

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 15 2016
SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

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

RESPONDENTS/CROSS-APPELLANTS'
RETURN TO PETITION FOR REHEARING

John R. Ferguson
S.C. Bar No. 1987
107 W. Laurens St. - PO Box 286
Laurens, SC 29360
(864) 984-212
Fax (864) 984-7372

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents/Appellants

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

The Respondents/Cross-Appellants (Respondents) respectfully submit the following response in opposition to Appellant/Cross-Respondent's (Appellant's) Petition for Rehearing. To simplify the Court's task, Respondents/Cross-Appellants will respond section by section to Appellant/Cross-Respondent's Petition for Rehearing. It will not surprise the Court that the Respondents found much to disagree with.

LAW/ANALYSIS

I. The Court erred or misapprehended the standard of review by applying the standard of review for actions at Law, rather than the standard for actions in Equity.

On p. 2 of his Petition Appellant claims that "Respondents-Appellants successfully morphed the matter into an action seeking a refund of the Appellant's compensation...." The undersigned is amazed to learn that he has such power to influence the Court and is quite regretful that he failed to use it in defending his attorney fee.

The fact is that the parties agree that this is an action in Equity. During oral argument the undersigned was asked what standard of review applied to this case, and he replied that the Two-Judge Rule applied, which is a rule of Equity. Counsel for the Appellant immediately agreed.

The fact that Respondents had to return funds to the Estate does not make the action one for a refund; that would be more applicable to a contract dispute. The Probate Court used its equitable powers to avoid the unjust enrichment of the Personal Representative (PR) by making him return unearned compensation. As the Appellant observed on p. 3 of his Petition, if the action is essentially equitable, the fact that money is recovered does not transform the action into one at Law to recover money.

IIA. The Court did not err in using the value of the Estate as one basis for the Personal Representative's compensation, but it erred in how it set his fee.

The Appellant makes much of the provision in the Will he drafted giving him "reasonable compensation". It is his position that he should have the final say about what is reasonable and that the Court should just get out of the way. He admits, however, that the Will does not provide a standard to determine what is reasonable. This makes the issue a matter of judicial discretion, and the Court is free to apply any reasonable standard. The probate judge chose to base

compensation on what he determined to be the size of the Estate.

The judges below failed to make the essential finding of extraordinary services as required by S.C. Code Section 62-3-703, but they awarded Appellant an extremely generous fee of \$ 51,300, which the probate judge determined to be 10% of the Estate (R. p. 3, No. 11). The problem with the probate judge's valuation of the Estate is that it gave the PR the benefit of the massive amount of Estate money he had squandered on having his paralegals boost the value of the personalty. He thus became the beneficiary of his own wrong, contrary to the rules of Equity.

The Estate was plainly not taxable, so the only reason for spending over \$ 18,000 of the Estate's money (204.6 hours x \$ 90/hr.) for this was to boost the value of the Estate and therefore his compensation. (See R. pp. 4-5, No. 17 for the hours and R. p. 795 for the hourly rate.) Bear in mind that there were detailed instructions for distributing this personalty (R. p. 71, ll. 22-24 and p. 72, l. 8- 73, l. 7) which was therefore not available to pay the PR, and there were no disputes about the distribution of the personalty (R. p. 73, ll. 1-7). The Testatrix did not intend for her Personal Representative to bleed her Estate in this fashion.

The Appellant belatedly asks the Court to apply compensation standards he did not assert at trial. He was asked at trial what the basis for his compensation was, and he testified that it was not based on time (R. p. 174, ll. 9-11 and 205, ll. 1-2, 16-18) and not based on a percentage (R. p. 205, ll. 3-4). Instead, he testified that at the beginning of the case he decided what his services would be worth and began merrily charging toward that goal (R. p. 174, ll. 14-16, 21-24). This included taking \$ 68,000 in securities for himself before there was any controversy or complication (R. p. 316, ll. 3-21). He later attempted to recover from his candor by filing various affidavits, but these are too little and too late to overcome his testimony.

Although the Appellant complains about the amount of notice of the issues, there was a lengthy recess during the case and he did not move for more time to prepare. In his testimony (R. p. 123, ll. 3-7) he admitted that he had known in advance that his compensation would be an issue. It is also true that Appellant dumped hundreds of pages of documents on Respondents not long before the hearing; and it was only after reviewing these documents that the undersigned was able to determine the issues, so Appellant was the author of his own injury.

IIB. The lower courts' finding that the Appellant unnecessarily complicated the Estate is amply supported by the evidence.

Appellant's argument should be dismissed as abandoned. It is conclusory, and it has no supporting statutory or case citations. Its only citation to the record is to the finding it disagrees with.

If, however, the argument is to be examined on the merits, the record is replete with support for the conclusions of the courts below. The Appellant confesses in his Petition (pp. 5-6) that he spent 20 months trying to come up with a settlement even though "no progress was made or even responses received." It should have been plain to the PR long before the passing of 20 months that he was wasting time and money for no good purpose. The Copeland option expired after 8 months and would have ceased to be a factor but for the PR's decision to extend it indefinitely and rewrite its terms (R. p. 8, No. 3). He filed a partition action to force his preferred division without first seeking agreement from the heirs about where to draw the lines (R. p. 334, ll. 11-16). He sued the heirs for the power to sell Estate property without their consent when he already had the power to do this (R. pp. 168, ll. 18-20; 169, ll. 2-3; 198, ll. 18-20; 199, ll. 2-3) and when Respondents were willing for the property to be sold to a proper buyer (R. pp. 60, l. 9; 62, ll. 5-7; 64, ll. 20-23; 112, ll. 2-8, 308, l. 17). He filed a partition action when all he needed to do was to sign a deed of distribution (R. p. 8, No. 2). (See also S.C. Code Section 62-3-910.) He suggested that Mr. Copeland sue the Estate concerning his expired option (Def. Ex. No. 1, R. p. 817). He asked the heirs to sign off on his administration without disclosing his charges (R. p. 185, ll. 11-16) with the result that a hearing had to be held on his accounting. Had he not devoted himself to playing profitable games, the Estate could have been probated quickly.

As was noted before, the PR spent over \$ 18,000 of the Estate's money to value its personalty for his own benefit. The Estate had no benefit whatsoever from this. He also hired experts whom he intended to pay with Estate money to support his claim for inflated compensation. His focus was consistently on benefitting himself.

The Two-Judge Rule also mandates a rejection of Appellant's argument. As In the Matter of Hall, 318 S.C. 188, 193, 456 S.E.2d 439 (Ct. App. 1995) held,

Where the circuit court, sitting as an appellate court, affirms the findings of the probate court..., the 'two-judge rule' should apply. [Citation omitted] Under that rule, [where] there is evidence which reasonably supports the lower court's factual findings, we must also affirm.

II.C. The evidence supports the lower courts' finding that a deed of distribution would have been in conformity with the Testatrix's intent.

The Court should reject Appellant's argument as abandoned. Failing that, it should apply the Two-Judge Rule to uphold what the two courts below found.

The Testatrix clearly intended to benefit her heirs. There is nothing to indicate that she intended for her PR to spend 20 expensive months trying to coerce them into an agreement followed by suing them. The PR testified that the Testatrix asked him to come to an agreement with Respondents about the farm four years before she died (R. p. 567). When it was plain that this could not be done, she did not file a partition action; she let the matter rest. That shows her intent. See also S.C. Code Section 62-3-703 concerning the PR's duty of expeditious and efficient settlement of the Estate.

The Appellant seems to believe that only he could file a partition action. The PR's charges for himself and his law firm amounted to about a third of the Estate before Respondents ever asked for a hearing (R. p. 4, No. 12). If partition had actually been required, the heirs could have accomplished it much more quickly and cheaply without his dubious assistance if he had just gotten out of the way by filing a deed of distribution.

The Appellant alleges that the Copeland option was an impediment to issuing a deed of distribution, but this was only true because the PR chose to make it a complication. The option expired on its own terms after 8 months, and Mr. Copeland never attempted to exercise the option the Will offered him. But for the PR's attempt to extend the option indefinitely and rewrite its terms, it would not have been an impediment whatsoever.

III. The two lower courts had a firm evidentiary basis to deny Appellant increased compensation and his legal fees and costs.

The Appellant was hoist on the petard of his own testimony. He told the probate judge that he did not charge by time and he did not charge by a percentage of the Estate. He told the judge that he charged according to what he thought he should be paid (R. p.174 ll. 14-24). He knew he could have asked the judge to approve a fee (R. p. 204 ll.16-18), but he preferred seeing if he could slip a large fee past the heirs (R. p. 185, ll. 11-16).

It is disingenuous to claim that he used the Model Rules of Professional Conduct to determine his fees. He raised this argument after the hearing when it became apparent how much

damage his testimony about the real basis for his fees had done. At the hearing he had testified that there was very little legal work to be done (R. p. 206, ll. 6-7) and he was not acting as an attorney (R. p. 145, ll. 5-8; p. 171, l. 18- 172, l. 16; Def. Ex. 13, p. 844). However, even though he testified that he was not paid by his law firm for Estate work (R. p. 173, ll. 5-7), clearly his law firm was charging for his Estate work (R. p. 1421(d)) while he charged for the same hours. The Collins and Lacey invoice dated November 26, 2007 (R. p. 741) charges for 51 hours of Mr. Sullivan's work on the Estate. The August 16, 2010 invoice (R. p. 754) charges for 91.5 hours of Mr. Sullivan's time for work on what the probate judge declared to be an uncomplicated estate.

The PR's use of Alan Medlin's affidavit was a disservice both to the expert and to the Court, because the only information the expert had was what Appellant had told him and this did not include his time sheets (R. p. 196. ll. 1-3). He tried to manipulate the expert just like he tried to manipulate the heirs and others.

Once again the Appellant complains that the probate and circuit court judges told him that he should just have filed a deed of distribution. Once again he admits he spent 20 months making proposals and not getting a response (Petition, p. 9). Without support in the record he claims that the Testatrix wanted him to sue her relatives, although she herself refused to do that when she was alive.

Though the PR tries to make the question one of whether he had the legal power to file a partition action, this was never an issue in the case. The issue was whether it was reasonable and in the best interest of the heirs for the PR to drag out the Estate administration with years of legal maneuvers for his personal enrichment. The Court did not overlook this point; it just adhered to a rule of reason.

Appellant claims (Petition, p. 9) that "a super majority of the heirs" desired for the real property to be divided and sold. This is simply not true. Bart Heard and Presbyterian Home (who together had a 20% interest) had indicated before the judge ruled that they wanted their money right away. Appellant wrongfully counts the Lisbon Presbyterian Church and the Lisbon Church Cemetery Fund as part of his super majority. In fact Lisbon was concerned about his fee (R p. 262, ll. 4-6, 10-11) and did not have the power to agree to a sale without a congregational vote (R. p. 198, ll. 15-18), which did not happen until after Roland Milam offered to buy the property (R. p. 472, ll. 1-5) long after Appellant claims their support began. In fact, the Appellant testified, "[T]he church had indicated to me that they wanted me to accommodate

everybody.” (R. p. 79, ll. 5-7) Accommodating people is not a synonym for suing them, and the Two-Judge Rule should prevail.

IV. The Court did not misapprehend SC Code 62-3-907.

Appellant correctly notes that S.C. Code Section 62-3-907(A) was amended after the trial of this case, but he does not argue the version of the statute which was in effect at the time of the trial. The applicable version reads in part “If distribution in kind is made, **whether real or personal property**, the personal representative must execute an instrument or deed of distribution....” Ignoring the plain words of the statute, the Appellant makes the argument that “in-kind” can pertain only to personalty. Ignoring the plain words of the Will’s residuary clause (R. p. 554) and of his own Inventory and Appraisement (R. p. 708), the Appellant claims that the Testatrix did not convey any real estate to her heirs. The Testatrix plainly conveyed her half interest in the farm and other real estate to her heirs. There is nothing in her Will to indicate that she desired hugely expensive lawsuits instead of a peaceful transfer. Even if one were to assume that PR acted out of a good faith inability to discern the clear desires of the Testatrix, this would not justify paying himself a large fee for violating her plain intent to the detriment of the Estate and its heirs.

V. Appellant is not entitled to an award of legal fees and costs.

Two judges below and this Court have now ruled that Appellant’s expenditures for legal counsel and for costs were for his own benefit and not for the benefit of the Estate. As the Appellant noted on p. 2 of his Petition, a Personal Representative is a fiduciary. This means that he is bound to act for the benefit of the Estate and not for his own personal benefit. When he departs from this, he forfeits any right to be compensated for his self-serving conduct, otherwise he would be unjustly enriched and the Estate would be unjustly impoverished. The Estate should not be compelled to subsidize his efforts to benefit himself at its expense.

The statute cited by Appellant (Section 62-3-720) must be read in conjunction with S.C. Code Section 62-3-703. In addition to affirming the fiduciary status of a PR, that statute directs the PR to settle and distribute the Estate of the decedent expeditiously and efficiently in accordance with the Will. A PR who violates this statute cannot expect to be compensated for

the violation.

The claim of one of the Respondents (Ms. Brown) to a parcel that had been promised her in a partition agreement is a red herring. The issue was not pursued until Appellant made a hearing necessary. Because there was to be a hearing anyway, Ms. Brown went ahead and asserted her right. The Court below found that she did not introduce enough evidence to support her claim (R. p. 18), so it does not appear that Appellant had to devote much effort to defending against that issue, which was a very small part of the hearing and is not a part of the appeal.

The Probate Court did not “require” the PR to file and seek approval of his accounting; the legislature did that. (“[T]he probate code required Appellant to file a petition for settlement....” Appellant’s Petition, p. 11.) The PR offered Respondents a hearing on his accounting, and Respondents accepted that. The PR never sought a different procedure, and the prolonged recess in the middle of the case and the PR’s failure to seek more time to prepare show that he was not prejudiced by the procedure he agreed to. There was in fact more prejudice to Respondents, who were the recipients of a large document dump not long before the hearing and who were not informed of Appellant’s expert witnesses in advance. The Respondents could not have provided an itemization of what the PR did wrong in a pleading because the PR withheld the information necessary to make that judgment until shortly before the hearing. He is estopped to complain about a circumstance he created.

Appellant is incorrect in his assertion that he had to pay the expert fees because his experts testified concerning uncontested issues. The reason the courts below did not grant him reimbursement for some of the expert fees was that those experts were retained to bolster the PR’s claims for compensation, not to benefit the Estate (R. p. 11, Nos. 18 and 19).

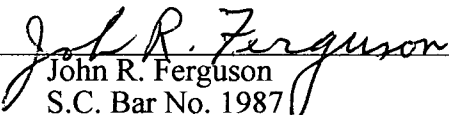
Appellant again claims credit for the sale of the realty to Roland Milam, but this buyer was referred to him by Respondent Moses (R. pp. 257, ll. 5-9; 73 ll. 21-24). The “extraordinary” sales price Appellant supposedly secured (R. pp. 698 and 703) was almost \$ 24,000 less than the appraised value of the property (R. p. 708; Ex. C 6-8 at R. pp. 561-629), and this sale was in no way contested (R. p. 112, ll. 1-8). What Respondents energetically opposed was not the sale but Appellant’s continuing efforts to enrich himself at the expense of the heirs, something no statute encouraged or condoned.

CONCLUSION

The Appellant is not entitled to any relief. This Court correctly denied his claims for extra compensation beyond the excessive compensation he has already received. Far from having a chilling effect, the denial of extra compensation will be a sign to future personal representatives that they are to act as the fiduciaries they are and avoid enriching themselves at the expense of the Estate. The Respondents are entitled to a rehearing on the issues raised in their Petition.

Respectfully submitted by:

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents/Cross-Appellants

By: 
John R. Ferguson
S.C. Bar No. 1987
107 E. Laurens St. - P.O. Box 286
Laurens, S.C. 29360
(864) 984-2126

August 11, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

AUG 15 2016

SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, Appellant/
Respondent

v.

Martha Brown and Mary Moses, Respondent/
Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox
Ferguson & Wham, LLC and that on the 11 day of August,
2016 she served the Respondents/Cross-Appellants' Return to
Petition for Rehearing herein by depositing a copy of it in
the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
Attorney at Law
P.O. Box 11906
Columbia, SC 29211.

Dulorah S Ball

August 11, 2016

COX, FERGUSON & WHAM

ATTORNEYS AT LAW
107 E. Laurens St.
P.O. Box 286
LAURENS, SOUTH CAROLINA 29360-0286

W. REID COX, JR.
JOHN R. FERGUSON
ALLEN M. WHAM

PHONE: (864) 984-2126
FAX: (864) 984-7372
E-MAIL: jferg@backroads.net

August 11, 2016

Office of the Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RECEIVED
AUG 15 2016
SC Court of Appeals

Re: Sullivan v. Brown and Moses, 2013-002319

Dear Ladies:

Enclosed with this letter you will find an original and nine copies of Respondents/Cross-Appellants' Return to Petition for Rehearing in the above-referenced appeal plus a Certificate of Service on opposing counsel. Please file the originals and send me a clocked copy. Thank you for your help.

Sincerely,



John R. Ferguson

JRF/wp
Encl.

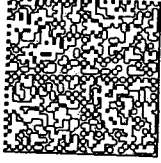
UNITED STATES POSTAGE



PITNEY BOWES

02 1P \$ 005.95

0000238075 AUG 11 2016
MAILED FROM ZIP CODE 29360



COX, FERGUSON & WHAM, LLC

ATTORNEYS AT LAW
107 E. LAURENS ST. - PO BOX 286
LAURENS, SC 29360

TO:

Office of the Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RECEIVED
AUG 15 2016
SC Court of Appeals