. In the Petition, the Appellant-Respondent Edward D. Sullivan ("Appellant") requested that the probate court "consider and approve an accounting and proposal for Distribution; Approve previous distributions; and discharge the Appellant as Personal Representative" among other things. Counsel for Respondents-Appellants Martha Brown and Mary Moses ("Respondents") requested a hearing on the Appellant's Petition.

Respondents- Appellants filed no responsive pleadings outlining their contentions.

The Court ruled that this case is an action at law "[b]ecause the proceeding in this case involved claims for money due . . .", and that "the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them". However, "[a]n action for an accounting sounds in equity." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009). Therefore, the reviewing court may review the record and make findings with its own view of the preponderance of the evidence. Id. (citing Lawson v. Rogers, 312 S.C. 492, 495, 435 S.E.2d 853, 855 (1993)).

In Lee v Lee, 251 S.C. 533, 536, 164, S.E.2d 308, 308 (1968), a ward challenged the actions of his general guardian and sought both an accounting and refund of commissions which he claimed the guardian was not entitled to. The Supreme Court held that the action was one in equity, in part because of numerous decisions of the court asserting that "equity has jurisdiction 'where a fiduciary relationship exists between the parties, and the duty rests upon the [fiduciary] to render an accounting.' " (citations omitted), at 536, 309.

The relationship of the Appellant as Personal Representative (PR) to each of the beneficiaries, including Respondents-Appellants, Brown and Moses, is a fiduciary one. See, SC Code Ann. Section 62-3-703(a) (2009) (stating "[a] personal representative is a fiduciary"). See also, Turpin v Lowther, 404 SC 581, 745 SE 2d 397, 400 (SC App. 2013). Accordingly, the case on appeal is one in equity.

As this Court notes, "the standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." Here, the underlying cause of action was the petition to approve the estate accounting – an equitable matter that would be decided by a judge and not a jury. The Respondents-Appellants successfully morphed the matter into an action seeking a refund of the Appellant's

compensation despite not filing the appropriate pleadings as required by the probate code. See S.C. Code Ann. § 62-3-721(a) (Supp. 2015). However, this does not change the original underlying nature of the proceedings nor change the standard of review pertaining to matters of equity. "[If the] alleged cause of action . . . is essentially equitable in nature, [a] prayer for the recovery of a specific sum of money does not change the action to one at law 'for the recovery of money only.'" Lee v. Lee, 251 S.C. 533, 536, 164, S.E.2d 308, 308 (1968).

The underlying proceeding on appeal was an action in equity and as such the proper standard of review allowed the circuit court to make factual findings according to its own view of the preponderance of the evidence. The circuit court did not find facts, nor analyze facts, but did hold the underlying action was an action in equity. (R. p. 21).

In the posture of this case, the Appellate Court may reverse the lower courts on errors of law or make findings of fact where facts relied upon below are without evidentiary support or against the clear preponderance of the evidence.

II. The Court Erred and Misapprehended or Overlooked that Basing a Personal Representative's Compensation Exclusively or Predominately on the Value of the Estate, pursuant to language in SC Code Section 62-3-319(a), is Error When the Will of the Decedent Otherwise Directs the Basis of Compensation

A. The Court should establish factors for courts and Personal Representatives to consider when determining a Personal Representative's compensation where Section 62-3- 719(a) five percent cap does not apply.

This Court noted that the five per cent ceiling on compensation of the PR of SC Code Section 62-3-719 (a) does not apply to determining a reasonable compensation for a Personal Representative's (PR's) services "where the will otherwise directs", but then analyzed the percentage of compensation based on the value of the Estate without considering or establishing enumerated factors for either future courts or PR's to consider when determining

reasonable compensation. No guidance is provided on how to evaluate and determine "reasonable compensation."

This Court recognized that the probate court based its decision on the "value of the Estate" and exacerbated this error by applying the "action at law" standard of review by stating that it does not believe the utilization of an "Estate value " formula was "without [evidentiary] support." Appellant has argued above that the proper standard of review should be to reverse a finding if against a clear preponderance of the evidence, but more importantly, relying exclusively or predominately on the value of the Estate to establish reasonable compensation is an error of law. The will dictated the testatrix's intent that the compensation be "reasonable" and to that end an analysis of relevant factors should be considered and discussed.

Appellant does not argue that the value of the Estate has no relevance to the determination of reasonable compensation but does argue that value of the Estate and its assets should be considered as only one of many factors. These other factors should include the following:

1. Time and labor required,
2. Time limitations imposed by client and/or circumstances,
3. Novelty and/or difficulty of questions/issues presented,
4. Skill required to perform the service properly,
5. Results obtained,
6. Nature and value of the assets that are involved,
7. Complexity or simplicity of the estate involved,
8. Promptness, efficiency, and skill with which the administration was handled by the personal representative,
9. Benefits or detriments resulting to the estate or its beneficiaries from the PR's services,
10. Responsibilities assumed by and potential liabilities of the PR,
11. Experience, reputation, and ability of the PR performing the service,
12. If the PR is a member of the South Carolina Bar and has rendered legal services in connection with the administration of the estate,

13. Other professional education, experience, or accolades of the PR,
14. Likelihood that attorney's employment as PR will preclude other employment by the attorney,
15. Fees customarily charged in the locality for similar legal services by a personal representative with like skill, knowledge and experience,
16. Extraordinary services performed by the PR including, but not limited to sale of real or personal property, conduct of litigation on behalf of or against the estate, involvement in proceedings for the adjustment or payment of any taxes, carrying on of the decedent's business, any special services which may be necessary for the PR to perform,
17. Any delay in payment of the compensation after the services were furnished, and
18. Such other factors as a court may determine as reasonable to consider in a particular case.

See also Brief of Appellant-Respondent, pages 8 – 35; 37 – 40.

These factors should be considered in the determination of the amount of the Appellant's compensation as PR during the entire administration of the Estate, including his ongoing services since the initial filing of the Petition for Settlement.

B. A clear preponderance of the evidence contradicts the lower court's findings of fact including that the Appellant unnecessarily complicated the the estate.

The lower court made a finding of fact that the Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." (R. p. 8, para 2). To the contrary, a preponderance of the evidence, if not all of the evidence, supports that, as noted in this Court's opinion, the Appellant worked for 20 months with the various interested parties, made proposals, which garnered no response, and offered compromises to secure a resolution. Only when no progress was made or even responses received did the Appellant file the partition action – which included an action to declare the rights of the parties. There is no evidence that Appellant complicated the administration of the Estate. He sought to carry out

the intention of Ms. Kay to liquidate the Estate, to provide funds to the beneficiaries, including the cemetery fund, and to allow Charles Copeland to exercise the option granted by the will.

C. A clear preponderance of the evidence contradicts the lower court's finding of fact that a deed of distribution would have been in conformity with Ms. Kay's will.

The lower court made a finding of fact that "[t]his was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution. This would also have been in conformity with the Testatrix's Will." (R. p. 8, para 2). This is pain error. Ms. Kay intended for the real estate to be liquidated and the proceeds disbursed to the beneficiaries rather than simply giving them an undivided interest in real estate. For example, the will provides that interest on the cemetery fund's share of the proceeds be used to upkeep the Kay plot. There would be no interest without a liquidation of the real estate to create a cash fund to then accrue interest. Likewise, the Appellant could not have issued a deed of distribution to the beneficiary cemetery fund as "funds" of this nature are not legal entities and cannot hold title to real property. Furthermore, Ms. Kay granted an option to Charles Copeland. In liquidating the estate and resolving the issues created by the various competing interests, the preponderance of the evidence supports that Appellant carried out Ms. Kay's testamentary intent, his primary duty. See S.C. Code Ann. § 62-1-102(b)(2) and (3) (Supp. 2015) stating that underlying purposes and policies of this Code include making effective the intent of the decedent in the distribution of her property and promoting a speedy and efficient system for liquidating the estate and making distributions to [her] successors. (emphasis added).

III. The Lower Court's Ruling Regarding the Appellant's Compensation and Legal Fees and Costs is Contradicted Both by a Clear Preponderance of the Evidence and is Without Evidentiary Support Requiring Rehearing

Assuming arguendo that the Court applied the correct standard of review, "an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S. E. 2d 773, 775 (1976) (emphasis added). "The rule is the same whether the judge's findings are made with or without a reference." Id. "The judge's findings are equivalent to a jury's findings in a law action." Id.

1. The lower court's finding that Appellant failed to provide a legitimate basis for his compensation is without evidentiary support

The lower court found that "the [Appellant] failed to provide any legitimate basis for the fees he claimed and instead testified that he had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air. Although the [Appellant] in Memorandum argued that he had 468.6 hours of time as PR, the proof he provided failed to support this." (R. p. 9, para 8). This is not correct.

The record reflects that the Appellant testified he used various factors in determining the amount of the compensation, including time (468.6 hours), effort, novelty of issues, and the result. (R. p. 174, Line 19 – p. 175, Line 3). Because the will called for "reasonable compensation" and there is no specific standard or formula set in South Carolina, Appellant was forced to determine what would be considered "reasonable compensation". Appellant determined his fees based on several factors, including the Model Rules of Professional Conduct (although he was not charging as an attorney, he is still bound by the rules) and the

well-established formulas found in Florida and Colorado. (R. p. 174, Line 12 – p. 176, line 9} Appellant also consulted with Alan Medlin, a well-known expert in the field, and another attorney to determine reasonableness. (R. p. 175, Line 23, - p. 176, Line 9; R. p. 181, Line 21 – p. 182, Line 7). As this Court notes, Appellant has provided invoices, time sheets, and affidavits. Contrary to the lower court's finding, the Appellant simply did not "pull a number out of the air" and did in fact provide a method that was used to determine "reasonable compensation".

The lower court itself offers no support of its finding that a fee of $51,300 is reasonable compensation other than it is about 10% of the Estate. There is no other justification or support by the lower court for reducing the Appellant's compensation other than (1) the value of the estate, (2) an inference that his ruling is based on his disagreement with the Appellant's handling of the estate and (3) a "compromise [that] takes into account that not all of the heirs opposed the PR's final accounting . . . ". (R. 10, Para 14). In fact, there were more witnesses that testified in favor of the Appellant's management of the Estate and compensation and expenses (Penelope Arnold and Bart Heard) than opposed (Martha Brown). Furthermore, Ms. Arnold's duties at the Presbyterian home included working with estates and personal representatives. In fact, Ms. Brown conceded that Ms. Arnold would be in a better position than her to evaluate the Appellant's services. (R. p. 364, Line 11 – p. 365, Line 9). Because the Court overlooked this point, the Court should allow re-hearing of the case.

2. The lower court's finding that Appellant complicated the Estate and should have simply filed a deed of distribution is without evidentiary support

There is no credible evidence that the Appellant complicated the Estate by "insisting" on filing a partition action.(R. p. 8, Para 2). In fact, Appellant did not insist, but worked with the

parties for 20 months and offered several proposals, to which there was no response. Without citing to any law, the lower court determined that the Appellant should have issued a deed of distribution to the beneficiaries in lieu of seeking to liquidate the real estate. (R. p. 8, Para 2). However, not only did Ms. Kay intend for the real property to be divided and sold, a super majority of the heirs had the same desire. The lower court's ruling would negate in its entirety SC Code Section 62-3-911 that provides for a partition action by the PR or one or more of the interested heir or devisees. This is error. Because the Court overlooked this point, the Court should grant rehearing.

IV. The Court Seemingly Relies on a Misapprehension of SC Code 62-3-907 (A)

Though this Court does not rule on the proper course of action, it implies in its footnote 5 that section 62-3-907(A) of the South Carolina Code (Supp. 2014)[1] may provide the answer because it provides, "[i]f a distribution in kind is made, the personal representative must execute a deed of distribution with respect to the real property." "In-kind" is defined as "goods or services rather than money." *In Kind*, Black's Law Dictionary (9th ed. 2009). As a result, this statute does not apply because Ms. Kay did not bequeath or devise, (i.e. distribute), the real estate in kind to any of the heirs, and there was no distribution made in kind. Nor did Appellant make a distribution of real property. Second, the purpose of this probate code provision is to provide for a mechanism that evidences the conveyance of title to distributees. See S.C. Code Ann. § 62-3-907 Reporter Comment (Supp. 2015). If a beneficiary inherits a particular property by the will, the provision requires the personal representative to provide an "instrument or deed of distribution" as evidence of the transfer of title. Id. at § 62-3-907(A). (Also see subsequent provision SC Code 62-3-908 "Distribution; right or title of distributees" in

1 This Section of the South Carolina Probate Code was amended in 2013 after the partition action was

further explanation of the statutory scheme relating to conclusive evidence of title). The statute does not, however, override the intent of the testator as to how the property is left or impede the powers granted to the personal representative in effecting the testator's intent. Accordingly, this section does not support the contention in any way that seeking to divide the property, filing a partition action and subsequently selling the property was improper and therefore serving as a basis to reduce Appellant's compensation. Appellant acted in accordance with the powers granted by the will and by statute to effect the intent of the testator, and absent evidence of abuse of discretion in exercising these powers, should not be penalized by this substantial reduction in his compensation. In fact, the lower court made a specific finding that Appellant did not act in bad faith (R. p. 10, para 16), and the record is replete with evidence with the efforts made by Appellant to carry out the intent of the testator, to reach a compromise among the beneficiaries, and to accommodate the desires of those beneficiaries to initiate a partition action – their statutory right pursuant to SC Code Section 62-3-911 as well as the powers granted by the will. See S.C. Code Ann. § 62-1-102 (Supp. 2015). Therefore, section 62-3-907(A) simply does not apply.

The lower court's ruling is marred by its disagreement with the Appellants' efforts to ascertain and carry out the intent of Ms. Kay, the decedent, that resulted in the partition action. As such, the ruling is both without evidentiary support and contradicted by a clear preponderance of the evidence, and its order requiring a refund of fees and denial of additional compensation, legal fees and costs and expert fees should be reversed. This Court apparently misapprehends SC Code Section 62-3-907 as well as 62-3-911, and the express powers of Ms. Kay's will. Accordingly, the Court should grant rehearing and reconsider its opinion.

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filed.

V. The Appellant Should be Awarded Legal Fees and Costs

The Respondents-Appellants' demand for a hearing on the Appellant's Petition for Settlement necessitated that he try to prepare for all possible issues, especially when the trial court ruled he must present his evidence as if he was the moving party.

The majority of the Court holds that the Appellant is not entitled to legal fees and costs related to the hearing. The majority cites SC Code Section 62-3-720, which states "If any personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." Despite its plain language, the majority concludes that the statute was intended to cover those fees and expenses in connection with prosecuting and defending claims exclusively against the estate. Respectfully, the majority overlooks that Respondent Brown used the hearing that she requested to pursue a claim against the Estate for five (5) acres of land (or apparently the equivalent value). (R. p. 100, Line 23 – p. 104, Line 18). She renewed this request at the Rule 59 Hearing. Appellant successfully defended her ongoing claims. {See Order Disposing of Post-Trial Motions, R. p. 18, 1st paragraph). Accordingly, the Appellant did in fact defend a claim against the Estate (successfully) and is entitled to reimbursement—even given the majority's view. Further, as the dissent notes, the probate code required Appellant to file a petition for settlement and he both prosecuted and defended in good faith his decisions to support his claims for compensation and to conclude the Estate at the requested hearing. See S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015). The Appellant successfully defended Respondent Brown's claim against the Estate, appeared in good faith, and is entitled to be reimbursed for reasonable attorney's fees and costs as provided by the

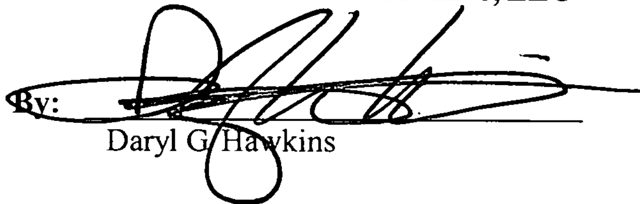
statute (and will provisions) for his fees and costs. A rehearing should be granted.

The Court affirms the lower court's decision to assess expert fees for those testifying at the hearing against the Appellant individually because their work product and valuations were not contested issues at the hearing. Because the Respondents-Appellants filed no written pleading on any positions they intended to take, all issues had to be addressed. Everything the Appellant did as personal representative, including what the amount of his compensation was subject to review by the Court. These experts appeared and testified not just about the work they had previously performed for the estate but to provide testimony as to the extraordinary result achieved by the Appellant in selling the real estate and as additional justification for the compensation. These issues were absolutely contested. In fact, the Court, based on this testimony, found that the Appellant "did an excellent job in securing the sales price for the real estate." Respectfully, the value of the Appellant's services, as supported by the outstanding result achieved, was in fact an issue – if not the issue – and bitterly contested by the Respondents making the use of legal counsel and experts reasonably necessary. Accordingly, Appellant is statutorily entitled to reimbursement of these fees and costs. The failure to award reasonable attorney's fees and expert's fees is an error of law. The Court should grant rehearing.

CONCLUSION

The Court's opinion affirming the lower court's decision relating to determination of reasonable compensation in the face of the overwhelming evidence, facts and circumstances of this case as well as this Court's interpretation of SC Code Section 62-3-720 pertaining to recovery of legal fees and costs will have a chilling effect on those that are asked to serve as personal representatives and undertake that enormous responsibility. For the foregoing reasons, Appellant- Respondent respectfully requests this Court grant rehearing in this Case.

LAW OFFICE OF DARYL G. HAWKINS, LLC



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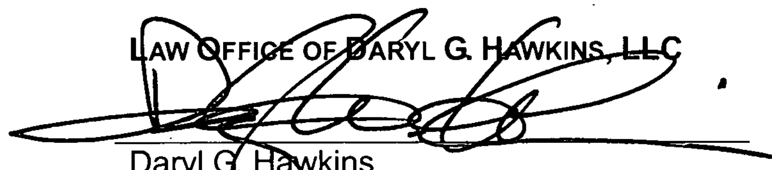
PROOF OF SERVICE

I certify that I served Appellant-Respondent's Petition for Rehearing upon Respondents-Appellants Martha Brown and Mary Moses by mailing one (1A) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360- on August 1, 2016.



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VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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Laurens Co Circuit Court Appeals File No. 2012-CP-30-258
Laurens Co Probate Court File No. 2007-ES-30-208
SC Court of Appeals Tracking No. 2013-002319

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the Appellant/Respondent's Petition for Rehearing in the above-referenced matter. I am also enclosing a check in the amount of $25.00 for the required filing fee.

Please return a clocked-copy with our courier.

If you have any questions, please do not hesitate to call.

Very truly yours,

Legal Assistant

Enclosures
Cc: John R. Ferguson