

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Appeal from Laurens County  
Court of Common Pleas

**RECEIVED**

AUG 08 2016

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

**SC Court of Appeals**

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/Cross-Respondent

v.

Martha Brown and Mary Moses . . . . . Respondents/Cross-Appellants.

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**APPELLANT-CROSS RESPONDENT'S  
RETURN TO PETITION FOR HEARING**

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

Pursuant to Rule 240(e), SCACR, Appellant-Cross Respondent Edward D. Sullivan, Personal Representative ("Appellant"), respectfully submits the following response in opposition to Respondents/Cross-Appellants Brown and Moses' ("Respondents") Petition for Rehearing:

### **INTRODUCTION**

In arriving at its decision in this case, the Court correctly held that SC Code Section 62-3-719 (a) does not limit the Appellant's compensation as PR to 5% of the Estate's value where a will provides for another measure as in this case. It also correctly notes the allegations of the Respondents of bad faith are unsubstantiated and a mischaracterization by Respondents of Appellant's efforts. Finally, the Court properly reversed the lower court's ruling requiring the Estate to pay the legal fees of Respondents' counsel under the common fund doctrine. Because the Respondents have not stated with particularity any points overlooked or misapprehended by the Court, their Petition for Rehearing must be denied.

### **FACTS**

A comprehensive Statement of Facts is set forth in the Brief of Appellant and is also incorporated herein by reference

## LAW/ANALYSIS

### **I. The Court Properly Reversed the Probate Court's Decision to Award Respondents' Counsel Attorney's Fees.**

In reversing the Probate Court's decision to award Respondents' Counsel Attorney's fees based on the common fund doctrine, the Court correctly notes that fees cannot be awarded when the interests of the interested parties (e.g. beneficiaries of an estate) are adverse, even though services may have benefited all interested parties. Bedford v Citizens & S. Nat'l Bank of S.C., 203 507, 515, 28 S.E. 2D 405, 407 (1943). In other words, the common fund doctrine requires all interested parties to have the same interest. In this case, several, if not all, of the parties were adverse to Respondents. Beneficiaries receiving at least 70% of the residuary estate desired a cash distribution as opposed to an undivided interest in real estate as sought by Respondents. (See R. p. 78, Lines 12 – 22; R. pp. 630 – 631). Penelope Arnold, a representative of the beneficiary "The Presbyterian Home of South Carolina," testified in essence that the Presbyterian Home would have been unduly burdened by an interest in real property due to the financial strain of property taxes and upkeep. (R. p. 243, Line 12 – p. 244, line 2).

Furthermore, Respondents' retained counsel because they disagreed with the division of the estate and stated positions adverse to the other beneficiaries.

Respondent Brown continued to press a claim for 5 acres of real estate into the Appeal which was adverse to the interests of all other beneficiaries. (R. p. 319, line 19 – p. 327, line 5). They also disagreed with the Appellant's compensation. On the other hand, Penelope Arnold testified that the Presbyterian Home was in favor of the Appellant's actions in pursuing a partition action. She also approved of the Appellant's compensation and expenses. R. p 246, lines 9 – 25. Bart Heard testified he did not object to any of the Appellant's fees. R. p. 134, L. 5 – p. 135, L. 10). Unquestionably, most if not all of the interests of the other beneficiaries were adverse to the Respondents.

Furthermore, there is no evidence of a contract of employment, whether express or implied in law, between the Respondents' counsel and all of the other beneficiaries. Peppertree Resorts, Ltd. V Cabana Ltd. P'ship, 315 S.C. 36, 41, 431 S.E. 2D 598, 601 (Ct. App. 1993). In fact, Bart Heard was represented by counsel during some of the proceedings. See, 1/11/2012 Transcript, R. p. 379, lines 16-19. Accordingly there can be no express or implied contract between Respondents' counsel and all parties with an interest in the fund. Petition of Crum, 196 S.C. at 532-33, 14 S.E.2d at 23 (1941). Finally, as the Court notes, "the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice." Opinion, Part I, E citing Johnson v. Williams, 196 S.C. 528, 532, 14 SE 2d at 23 (1941). Given the facts and circumstances of this case, such an award would not

promote justice and would in fact be unjust to the other beneficiaries who made known to the PR during administration of the estate, and to the Probate Judge at the hearing, that they had adverse interests to Respondents.

Accordingly, the common fund doctrine is not applicable, and the probate court's award of fees to Respondents was properly reversed.

**II. The Court Properly Determined that Appellant Did not Improperly Exercise his Power and did not breach his duty to the Estate and its Beneficiaries.**

As the Court ruled in its Opinion, Respondents' allegations that Appellant acted in bad faith were "unsubstantiated and a mischaracterization by Respondents of Appellant's efforts as PR." See Opinion at Part II, Section A. Respondents' Petition for Rehearing continues to mischaracterize Appellant's actions and continuously misstates the record. For example, Respondents assertion that the Appellant "asked the heirs to approve those fees without informing them of their amount until Ms. Brown and Ms. Moses forced him to do so" is absolutely false. (See Petition of Rehearing of Respondents/Appellants, p. 10.) The amounts paid had been disclosed in accountings previously filed and served on the Respondents and other beneficiaries. (See Respondents' Brief of Appellant – Respondent, Arguments I and II, pp. 7 – 12, incorporated herein by reference. Also see Reply Brief of Appellant – Respondent, Argument IV at p. 9 Also see Interim Accountings 1 - 4, R. p. 713 - 719, served upon the beneficiaries on October 18, 2010 through November 15, 2010. Respondents

requested the hearing on December 6, 2010, R. p.851, 852). Accordingly, Respondents' Petition for Rehearing fails to point out any points that the Court overlooked or misapprehended and should be denied.

**III. The Court Properly Ruled That Respondents Abandoned Arguments and Issues Raised Were Not Preserved for Appellate Review (Respondents' Argument III, page 7 of Respondent Appellant's Petition for Rehearing)**

Respondents' Argument III at page 7 of their Petition is without merit. Rule 208 (b) SCACR provides that issues on appeal must be set forth in a statement of issues presented for review and be set forth in argument. Respondents' contention that the probate court erred in failing to require all costs associated with the proceedings to be assessed against the PR was not properly set forth and Respondents' alleged grounds of error are merely conclusory. Accordingly, the two sentences in Respondents arguments section of its Petition are and were insufficient to assert a legal error and the Court properly declined to address the argument. The fact that Respondents identified four cases in their argument is not relevant as none of the cases actually support the propositions they are cited for or are so easily distinguishable from the facts of this case that they are not relevant.

Furthermore, Respondents' claims concerning additional proceeds and unclean hands of the Appellant were not argued in the court below.

**IV. The Proper Standard of Review in this Case is of Actions or Appeal "In-Equity."**

This issue is addressed by Appellant in Argument I of his Petition for Rehearing at pages 1 - 3.

**CONCLUSION**

For the foregoing reasons, Appellant- Respondent respectfully requests that this Court deny Respondents' Petition for Rehearing, but grant Rehearing on the grounds raised by the Appellant in his Petition.

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August 8, 2016

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**PROOF OF SERVICE**

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I hereby certify that I served Appellant-Cross Respondent's Return to  
Petition for Hearing to Martha Brown and Mary Moses by mailing one (1) copy to  
counsel of record, John Ferguson, P.O. Box 286, Laurens, South Carolina 29360  
on August 8<sup>th</sup>, 2016.

SIGNATURE PAGE TO FOLLOW

**LAW OFFICE OF DARYL G. HAWKINS, LLC**

By: \_\_\_\_\_



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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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RE: *In the Matter of the Estate of Marion M. Kay*  
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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

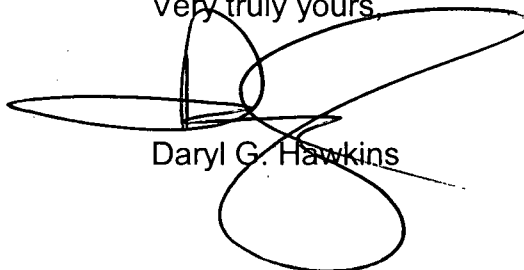
Dear Ms. Kitchings:

Please find enclosed for filing the original and ten (10) copies of the Appellant-Cross Respondent's Return to Petition for Hearing in the above-referenced matter.

Please return three (3) clocked-copies with our courier.

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

Very truly yours,



Daryl G. Hawkins

DGH:ejm  
Enclosures  
cc: John Ferguson