

**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

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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-Respondent,

vs.

Martha Brown and Mary Moses Respondents-Appellants.

**APPELLANT-RESPONDENT'S REPLY
TO RESPONDENTS-CROSS APPELLANTS' RETURN TO
PETITION FOR REHEARING**

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Edward D. Sullivan, PR of the
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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT
OF APPEALS

Pursuant to Rule 240(f), SCACR, Appellant/Cross-Respondent Edward D. Sullivan ("Appellant"), as Personal Representative of the Estate of Marion M. Kay, respectfully files this Reply to Return to Petition for Rehearing.

ARGUMENT

I. The proper standard of review is "in-equity."

In reply to Argument I of Respondents-Cross Appellants' (Respondents') response, the Court misapprehended the proper standard of review in this case when it determined it was "at-law." This case requires "in-equity" review because the underlying action was in the main a required accounting for distribution of estate assets. See Appellant-Cross Respondent's Petition for Rehearing, Section I at pages 1 - 3.¹

II. The Court Erred and Misapprehended or Overlooked the Clear Preponderance of Evidence in Support of Factors used by the PR to establish "reasonable compensation."

In reply to Arguments IIA, IIB, IIC and III of Respondents' response, the Court's dissent notes that the Appellant "had the right to partition the land pursuant to Kay's will and the probate code, and, thus, it was within his discretion to do so." Opinion, Few, A.J. The probate judge's disagreement with the Appellant's exercise of his right to partition was the driving force, not only in the disallowance of certain fees and costs, but

¹ The last paragraph in Argument I at page 3 should be cited as Geddings v

also in the rest of his findings and rulings. The Order itself makes clear that this disagreement with Appellant's exercise of his statutory rights and those both required and allowed by the will was the basis of the probate court's Order.

Notwithstanding Respondents' contentions, Appellant repeatedly testified that he based his compensation on numerous factors including "the time [he'd] spent and the effort [he'd] put into it and the results that were obtained." (R.p. 174, lines 5-8.). The testimony also included that the compensation was "based on all the factors and the rule, the time, the result obtained, and the novelty of the issues." (R.p. 174, line 19- p. 175, line 3). See Brief of Appellant, Argument IIB at pages 29 – 33.

The Court should apply the factors previously cited by the Appellant to the evidence and develop a proper measure for the determination of "reasonable compensation" both for use in this case and as a guide on the same issue of how to evaluate reasonable compensation for future cases outside the scope of South Carolina Code Section 62-3-719. Applying these factors to this case, the Appellant's compensation and expenses were "reasonable" beyond the clear preponderance of the evidence and should not have been reduced and/or denied by the probate court. See Appellant's Petition for Rehearing, Argument II at pages 3 - 6. Also, see Brief of Appellant, Argument IIA at pages 25 – 29. The Court has the option of remanding for consideration of calculating reasonable

Geddings, 319 SC 213, 480 SE2d 276 (1995).

compensation utilizing a set of criteria defined by the Court.

III. The Court misapprehended SC Code Section 62-3-907 relating to evidence of “in-kind” distributions.

In reply to Argument IV of Respondents' response, the amendment to SC Code Section 62-3-907 did not the change the effect of the statute on the facts of this case.² The statute applies only “[i]f a distribution in kind is made . . .”(emphasis added). No distribution in kind was made by the testatrix or the personal representative. If a distribution in kind is made, “evidence” of distribution “in kind” will be in the form of an instrument or deed of distribution which the personal representative will give to the distributees. “This instrument serves as a transfer of the interest an estate had in an asset or assets...” South Carolina Code Section 62-3-907, Reporter's Comment.

The version of Section 62-3-907 (A) in effect during the course of this estate's administration reads in full as follows:

If a distribution in kind is made, whether real or personal property, the personal representative must execute an instrument or deed of distribution assigning, transferring , or releasing the assets to the distributee as evidence of the distributee's title to the property.

As the Reporter notes, the purpose of the statute is to provide “evidence” of the transfer of title – but only if title is in fact conveyed. Respectfully, the Court's interpretation of the statute so that all real estate

² The 2013 amendments revised subsection (a) to provide discretion to the PR as to whether to provide such an evidentiary instrument pertaining to personal

must be conveyed to heirs could have the effect of defeating claims of creditors and taxing authorities. It would also ignore the statutory remedies of South Carolina Code Section 62-3-911 "Partition for purpose of distribution" and other probate code provisions. Although the Court indicates that it does not rule on the propriety of the Appellant's efforts to divide and sell the property, apparently its ruling is impacted by the misinterpretation of this statute. The Court should allow rehearing on this issue and/or reissue its Opinion regarding the interpretation of this code provision.

III. The Court misapprehended or overlooked that the PR defended a claim against the Estate and is entitled to be reimbursed for reasonable fees and costs pursuant to the will and statute.

In reply to Argument V of Respondents' response, Respondents acknowledge that not only did Respondent Brown press a claim against the Estate to a parcel of land but that the claim was made unannounced. Appellant successfully defended the claim on behalf of the Estate. The Court's Opinion will require future personal representatives to choose between attending the final hearing without counsel or proceeding at their own expense without knowing what claims are being made against them or the Estate until they are in the middle of the accounting - as occurred here. This result is in direct contravention of South Carolina Code Section 62-3-720 and, in this case, by will to choose to be represented at the Estate's expense. In addition, any future interested party could request a

property. South Carolina Code Section 62-3-907, Reporter's Comment.

hearing upon the request for approval of a final accounting and make assorted unannounced and unexplained claims, all potentially to his advantage and the detriment of the estate, or merely to aggravate the personal representative and/or the other beneficiaries. These are results not intended by the legislature and, in this case, the testatrix. Respondent Brown's claim against the Estate for 5 acres "because there was a hearing anyway" (Respondents' Return to Petition at page 7) is a perfect example of a disgruntled beneficiary raising a non-meritorious or frivolous issue "because they can" under this ruling.

Furthermore, as noted by the dissent, the Appellant was required to file the petition for settlement and attend the hearing, and he proceeded in good faith. Respectfully, Appellant is entitled to reimbursement of fees and costs by will and by statute, and the Court should reconsider its decision and grant rehearing.

CONCLUSION

As noted by the Court, the Appellant has worked diligently to resolve the various competing interests of the parties during the administration of this Estate. He has achieved an "excellent result" in the sale of the land, successfully defended Respondents' ongoing claims against the estate for a 5 acre parcel of land, and, thus far, successfully defended Respondents' claims for legal fees during this Appeal. Appellant's ongoing efforts to defend the estate and attempt to wind up the affairs through settlement agreements and partial distributions has

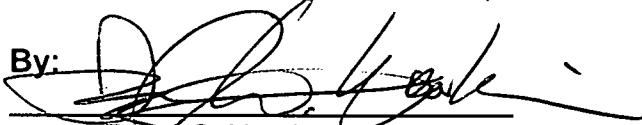
been time-consuming and expensive. Respectfully, there is a clear preponderance of the evidence that the probate court erred when it limited the Appellant's compensation to a percentage of the Estate's value, awarded \$2500 to wind-up the Estate without regard to the services rendered to the Estate since February 2, 2011, and denied Appellant reimbursement for fees and costs as allowed by will and by statute - simply because it disagreed with the Appellant's exercise of his discretionary right to seek to divide and sell the Estate's real estate. For these and the foregoing reasons of Appellant's Petition for Rehearing and this Reply, Appellant respectfully requests this Court grant rehearing in this Case so that the Court can determine and award "reasonable compensation" for the administration of this Estate from the death of the testatrix in May 2007 through the present as well as reimbursement for "reasonable expenses."

(Signature Page to Follow)

Respectfully submitted,

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By:



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August 18th, 2016

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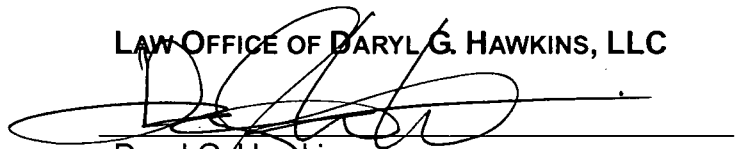
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Martha Brown and Mary Moses Respondents-Appellants.

PROOF OF SERVICE

I certify that I served Appellant-Respondent's Reply to Respondents-Cross Appellants' Return to 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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August 18, 2016

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 Probate Court File No. 2007-ES-30-208
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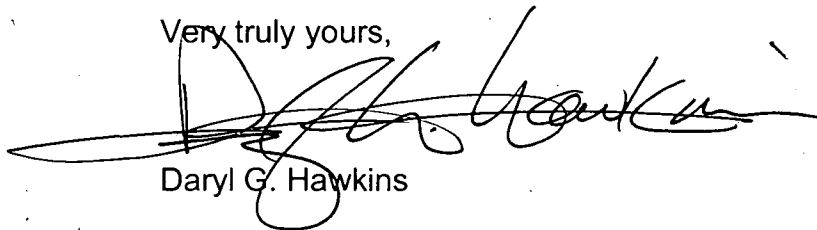
Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the Appellant Cross Respondent's Reply to Respondents-Cross Appellants' Return to Petition for Rehearing in the above-referenced matter.

Please return a clocked-copy 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