THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

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

v.

Martha Brown and Mary Moses .... Respondents/Petitioners

PETITIONER/RESPONDENT'S
PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 1

INTRODUCTION AND CONSIDERATIONS GOVERNING REVIEW OF COURT OF APPEALS DECISION 1

STATEMENT OF THE CASE 4

ARGUMENTS 10

I. The Court of Appeals erred in affirming the probate court's erroneous ruling that the PR was not entitled to be reimbursed for fees and expenses as additional compensation for attending the hearing on the Petition for Settlement and the ongoing efforts to settle the Estate. 10

II. The Court of Appeals erred by affirming the lower court's determination of the PR's "reasonable compensation" based primarily on the value of the decedent's estate without considering other factors when the will of the decedent "otherwise directs" the basis of compensation. 12

III. The Court of Appeals erred in affirming the probate court's ruling reducing the PR's compensation on the basis that it disagreed with the PR's decision to partition Estate Property. 15

IV.The Court of Appeals erred in affirming the lower court's ruling reducing the Personal representative's compensation by applying the "two-judge" rule............ 17

V. The Court of Appeals erred in affirming the lower court's ruling reducing the PR's compensation because the preponderance of the evidence, if not a clear preponderance of the evidence, contradicts the lower court's findings. 18

CONCLUSION 22

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on November 2, 2016. (App. 1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err by affirming the lower court's ruling that the Personal Representative was not entitled to reimbursement for legal fees and expenses despite such a provision allowing such reimbursement included in the last will and testament of the decedent, Marion M. Kay, as well as Section 62-3-720 of the South Carolina Probate Code?

2. Did the Court of Appeals err by affirming the lower court's determination of "reasonable compensation" based primarily on the value of the decedent's estate without considering other factors?

3. Did the Court of Appeals err in affirming the lower court's ruling reducing the Personal Representative's compensation based upon its disagreement with the Personal Representative's decision to use his powers granted by will and statute to partition Estate Property?

4. Did the Court of Appeals err by applying the "two-judge" rule in such a way that changes the standard of review in equity cases from the "preponderance of the evidence" to the standard of "any evidence"?

5. Did the Court of Appeals err in affirming the lower court's ruling even though the preponderance of evidence does not support the lower court's findings?

Petitioner Edward D. Sullivan, Personal Representative of the Estate of Marion M. Kay ("Petitioner"), hereby petitions this Court for a Writ of Certiorari.

INTRODUCTION AND CONSIDERATIONS GOVERNING REVIEW OF COURT OF APPEALS DECISION

Under the holding of the Court of Appeals, if a Personal Representative retains an attorney to represent them in the proceeding before the Probate Court on the Petition for Settlement (required to be filed by S.C. Code § 62-3-1001(a)(3) (Supp. 2015)) where the compensation for the Personal Representative is an issue, the cost of the attorney and any

costs incurred is entirely the burden of the Personal Representative and no reimbursement of payment from the Estate may occur.

The underlying purposes of the S.C. Probate Code include "(1) to discover and make effective the intent of a decedent in the distribution of property and (2) to promote a speedy and efficient system for liquidating the Estate of the decedent and making distributions to [her] successors." S.C. Code Ann. §§ 62-1-102(b)(1) and (2) (Supp. 2015). In this case, the personal representative ("PR") set out to liquidate the Estate as provided by the powers granted by the will and by statute in the Estate's best interest and give effect to the intent of the decedent. Almost two (2) years into the administration of the Estate, the PR filed a partition and declaratory judgment action on or about January 1, 2009, (which was amended on March 4, 2009) in the Circuit Court. The purpose of the litigation was to determine the rights of the parties arising out of an Option to Purchase, the Right of First Refusal and other claims made by Respondents, clear the title to the property, and divide or sell the real property so that the Estate could be settled. (*See*, PR Exhibit C-12B; R. 657-663). The PR was successful in securing a buyer for the real property with an excellent sales price as well as securing consents of all interested parties to the sale, and therefore the partition action became moot and was dismissed. (R. 103, l. 20 – R. 104, l. 18); (PR Exhibit C-1; R. p. 563, Paragraph 31); (PR Exhibit C-15; R. p. 678-685). Subsequently, after the hearing on the Petition for Settlement of the Estate, the probate court, despite the extensive powers granted by the will as well as statutory power, ordered the PR to refund a substantial portion of compensation because it disagreed with the actions taken by the PR to make effective the intent of the decedent in the distribution of her property— i.e., to liquidate the Estate and make cash distributions to the

beneficiaries rather than to deed undivided interests in real property to the beneficiaries. (*See*, Final Order, R. 10, paragraph 14; R. 13, Items a) and b)).

The probate court also disagreed with the method used by the PR to determine a reasonable amount of compensation (and expenses) granted by the will. The will provides that the PR "shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." (*See*, PR Exhibit B; R. 555). The PR determined a fee based on research with multiple factors taken into consideration including time, complexity of issues, litigation, sale of real estate, and results obtained. (*See*, R. 174, Lines 5-8, Line 19 – 175, Line 3). The lower court limited the compensation to $51,300.00, which is approximately 10% of the total value of the Estate. (*See*, Final Order, R. 10, paragraph 14; R. 13, Items a) and b)). In addition, the probate court denied the PR's request for additional compensation and attorney's fees and costs incurred on behalf of the Estate in preparing for and attending the hearing on the Petition for Settlement required by the probate code.

Rule 242(b), SCACR, provides that the Supreme Court may consider issuing a writ of certiorari to review a final decision of the Court of Appeals when (1) there are novel questions of law and (2) when there is a dissent in the Court of Appeals. This case concerns the interpretation of testamentary provisions, several probate code sections and how they relate to each other, particularly those relating to powers granted to the PR to effect the intent of the decedent and the determination of "reasonable compensation," and reimbursement to the PR for "reasonable fees and costs." These are novel issues of law as there do not appear to be prior decisions regarding these aspects of the will and probate law. Additionally, the decision is complicated by the effect of the "two-judge rule" on

the standard of review. The Honorable John Few authored a dissenting opinion that disagreed with the majority on a portion of the Court's decision, and he also expressed his view on the effect of the "two-judge rule" on the Court's standard of review. (App. 18). The final decision in this case will be of special significance to future personal representatives and attorneys who practice in South Carolina probate courts. For these special and important reasons, the Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

STATEMENT OF THE CASE

1. Statement of Facts

This action arises from the administration of the Estate of Marion M. Kay, who died on May 3, 2007. (R. p. 70, Lines 22-24). At the time of her death, Ms. Kay owned a house and 10 acres of land as well as one-half undivided interest in an adjoining 330 acre parcel (the "Farm"). (*See*, Supplemental Inventory and Appraisement; R. pp. 707-712); (3 Appraisals; R. 571-629); (R. 74, Lines 19 – 77, Line 16); (PR Exhibit C-1; R. 560, Items 1, 4). The other one-half undivided interest was titled in the name of "The Heirs of W.H. Milam," which consist of Respondents Martha M. Brown and Mary Leona M. Moses. (*See*, PR Exhibit C-1; R. 560, Item 1). The house and 6.238 acres (the "Homeplace") are separated from the remaining 3.762 acres (the "Lot") by a public roadway. (*See*, PR Exhibit C-1; R. 560, Item 4). The Estate was valued at $513,491.33. (*See*, Supplemental Inventory and Appraisement; R. 707-712). Item IV of Ms. Kay's will provides as follows:

> Outright Gift of Residuary. I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises) wherever situate and whether acquired before or after the execution of this Will, absolutely and

> forever, as follows:
>
> One-fourth (1/4) interest to Lisbon Presbyterian Church, absolutely forever;
>
> One-fourth (1/4) interest to Lisbon Presbyterian Church Cemetery fund, absolutely forever, the interest to be used to keep up the Milam-Kay plot;
>
> One-tenth (1/10) interest to Marla Elizabeth Heard, (per stirpes), to be hers absolutely forever;
>
> One-tenth (1/10) interest to Bart Edward Heard, (per stirpes), to be his absolutely forever;
>
> One-tenth (1/10) interest to Martha Milam Brown (per stirpes), to be hers absolutely forever;
>
> One-tenth (1/10) interest to Mary Leona Milam Moses (per stirpes), to be hers absolutely forever;
>
> One-tenth (1/10) interest to Presbyterian Home of South Carolina, Clinton, South Carolina;
>
> (*See*, PR Exhibit B; R. 550-559).

The second item, a one-fourth (1/4) interest to Lisbon Presbyterian Church Cemetery fund (the "LPCC") for the purpose of "[keeping up] the Milam-Kay plot" necessitated that assets of the estate be converted to cash so as to provide the necessary funds. (R. 554).

The will also granted Charles P. Copeland, Ms. Kay's neighbor and close friend, an eight-month Option to Purchase Ms. Kay's interest in the Farm. (*See*, PR Exhibit B, Item IX; R. 556-557). Additionally, the will named Ms. Kay's attorney and life-long friend, Edward Sullivan, as the PR. (*See*, PR Exhibit B; R. 555, Item V(1)); (R. 70, Lines 12-18). The will essentially authorized and empowered the PR "by way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to

PRs generally . . . to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my PR my seem best and to do all acts which my PR may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a Court order." (Emphasis added) (*See*, PR Exhibit B; R. 555-556, Item VII). In addition, the will's language regarding Copeland's option provides "the decision of my PR regarding the fair market price to be final." (emphasis added) (*See*, PR Exhibit B; R. 556-557, Item IX).

After Ms. Kay's death, Respondent Martha Brown testified that she and Respondent Mary Moses were "very disappointed" to learn that they did not inherit Ms. Kay's interest in the Farm. (R. 344, Lines 2-13). They then questioned Ms. Kay's ownership interest in the Farm and her right to leave the property to anyone else. (R. 344, Lines 2-13). The PR understood that Ms. Kay intended that her real estate be sold and the proceeds distributed to the devisees. (R. 155, Lines 4-19). In addition to Ms. Kay's previous desire to divide the farm, the provision of the will referenced above refers to the "interest to be used to keep up the Milam-Kay plot." (*See*, PR Exhibit B; R. 554, Item IV). The PR did not believe a simple deed of distribution to the beneficiaries could carry out Ms. Kay's testamentary intent. The beneficiaries would be minority co-tenants of the Farm with Brown and Moses, responsible for property taxes and insurance, and subject to liability. These heirs would be faced with filing a partition action or selling to Respondents Brown and Moses at a deep discount because of the lack of marketability of

their respective interests in the property. The PR was also concerned about possible title issues. (R. 148, Lines 21 – 153, Line 22; R. 159, Lines 13 – 161, Line 5).

2. Procedural History

On November 12, 2010, after more than three years and six months of Estate administration, litigation in the Circuit Court, and the negotiation and closing on a sale of the Estate's interest in real estate, the PR filed a Petition for Settlement and a Proposal for Distribution. (*See*, PR Exhibit C-1; R. 563, paragraph 33). Counsel for Martha Brown and Mary Moses, each 1/10 residual beneficiaries and defendants in the aforementioned litigation, wrote a short letter to the probate court simply requesting a hearing. (R. 851-852). No pleadings outlining any positions or disagreements were filed other than PR's Petition for Settlement.

At the hearing, the PR presented the (1) Last Will and Testament of Ms. Marion M. Kay, (2) a Supplemental Inventory and Appraisement reflecting her assets and valuation at the time of death and several accountings for the administration, (3) his extensive affidavit including issues confronted during the administration of the Estate and his time spent on the administration (4) an affidavit of an expert witness in support of his compensation (5) invoices for legal fees for services rendered by a law firm during the administration of the Estate, and (6) invoices for legal counsel and expert witnesses for purposes of the hearing.

In addition, the PR testified as to the identity of the beneficiaries of the residuary Estate and their respective interests, the intent of Ms. Kay as it related to the liquidation and distribution of the Estate's primary asset, a one-half undivided interest in the Farm, the stated desires of various beneficiaries to receive cash rather than an interest in land,

the various competing claims to the Farm that led to litigation including a partition and declaratory judgment action, the results of the litigation, the novel issues in the administration of the Estate, the difficulty in completing the Estate, and the various charges and expenses of the Estate administration, including the amount of PR compensation and factors used in determining reasonable compensation. The reasonableness of compensation was supported by the testimony of two beneficiaries of the Estate. In addition, two expert witnesses testified as to the outstanding results achieved by the PR in selling real estate owned by the Estate.

The probate court disallowed the introduction into evidence of a comprehensive affidavit of the PR outlining and describing the events of the Estate administration. The court also disallowed the affidavit of R. David Massey, Esquire, offered by the PR in support of the reasonableness of his compensation.

The probate court ruled that the PR should have deeded out the Estate property to the beneficiaries as tenants-in-common. The court found that the PR (1) unnecessarily complicated the Estate and (2) failed to provide adequate proof for the hours claimed and necessity for the hours. It also ruled that the amount paid to the PR during the three and one-half year administration, $93,775.00, was excessive, that a fee of $51,300.00, about 10% of the Estate value was reasonable, and ordered the PR to refund to the Estate within 30 days the amount paid in excess of $51,300.00, that amount being $42,475.00 or, if the PR completed the settlement, $39,975.00, reflecting additional compensation of $2,500.00 for winding up the Estate. (*See*, Final Order, R. p. 10, paragraph 14; R. 13, Items a) and b)). Additionally, the probate court denied the PR's request for

compensation for preparing for and attending the hearing, as well as the request for reimbursement of legal fees and witness fees.

The probate court also ruled that counsel for Respondents Brown and Moses was entitled to be paid $19,860.00 by the Estate pursuant to the common fund doctrine. (*See*, Final Order, R. 11, paragraph 21; R. 13, Item e) (reversed by the recent decision of the Court of Appeals). (App. 13).

Thereafter, the PR filed a Rule 59 motion to alter or amend the judgment and/or reopen the record on the basis that such motion should be granted to prevent clear errors of law and/or prevent manifest injustice. (*See*, Rule 59 Motion to Re-Open Record, Accept Additional Evidence and/or to Alter or Amend Judgment; R. 906-968). After a hearing on the Rule 59 motion, the probate court upheld its earlier decision and declined to re-open the record to allow in time sheets offered by the PR as well as an Affidavit of Teri Stomski, a real estate transactional attorney who had earlier counseled the PR on the wisdom of filing a partition action due to title issues regarding the Estate Property. The probate court further denied a claim brought by Respondents Brown and Moses for five acres that had been owned by the Estate, denied additional legal fees sought by Respondents Brown and Moses, and ordered that Respondents Brown and Moses be responsible for one-half of the Court reporter costs. (*See*, Order Disposing of Post-Trial Motions; R. 15-18).

The PR, Martha Brown, and Mary Moses filed Grounds for Appeal. A hearing was held in the Circuit Court on July 19, 2013, and the Circuit Court affirmed both Orders of the probate court. (*See*, Order dated August 20, 2013; R. 19-20). The court

denied Respondent Brown and Moses's Rule 59 Motion for Rehearing. (*See*, Order dated September 30, 2013; R. 21-22).

The Petitioner served his notice of appeal in this matter on October 24, 2013, and served an amended notice of appeal on October 30, 2013. Respondents Martha Brown and Mary Moses served a notice of cross-appeal on October 29, 2013. The Court of Appeals issued its opinion, affirming in part, reversing in part, and remanding on June 15, 2016. Both parties filed Petition(s) for Rehearing. On November 2, 2016, the Court of Appeals filed a substituted opinion, affirming in part, reversing in part, and remanding. This Petition for a Writ of Certiorari follows.

ARGUMENTS

I. The Court of Appeals erred in affirming the probate court's erroneous ruling that the PR was not entitled to be reimbursed for fees and expenses as additional compensation for attending the hearing on the Petition for Settlement and the ongoing efforts to settle the Estate.

The Respondents' demand for a hearing on the Petitioner's Petition for Settlement necessitated that he prepare for all possible issues, especially when the trial court ruled that he must present his evidence as if he was the moving party and without the benefit of pleading by Respondents Brown and Moses as to what matters they wished to put in contention, or any evidence they intended to rely upon, or any list of witnesses they intended to call. The majority of the Court held that the Petitioner is not entitled to legal fees and costs related to the hearing. (App. 8). In doing so, the majority cites S.C. 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." (App. 7). The majority

concludes that the statute was intended to cover those fees and expenses in connection with prosecuting and defending claims against the estate, and hereafter, under this holding, no personal representative may be reimbursed for legal counsel retained to appear in the proceeding nor much of their costs. This holding will have a chilling effect on the willingness of persons and entities to act as personal representatives in complicated estates.

The majority opinion holds that when a single disgruntled beneficiary requests a hearing on the Petition for Settlement, and then proclaims as some point during a hearing that they believe the PR's compensation is "too much", the PR must now decide whether to retain counsel at their own expense, or proceed pro se.

Respectfully, the majority overlooks that Respondent Brown used the hearing that she requested to pursue a claim against the Estate for approximately five (5) acres of land (or the equivalent value). (R. 100, Lines 23 – 104, Line 18). Ms. Brown renewed this request at the Rule 59 Hearing. Petitioner successfully defended her ongoing claims. (*See*, Order Disposing of Post-Trial Motions, R. 18, paragraph 1). Accordingly, the Petitioner did in fact defend a claim against the Estate (successfully) and is entitled to reimbursement. Further, as Justice Few notes in the dissent, the probate code actually required the Petitioner 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). (App. 17). The Petitioner successfully defended Respondent Brown's claim against the Estate for approximately five (5) acres of land, appeared in good faith, and is

entitled to be reimbursed as provided by the statute (and will provisions) for his fees and costs.

Citing to S.C. Code Section 62-3-721(a), the Court affirmed the lower court's decision to assess expert fees for those testifying at the hearing against the Petitioner because the experts' work product and valuations were not contested issues at the hearing. (App. 11-14). However, because the Respondents filed no written pleading on any positions they intended to take and what was put into issue by the Respondents on the approval of Petitioner's accounting and everything the Petitioner did as personal representative, including what the amount of his compensation should be, this could not reasonably be done without experts. These experts 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 Petitioner in selling the real estate and as additional justification for the compensation that Petitioner requested. In fact, the lower court, based on this testimony, found that the Petitioner "did an excellent job in securing the sales price for the real estate." (App. 15). Respectfully, the value of the Petitioner's services, as supported by the outstanding result achieved, was in fact an issue—if not the issue—and bitterly contested by the Respondents. This Court should agree with Justice Few's assertion that the Court of Appeals should "find [the Petitioner] is entitled to reasonable attorney's fees and expenses." (App. 18).

II. The Court of Appeals erred by affirming the lower court's determination of the PR's "reasonable compensation" based primarily on the value of the decedent's estate without considering other factors when the will of the decedent "otherwise directs" the basis of compensation.

South Carolina lacks a definitive standard for assessing reasonable compensation for a personal representative when a will provides for "reasonable compensation. (*See*,

Brief of Appellant/Respondent, 25-35). The Court noted that the five per cent ceiling on compensation of the PR of S.C. Code Section 62-3-719(a) does not apply to determining a reasonable compensation for a PR's services "where the will otherwise directs," as provided by S.C. Code Section 62-3-719(c), but then the Court analyzed the percentage of compensation of the Estate's value without considering or establishing enumerated factors for either future courts or PR's to consider when determining reasonable compensation. (App. 7).

Petitioner 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,
18. Such other factors as a court may determine as reasonable to consider in a particular case.

(*See,* Brief of Appellant-Respondent, 8 – 35; 37 – 40).

These factors should be considered in the determination of the amount of the Petitioner's compensation as PR during the entire administration of the Estate, including his ongoing services since the initial filing of the Petition for Settlement. Without addressing factors for consideration, this holding indicates that the primary consideration for probate court in determining a reasonable fee is the value of the estate.

Based on the "any evidence" standard of review, the Court of Appeals upheld the lower court's decision to decrease the Petitioner's compensation based primarily on the value of the Estate without due consideration of the hours required, effort involved, the PR's skills and expertise, and other similar factors. (App. 8) If this Court correctly applies the preponderance of the evidence standard, then it should determine that the Court of Appeals erred in affirming the lower court's decision to base the Petitioner's

compensation primarily, if not solely, on the value of the Estate rather than using these other factors (which are codified in several other states). (*See*, Brief of Appellant-Respondent 25-36). Moreover, even if this Court applies the "any evidence" standard of review, it should find that the lower court erred in holding that Petitioner's "reasonable compensation" was based primarily on the value of the Estate, especially given the complexity of the issues involved and the resistance of two beneficiaries to any compromise.

III. The Court of Appeals erred in affirming the probate court's ruling reducing the PR's compensation on the basis that it disagreed with the PR's decision to partition Estate Property.

The probate court's decision was erroneously based on its disagreement with the PR's decision to file a partition action and ultimately sell the estate's interest in the real estate. (*See*, App. 17) (Few, A.J., dissenting in part)). The will and the probate code specifically empowered the PR to partition and sell the real estate. Further, the probate code specifically provides for PRs or one or more beneficiaries to partition real estate. S.C. Code Ann. § 62-3-911 (Supp. 2015). Most, if not all of the beneficiaries of the Estate (other than Respondents), desired a cash distribution as opposed to an undivided interest in real estate. The will provides for a residuary share of the Estate to go to the "Lisbon Cemetery fund, absolutely forever, the interest to be used to keep up the Milam-Kay plot." (*See*, PR Exhibit B; R. 554, Item IV; Brief of Appellant/Respondent 18-19). Although the probate court ruled that the PR should have deeded out the real estate to the various beneficiaries, including the cemetery fund, rather than seeking to liquidate it, this bequest to the cemetery fund requires a distribution of cash to a fund for the upkeep and maintenance of the plot. Because most (70%) of the beneficiaries desired cash and the

Respondents consistently failed to respond to the PR's multiple proposals, offers, and requests, the PR determined that the best action to take was to file a partition action and distribute the funds to the beneficiaries. The will itself necessitated cash so as to fulfill the bequest to the LPCC to provide a resource for maintaining the Milam-Kay plot. In addition, the Presbyterian Home and Lisbon Church did not want to receive an undivided interest in real estate. (R. 243, ll. 19-25, R. 244, ll. 1-2 and R. 630-631, Letter of R. Fuller, Ex. C-9).

Employing the powers granted by the will and statute and relying specifically on S.C. Code Section 62-3-920, the PR used his discretion to partition the real estate. As noted by Justice Few, "In my view, the probate judges' denial of [Petitioner's] request for fees and expenses was driven by his disagreement with [Petitioner's] decision to file a partition action and ultimately sell the estate's interest in the real estate. [Petitioner] 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." (App. 18). In fact, citing to S.C. Code Section 62-3-1001(a)(3), Justice Few agreed that "the probate code required [Petitioner] to file a petition for settlement." (App. 18). Additionally, the probate court and the Court of Appeals found that the PR did not act in bad faith during his administration of the estate. (App. 8). Because Justice Few agreed that the PR had the right to partition the land pursuant to the will and the probate code and that the PR did not act in bad faith, he reasoned that he would find that the PR is entitled to reasonable attorney's fees and expenses. Accordingly, the Court of Appeals erred in affirming the probate court's decision to reduce the compensation based on its disagreement with the PR's last resort

option of filing a partition action and ultimately selling the estate's interest in the real estate.

IV. The Court of Appeals erred in affirming the lower court's ruling reducing the Personal Representative's compensation by applying the "two-judge" rule.

As noted by Justice Few in the dissent, it is questionable whether the "standard of review in an appeal from an equity case is any different simply because two judges have made the same factual determination." (App. 18). "As former Chief Justice Toal noted in her concurrence in [*Lewis v. Lewis*, 392 S.C. 381, 390-91, 709 S.E.2d 650, 654-55 (2011)], 'our standard of review in a particular case depends on the nature of the underlying action and has little to do with the semantics concerning the method by which the case reaches the Court.'" (App. 18). In applying the two-judge rule and changing the standard of review to something other than a preponderance of evidence, the Court of Appeals erred.

In substituting its first opinion, the Court of Appeals properly determined that this matter is a case of equity. (App. 6) (substituting the Court's first opinion, which found that this case was an action at law (App. 26)). Because this matter is a case of equity, the appellate court may make factual findings according to its own view of the preponderance of the evidence. *In re Howard*, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (citations omitted). (*See also*, App. 26). However, the Court of Appeals erred by following their own precedent and applied the two-judge rule, stating that "[i]f a matter is decided by the probate court and affirmed by the circuit court, this court applies the two-judge rule." (App. 6) (citing *Dean v. Kilgore*, 313 S.C. 257, 259-60, 437 S.E.2d 154, 155-56 (1993)). Because the Court incorrectly applied the two-judge rule, it

determined that the "standard of review for this court is whether any evidence reasonably supports the findings of the court below." (emphasis added). (App. 6) (citing *Dean*, 313 S.C. at 260, 437 S.E.2d at 155-56). Respectfully, this interpretation of the two-judge rule is erroneous.

The South Carolina Constitution provides that appellate jurisdiction in cases of equity requires that appellate courts review findings of fact as well as the law. *See* S.C. CONST. Art. V, § 5. The Supreme Court interpreted this provision and held that "it may now be regarded as settled that this court may reverse findings of fact by the circuit court [in a case of equity] when the Petitioner satisfies this court that the preponderance of the evidence is against the findings of the circuit court." *Wise v. Wise*, 60 S.C. 426, 38 S.E. 794, 803 (1901). Nevertheless, the majority in the Court of Appeals applied the "two-judge" rule and in weighing the evidence affirmed the lower court's findings regarding the lower court's decision to reduce the PR's compensation because they "[did] not believe the probate court's decision to decrease the [Petitioner's] compensation based on the value of the Estate and the court's view of the evidence [was] without support." (App. 8). In doing so, the majority applied an improper standard of review, that of "any evidence."

V. The Court of Appeals erred in affirming the lower court's ruling reducing the PR's compensation because the preponderance of the evidence, if not a clear preponderance of the evidence, contradicts the lower court's findings.

A. The preponderance of the evidence shows that the Petitioner did not unnecessarily complicate the Estate.

The lower court made a finding of fact that the Petitioner "unnecessarily complicated the Estate by insisting on filing a partition action." (R. 8, paragraph 2). To the contrary, a preponderance of the evidence, if not all of the evidence, supports that, as

noted in the Court's opinion, Petitioner worked for 20 months with the various interested parties, made proposals (including deeding the disputed 5 acres of land to Respondents at no cost), which garnered no response, and offered compromises to secure a resolution. (App. 3-4). Only when no progress was made or even responses received did Petitioner file the partition action—which included an action to declare the rights of the parties. (App. 3-4). There is no evidence that Petitioner complicated the administration of the Estate. In fact, the Petitioner was required by statute 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. *See generally,* S.C. Code Ann. §§ 62-1-102(b)(1) and (2) (Supp. 2015). Furthermore, as previously stated, the Petitioner was required to file a Petition for Settlement of the Estate. *See* S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015). (App. 17).

The lower court's 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" and that "[t]his would also have been in conformity with Ms. Kay's Will" is plain error. (R. 8, paragraph 2). Among other things, Ms. Kay, by including a bequest for maintaining the Kay-Milam plot, clearly 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 Milam-Kay plot. There would be no interest without a liquidation of the real estate to create a cash fund to then accrue interest. Likewise, Petitioner 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 Petitioner carried out Ms. Kay's testamentary intent—which was his primary duty. *See* S.C. Code Ann. § 62-1-102(b)(2) and (3) (Supp. 2015) (stating that underlying purposes and policies of the probate code include making effective the intent of the decedent in the distribution of her property and promoting a speedy and efficient system for <u>liquidating the estate and making distributions to [her] successors</u>) (emphasis added). Because the Petitioner was required to carry out the intention of Ms. Kay and had the authority under the will and by statute to petition to partition the real property, the preponderance of the evidence contradicts the probate court's ruling that the Petitioner unnecessarily complicated the Estate.

B. <u>The preponderance of the evidence shows that the Petitioner did not fail to provide a legitimate basis for his compensation as personal representative</u>.

The lower court found that "the [Petitioner] 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 [Petitioner] in Memorandum argued that he had 468.6 hours of time as PR, the proof he provided failed to support this." (R. 9, paragraph 8). This is not correct.

The record reflects that Petitioner 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. 174, Lines 19 – 175, Line 3). Because the will called for "reasonable compensation" of the personal representative and there is no specific standard or formula set in South Carolina, Petitioner was forced to determine what would be considered

"reasonable compensation." Petitioner 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. 174, Lines 12 – 176, line 9). Petitioner also consulted with Alan Medlin, a well-known expert in the field, and another attorney to determine reasonableness. (R. 175, Lines 23 - 176, Line 9; R. 181, Lines 21 – 182, Line 7). As the Court notes, the Petitioner provided invoices, time sheets, and affidavits. (App. 7). Contrary to the lower court's finding, the Petitioner 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 value of the Estate. There is no other justification or support by the lower court for reducing the Petitioner's compensation other than (1) the value of the estate, (2) an inference that his ruling is based on his disagreement with the Petitioner'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, paragraph 14). In fact, there were more witnesses that testified in favor of the Petitioner's management of the Estate and compensation and expenses than opposed (Respondent Martha Brown). For example, a director of one of the beneficiaries (Presbyterian Home), Penelope Arnold, has experience in dealing with personal representatives. (R. 241, Lines 14-25). Ms. Arnold's duties at Presbyterian Home included working with estates and personal representatives. Ms. Arnold testified that she was satisfied with the Petitioner's work and the sale of the real estate. (R. 241,

Lines 14-25; R. 246, Lines 9-11, 18-25). Moreover, Respondent Martha Brown conceded that Ms. Arnold would be in a better position than her to evaluate the Petitioner's services. (R. 364, Lines 11 – 365, Line 9). Ms. Arnold had no objection to the Petitioner's fees for his services. (R. 364, Lines 9-11).

Therefore, the preponderance of the evidence shows that the Petitioner did in fact provide a legitimate basis for his compensation as the personal representative of the Estate because he submitted the appropriate invoices, times sheets, and affidavits and because several of the beneficiaries testified that his fee was reasonable.

CONCLUSION

The Court erred in applying the two-judge rule in the standard of review and should have applied the preponderance of the evidence standard. Additionally, 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 S.C. 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, Petitioner respectfully requests this Court to issue a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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December 16, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 16 2016
S.C. SUPREME COURT

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

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

v.

Martha Brown and Mary Moses.......................................Respondents/Petitioners

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PROOF OF SERVICE

I certify that I served Petitioner/Respondent's Petition for a Writ of Certiorari upon Martha Brown and Mary Moses by mailing one (1) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360, and via email transmission to jferg@backroads.net, on December 16, 2016.

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