

THE STATE OF SOUTH CAROLINA
in the Court of Appeals

Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

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

SC Court of Appeals

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.

BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Was the PR required to deed real property to residual beneficiaries, or did he have discretion to pursue an action for partition and sale of an undivided interest by statute, terms of the will and applicable law?
- II. Did the Circuit Court err in affirming the Probate Court's erroneous decision requiring the PR to refund a substantial portion of his compensation simply because the Probate Court disagreed with the PR's use of discretionary powers granted by the will and probate code?
- III. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation and disallowing his request for payment of expenses and ongoing services to the Estate because the Probate Court disagreed with PR's method for determining reasonable compensation?
- IV. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation because it would unjustly enrich the Estate beneficiaries who benefitted from the services of the PR?
- V. Did the Circuit Court err in affirming the Probate Court's erroneous decision to require the PR to refund a substantial portion of his compensation given that Brown and Moses did not petition the court pursuant to S.C. Code Ann. § 62-3-720 to review the reasonableness of the compensation determined by the PR for his services?
- VI. Did the Circuit Court err in affirming the Probate Court's erroneous ruling that the PR was not entitled to be compensated and reimbursed for expenses related to the hearing on the Petition for Settlement and the ongoing efforts to settle the Estate?
- VII. Did the Circuit Court err in affirming an award of legal fees to counsel for beneficiaries Brown and Moses?
- VIII. Did the Circuit Court err in affirming the Probate Court's erroneous denial of the PR's Rule 59 Motion?

INTRODUCTION

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 S.C. Code Ann. § 62-1-102(b)(2) (1976).

In this case, the PR set out to liquidate the Estate as provided by the powers granted by the will and statute in the Estate's best interest and give effect to the intent of the decedent as he understood it. After a hearing on the Petition for Settlement, the Probate Court, despite the extensive powers granted by the will as well as statutory power, substituted its discretion for that of the PR. It ordered the PR to refund a substantial portion of compensation because it arbitrarily disagreed with the actions taken by the PR to make effective the intent of the decedent in the distribution of her property - to liquidate the Estate and make distributions to the beneficiaries.

The 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". 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. The court limited the compensation to \$51,300.00, which the Court equated to approximately 10% of the value of the Estate. In addition, the 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.

The orders below should be reversed because the Circuit Court erred in affirming the decisions of the Probate Court.

STATEMENT OF THE CASE

This action arises from the administration of the Estate of Marion M. Kay, who died on May 3, 2007. 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, Edward D. Sullivan, filed a Petition for Settlement and a Proposal for Distribution. Counsel for Martha Brown and Mary Moses, each 1/10 residual beneficiaries and defendants in the aforementioned litigation wrote a letter to the Probate Court requesting a hearing. No pleadings were filed other than PR's Petition for Settlement.

Hearings were held on February 2, 2011 and February 21, 2011. At the hearings, Mr. Sullivan 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, (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 a 330 acre tract of land (the "Farm"), the stated desires of various beneficiaries to receive cash rather than an interest in land, the various competing claims to the Farm which 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 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 Court ruled that the PR should not have filed a partition/declaratory action to sort out various claims to Estate Property, but rather should have deeded out the Estate property to the beneficiaries as tenants-in-common. The Probate Court essentially 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. Based on these findings, the Court 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. p. 13, Items a) and b)). Additionally, the 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 Brown and Moses was entitled to be paid \$19,860.00 by the Estate pursuant to the common fund doctrine. (See, Final Order, R. p. 11, Paragraph 21; R. p. 13, Item e)).

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. pp. 906-968). Counsel for Brown and Moses simultaneously appealed and thereafter the PR, in an abundance of caution, cross-appealed to preserve his rights to an appeal. These appeals were later dismissed so that the Probate Court could entertain the PR's Rule 59 motion. After a hearing on the Rule 59 motion, the Court upheld its earlier decision and declined to re-open the record to allow in certain timesheets offered by the PR as well as an Affidavit of Teri Stomski, an attorney who had earlier counseled the PR on the wisdom of filing a partition action due to title issues regarding the Estate Property. The Court further denied a claim brought by Brown and Moses for five acres that had been owned by the Estate, denied additional legal fees sought by Brown and Moses and ordered that Brown and Moses be responsible for one-half of the Court reporter costs. (See, Order Disposing of Post-Trial Motions; R. pp. 15-18).

The PR and Brown and Moses filed Grounds for Appeal. A hearing was held in the Circuit Court on July 19, 2013 resulting in the two Orders of the Probate Court being affirmed. (See, Order dated August 20, 2013; R. pp. 19-20). Brown and Moses filed a Rule 59 Motion for Rehearing. The motion was denied. (See, Order dated September 30, 2013; R. pp. 21-22).

The PR served his notice of appeal in this matter on October 24, 2013. It later served an amended notice of appeal on October 30, 2013. Brown and Moses served a notice of cross-appeal on October 29, 2013. This appeal follows.

STATEMENT OF FACTS

A. The Estate and Residuary Devise of Marion M. Kay

Marion Milam Kay, a resident of Laurens County, South Carolina died on May 3, 2007. (See, Supplemental Inventory and Appraisement; R. p. 707); (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 a one-half undivided interest in an adjoining 330 acre parcel (the "Farm"). (See, Supplemental Inventory and Appraisement; R. pp. 707-712); (3 Appraisals; R. pp. 571-629); (R. p. 74, Line 19 – p. 77, Line 16); (PR Exhibit C-1; R. p. 560, Items 1, 4). The other one-half undivided interest was titled in the name of "The Heirs of W.H. Milam". (See, PR Exhibit C-1; R. p. 560, Item 1). The heirs of W.H. Milam consist of Respondents-Appellants Martha M. Brown and Mary Leona M. Moses. (See, PR Exhibit C-1; R. p. 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. p. 560, Item 4). Including Ms. Kay's personal property, the Estate was valued at \$513,491.33. (See, Supplemental Inventory and Appraisement; R. pp. 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. pp. 550-559).

The will also granted Charles P. Copeland, Ms. Kay's neighbor and close friend, an Option to Purchase Ms. Kay's Estate in the Farm. Item XIV of the Will provides as follows:

Option to Purchase. It is my desire and I hereby direct that Charles P. Copeland be permitted to buy my interest in the real estate within eight (8) months after my death at the fair market price on the date of my death, the decision of my PR regarding the fair market price to be final.

(See, PR Exhibit B, Item IX; R. pp. 556-557).

B. The PR, Discretionary Powers Granted by the Will, and Compensation and Reimbursement for Expenses

The will named Ms. Kay's attorney and life-long friend Edward D. Sullivan ("Mr. Sullivan" or the "PR") as Personal Representative (See, PR Exhibit B; R. p. 555, Item V(1)); (R. p. 70, Lines 12-18). Mr. Sullivan is an attorney with more than 25 years of legal experience. In addition, he is a Certified Public Accountant with several years of experience in public accounting and as Controller of a propane gas company. In addition to Bachelors of Science - Accounting and Juris Doctor Degrees, the PR has earned a Master of Accountancy degree and an LLM-Taxation degree. Mr. Sullivan is also a licensed real estate broker. He is originally from Laurens, South Carolina, and he and Ms. Kay both attended Lisbon Presbyterian Church, a small church in Mountville (Laurens County), South Carolina. (See, PR Exhibit A; R. pp. 548-549); (R. p. 62, Line

16 – p. 63, Line 2). He also served as her attorney in various matters beginning in 1997, including an effort to divide the Farm in 2003.

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. pp. 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. pp. 556-557, Item IX).

C. Issues Confronted by the PR During the Administration of the Estate

The primary asset of the Estate was a one-half undivided interest in farm consisting of 330-acre tract of land, partially planted with pine trees (the “Farm”). Moses owned some property which adjoined the Farm. In 2003, four years prior to her death, Ms. Kay retained the PR to divide the Farm. He corresponded with Brown and Moses to set up a meeting concerning the division and sharing of costs. (R. p. 66, Line 17 – p. 68, Line 6); (PR Exhibit C-2; R. pp. 566-567). Brown and Moses were unresponsive and the efforts to divide the Farm were discontinued at that time. (See, PR Exhibit C-1; R. p. 562, Item 20).

After Ms. Kay’s death, Brown and Moses were bitterly disappointed to learn that they did not inherit Ms. Kay’s interest in the Farm. They questioned Ms. Kay’s ownership interest in the Farm and her right to leave the property to anyone but them. (R. p. 74, Line 19 – p. 75, Line 22).

The PR understood that Ms. Kay intended that her real estate be sold and the proceeds distributed to the devisees. (R. p. 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. p. 554, Item IV). The PR did not believe a simple deed of distribution to the beneficiaries would 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. Because of the lack of marketability of their respective interest in the property, these heirs would be faced with filing a partition action or selling to Brown and Moses at a deep discount). The PR was also concerned about possible title issues. (R. p. 148, Line 21 – p. 153, Line 22); (R. p. 159, Line 13 – p. 161, Line 5).

Furthermore, at least three of the residuary beneficiaries, including Bart Heard, The Presbyterian Home of South Carolina, and Lisbon Presbyterian Church, together owning 70% of the residuary Estate, indicated that they desired that their share of the Estate assets be cash rather than an interest in the real estate. (R. p. 78, Lines 12–22); (letter of R. Fuller, Exhibit C-9; R. pp. 630-631). Assuming Ms. Orias also desired cash, 80% of the residuary interests wanted cash rather than an undivided interest in real estate.

With his knowledge of Ms. Kay's intent, the powers granted to him by the will, and the desire of the beneficiaries¹ to receive cash rather than an undivided interest in real estate, the PR set out to divide the property so that he could sell the Estate's land and distribute cash to the beneficiaries. The division was very complicated and involved the following issues:

- i. In 1972, owners of the Farm granted to each other a "right of refusal" thereby creating a conflict with Copeland's Option to Purchase.
- ii. Ms. Brown and Ms. Moses claimed Ms. Brown was entitled to approximately 5 acres of the Farm that had never been deeded to them.
- iii. There were claims that Ms. Kay either did not have title and/or did not have the right to devise her interest to anyone other than the Heirs of W.H. Milam.

(See, PR Exhibit C-1; R. p. 561, Paragraph 10); (R. p. 76, Line 23 – p. 77, Line 24; R. p. 68, Line 18 – p. 69, Line 20).

Furthermore, Copeland desired to exercise his option by purchasing 46.85 acres that adjoined his property. He made a written offer of \$56,400.00 on April 16, 2008 (See, PR Exhibit C-5; R. p. 570); (PR Exhibit C-1; R. p. 561, Paragraph 11). Later he agreed to pay \$1500.00 per acre, the appraised value. (See, PR Exhibit C-1; R. p. 561, Paragraph 11); (PR Exhibit C-11; R. pp. 632-633).

The PR discovered during this process that Respondent/Cross-Appellant Mary Moses had judgments against her. The PR personally looked at the records at the Laurens County Courthouse. He was concerned how these judgments might affect the title to the property. (See, PR Exhibit C-1; R. p. 561, Paragraph 17); (R. p. 159, Line 13 – p. 161, Line 22).

Another issue was what action was required by church protocol regarding the church's interest in the Estate to properly approve and consent to the sale of the real estate. The PR had several telephone conferences with Robert Fuller, and received and

¹ Other than Moses and Brown.

reviewed his "opinion" letter (See, PR Exhibit C-1; R. p. 561, Paragraph 16); (PR Exhibit C-9; R. pp. 630-631).

D. The PR's Actions to Address the Issues Confronted by the Estate

In an effort to sort out these claims, Mr. Sullivan obtained bids from surveyors and appraisers, and ultimately hired a surveyor and an appraiser. The Farm appraised at \$614,000.00 (See, PR Exhibit C-6; R. pp. 571-595), the Estate's interest being \$307,000.00. The Homeplace appraised at \$64,000.00 (See, PR Exhibit C-7; R. pp. 596-615) and the Lot appraised at \$20,000.00 (See, PR Exhibit C-8; R. pp. 616-629).

In order to reach a resolution, the PR met several times with Charles Copeland and his wife, Patsy Copeland about Mr. Copeland's option. On Saturday evening, April 26, 2008, the PR met with the Lisbon Church Session (governing body) to discuss a compromise proposal. (See, PR Exhibit C-1; R. p. 562, Paragraphs 18-19).

On May 2, 2008, the PR submitted a written proposal to Ms. Brown, Ms. Moses, and Mr. Copeland in an attempt to resolve the issues (See, PR Exhibit C-11; R. pp. 632-633). The proposal, subject to approval from the heirs and the Probate Court, was to convey 5 acres to Ms. Brown (as she claimed was hers) at no cost, convey 46.85 acres to Mr. Copeland that adjoined his property, and offer the remainder to Brown and Moses at the appraised value. No response was received from Brown and Moses. (R. p. 97, Line 14 – p. 99, Line 10); (PR Exhibit C-1; R. p. 562, Paragraph 20).

In another attempt to reach a resolution, the PR arranged a meeting with the beneficiaries, including representatives from Lisbon Presbyterian Church, Presbyterian Home of South Carolina, Mary Moses, Martha Brown, and Paul Major, appraiser. The meeting was held in Newberry, SC at Paul Major's office on July 31, 2008. Reverend Hampton Hunter attended the meeting on behalf of the church. Penny Arnold attended the meeting on behalf of Presbyterian Home of SC. The purpose of the meeting was to discuss an equitable division of the Farm. Initially, Ms. Moses and Ms. Brown refused to

discuss any proposal with Mr. Major and the PR as long as Reverend Hunter and Ms. Arnold were allowed to attend the meeting. Subsequently, the meeting was held and it was decided that Mr. Major would prepare a proposed division of the property and present a written proposal to the parties. (R. p. 99, Line 11 – p. 100, Line 6); (PR Exhibit C-1; R. p. 562, Paragraph 21).

A proposal was ultimately prepared and presented to Ms. Moses and Ms. Brown. They retained counsel. No comment was ever received on the proposal, nor did Ms. Moses or Ms. Brown ever submit a counter-proposal on a division of the Farm. (See, PR Exhibit C-1; R. p. 562, Paragraph 22).

E. The Partition/Declaratory Judgment Action, the Resolution of the Competing Claims, and the Sale of the Undivided Interest

Having not made progress toward a resolution after approximately 20 months, the PR filed a partition and declaratory judgment action on or about January 1, 2009 in the Circuit Court. The purpose of the litigation was to determine the rights of the parties arising out of Copeland's Option to Purchase, the Right of First Refusal and other claims made by Brown and Moses, clear the title to the property, and divide or sell the property so that the Estate could be settled. The Complaint was amended on March 4, 2009. (See, PR Exhibit C-12A; R. pp. 634-656). Mary Moses and Martha Brown filed a counterclaim asserting a right to 5 acres. (See, PR Exhibit C-12B; R. pp. 657-663). The litigation ensued and the parties engaged in discovery. After approximately 15 months, a mediator was retained to mediate the dispute. (R. p. 100, Line 3 – p. 102, Line 3); (PR Exhibit C-1; R. p. 562, Paragraph 23).

Throughout this time period, the PR took phone calls from people who were interested in the property and showed the Homeplace and Farm to potential buyers. (See, PR Exhibit C-1; R. p. 562, Paragraph 24).

In the Summer of 2009, the PR and Rowland W. Milam, a relative of Moses and Brown, began discussions about a possible purchase by Milam of the Estate's interest in the Farm. The first offer received from Rowland Milam was forwarded to the beneficiaries on March 1, 2010. Milam offered \$48,000.00 for the Homeplace, \$4500.00 for the Lot and \$224,410.00 for the Estate's interest in the Farm, approximately 71% of the appraised value. The offer included terms requiring the Estate to give general warranty deeds and pay for a termite inspection and be responsible for repairs. (See, PR Exhibit C-1; R. p. 562, Paragraph 26) (PR Exhibit C-13; R. pp. 664-668). Other offers and exchanges followed.

On the eve of mediation of the ongoing litigation, the PR reached an agreement to sell Rowland Milam the Estate's one-half undivided interest in the Farm, the Homeplace, and the Lot, subject to the necessary approval, if any, of the beneficiaries and the Probate Court. The sales price for the property was as follows: one-half undivided interest in Farm, \$292,500.00; Homeplace, \$57,000.00; and Lot, \$17,500.00. The Estate was not responsible for any repairs and the type of deed was "quit-claim". (See, PR Exhibit C-1; R. p. 563, Paragraph 29).

The PR prepared three contracts which were signed and dated May 4, 2010. The total purchase price for all of the Property was \$367,000.00, approximately 94% of the 2007/2008 appraised values. (See, PR Exhibit C-1; R. p. 563, Paragraph 30); (PR Exhibit C-14; R. pp. 669-677).

The PR prepared and obtained the consent of all interested parties to close the sale of the property subject to the terms of the Contract. (See, PR Exhibit C-1; R. p. 563, Paragraph 31); (PR Exhibit C-15; R. pp. 678-685).

The PR prepared the deeds and attended the closing of the transactions in Laurens, South Carolina on July 9, 2010. (See, PR Exhibit C-1; R. p. 563, Paragraph 32); (PR Exhibit C-16; R. pp. 686-706). Through the efforts of the PR, there was no

sales commission. The net proceeds collected by the Estate were \$365,012.85. (See, Settlement Statements, PR Exhibit C-16; R. pp. 694-705). Furthermore, the Estate was expressly relieved of any responsibility for roll-back taxes. (See, Addendum to Settlement Statements; PR Exhibit C-1, R. p. 563, Paragraph 32); (PR Exhibit C-16; R. p. 706). Despite the downturn in the economy and the stagnant real estate market, the Estate realized almost 94% of the appraised value through the efforts of the PR, an “exceptional” result. (See, PR Exhibit C-1; R. p. 563, Paragraph 30); (R. p. 233, Lines 6–24).

From September 1, 2010 until November 12, 2010, the PR made the final distribution of personal effects, met with beneficiaries, and sorted through the personal papers, pictures, books and remaining personal effects of Ms. Kay. (See, PR Exhibit C-1; R. p. 563, Paragraph 33).

F. Reasonable Compensation and Reimbursement for Reasonable Costs Incurred by the PR

Item V(3) of the Ms. Kay’s will provides “For its services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses.” (See, PR Exhibit B; R. p. 555).

From Ms. Kay’s death until August 31, 2010, the PR was an employee (“Of Counsel”) with Collins and Lacy, PC, attorneys (the “Law Firm”). The PR retained the Law Firm to assist in the administration of the Estate. At the PR’s request, the hourly rates for attorneys working on the matter were reduced from \$225.00 to \$145.00. Additionally, at the PR’s request, the invoices were discounted/written down in an amount exceeding \$20,000.00. In addition, at the PR’s request, the invoices reflect that the PR had 249.7 “no charge” hours so as to further reduce the fees to the Estate and to avoid doubling billing by the PR. (R. p. 91, Line 19 – p. 95, Line 12); August 17, 2010 invoice (PR Exhibit D; R. pp. 794-995), 173.3 hours plus August 16, 2010 invoice, 76.4

hours (R. p. 775). Furthermore, the PR worked an additional 216.10 hours in this matter in addition to the time listed on the aforementioned invoices - a total of 465.80 hours. (See, Rule 59 Motion to Re-open Record, Accept Additional Evidence, and/or to Alter or Amend Judgment; R. pp. 935-938).

In order to determine a reasonable amount of compensation, the PR reviewed the statutory and case law on compensation of PRs, consulted with Alan Medlin, a professor at the University of South Carolina School of Law, teaching Trusts and Estates and a recognized authority in South Carolina on these issues. He also sought and relied on other counsel. (R. p. 174, Line 5 – p. 176, Line 9); (R. p. 189, Lines 16–24).

At an hourly rate of \$225.00 and based on 465.8 hours, the value of the PR's services rendered to the Estate through November 12, 2010 was \$104,805.00. Based on the time involved, the issues and complications of the Estate administration, the litigation, the sale of the real estate (without retaining a real estate professional or paying a commission), his relationship with the client, his experience, knowledge and skills, and the results achieved, the PR determined that a reasonable fee for that three and one-half year period was \$93,775.00, an amount which was paid through periodic draws. (R. p. 203, Lines 10–23); (R. p. 204, Lines 8–25); (R. p. 202, Line 2 – p. 203, Line 9); (R. p. 174, Line 5 – p. 176, Line 9); (R. p. 107, Line 13 – p. 109, Line 16).

In addition, the PR has continued to provide services to the Estate and incur expenses since November 12, 2011. These services include preparation of an Amended Proposal for Distribution, preparation for the hearing on the Petition for Settlement, preparation of accountings, filing of tax returns, and attendance at hearings. Expenses incurred include legal fees and expert witness fees. (R. p. 176, Lines 10–22); (PR Exhibit C-18; R. pp. 727-728).

STANDARD OF REVIEW

"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." University of Southern California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners below. Dean v. Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993).

The appellate court is free to decide questions of law with no particular deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Furthermore, the interpretation of a statute is a question of law, which is reviewed de novo. Layman v. State, 376 S.C. 434, 444 658 S.E.2d 320, 325 (2008).

ARGUMENT

- I. **The Circuit Court erred in affirming the Probate Court's erroneous decision requiring the PR to refund a substantial portion of his compensation because the PR's use of discretionary powers granted by the will and probate code was reasonable.**

The Will gives the PR broad powers and discretion to settle the Estate. (See, PR Exhibit B; R. pp. 555-556, Item VII). S.C. Code Ann. § 62-3-704 and S.C. Code Ann. § 62-3-1001 require the PR to meet certain deadlines, subject to extensions of time as may be granted. The PR complied with all deadlines, as extended, that were imposed by the Code, the Court, and/or probate administration. There is no evidence that the PR abused or acted outside of the powers granted under the will or acted in bad faith in any way. In fact, the Probate Court made a specific finding that "[it] did not find bad faith on the part of the [PR]". (See, Final Order; R. p. 10, Item 16). All of the actions of the PR to settle the Estate were reasonable. Despite the powers granted by the will and statute, the PR's personal and professional relationship with Ms. Kay, and his understanding of

Ms. Kay's testamentary intent based on these relationships, the will, and his statutory and testamentary powers, the Probate Court impermissibly substituted its discretion for that of the PR as to what action the PR should have taken, i.e. deed out undivided interests in the real estate to the beneficiaries. In affirming this decision, the Circuit Court erred.

A. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he carried out the intent of the decedent.

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) (1976) and S.C. Code Ann. § 62-1-102(b)(2) (1976). "The paramount rule of will construction is to determine and give effect to the testator's intent." Holcombe-Burdette v. Bank of America, 371 S.C 648, 655, 640 S.E.2d 480, 483 (Ct. App. 2000) citing S.C. Code Ann. § 62-1-102 (b)(2) (1976), which provides "[t]he underlying purposes and policies of this Code are . . . to discover and make effective the intent of a decedent in the distribution of his property." "A testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy." Id. at 656, 483. In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator. Indeed, the rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself. Id.

"In determining the intent of the deceased, a court must always look first to the language of the will itself. The primary rule of ascertaining intent is that resort is first to be had to the instrument's language, and if such is perfectly plain and capable of legal

construction, such language determines the force and effect of the instrument.” Id. at 656, 485.

After providing an Option to Copeland, the will gives no instruction requiring passage of the real property by devise. Instead, the will identifies residual beneficiaries and specifically grants to the PR the right to sell property among other things.

It was the understanding of the PR, based on personal history with Ms. Kay and specific terms of the will, that Ms. Kay intended for her real estate to be liquidated and the proceeds distributed to the various residuary beneficiaries. Prior to Ms. Kay's death, she retained the PR to seek partition of the property. At Ms. Kay's request, the PR wrote letters to co-tenants Brown and Moses seeking to have the real property divided. (See, PR Exhibit C-2; R. pp. 566-567).

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.” (emphasis added). (See, PR Exhibit B; R. pp. 554, Item IV). The Probate Court ruled that the PR should have deeded out the real estate to the various beneficiaries rather than seeking to liquidate it. However, this bequest to the Lisbon Cemetery fund requires a distribution of cash to a fund that would earn interest as intended by Ms. Kay for the upkeep of the cemetery plot. It is questionable that a deed of distribution to a cemetery “fund” would have legal significance in that the “fund” has no independent legal identity as an entity to buy, own or sell real property. The PR in good faith understood that only liquidation would accomplish Ms. Kay's testamentary intent.

Furthermore, the will provides an Option to Purchase to Ms. Kay's neighbor Charles Copeland. While the option in the will (Item XIV) provided for 8 months the appraisals were not ready within 8 months. In deciding how to handle the distribution of the Estate it was within the PR's discretion to hold the opinion that a greater value to the Estate would be accomplished by working with Copeland in a manner to sell him all or

some of the property. The will gave the PR broad powers to contract with respect with Ms. Kay's property and the PR dealt with the option granted to Mr. Copeland in such a way as to satisfy his claim against the real estate. (See, PR Exhibit B; R. p. 556, Item VIII). Ultimately, Mr. Copeland consented to the sale releasing his claim and clearing the title. (See, PR Exhibit C-15; R. p. 679).

Finally, the will granted to the PR a power of sale in order to effect the liquidation and distribution of the real estate and effect the testamentary intent of Ms. Kay². All of the foregoing supports the PR's discretionary determination that the real estate was to be sold and the net proceeds distributed to the various residuary beneficiaries. As discussed below, statutory authority specifically allowed a partition action.

B. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he acted in the best interests of the Estate.

The Estate was complicated by competing claims to the real estate, including potential liens resulting from judgments against the beneficiary Moses, and the pre-existing (1972) Right of First Refusal. The ruling of the Probate Court seems to ignore, overlook or misapprehend the discretion given to the PR by both the will and statutory authority and would seem to prefer the desires and interests of two heirs above the other four. The Probate Court does not address how these issues would have been resolved through a deed of distribution nor does it even consider the burden that would be placed on other beneficiaries. The PR successfully resolved these issues after exhausting attempts to reconcile the parties amicably. In handling the Estate as he did, the PR achieved, as the Probate Court finds, an excellent result in the sales price. According to experts John Wilson and Paul Major, the PR "beat the market" by approximately \$147,460.00 to \$157,820.00. (R. p. 220, Line 25 – p. 221, Line 23); (R. p. 234, Lines

² See S.C. Code Section 62-3-906 (a), "[u]nless a contrary intention is indicated by the will, such as a power of sale, the distributable assets of an estate . . . " (emphasis added).

12-15). (Also, see attached **Appendix A** - calculation of the result in selling interest in the 330 acres.) Additionally, beneficiaries Lisbon Presbyterian Church, the Presbyterian Home of South Carolina, Bart Heard, and Marla Orias would have been co-tenants - a result they did not want - paying real estate taxes, sharing in the maintenance of the property, and bearing responsibility for accidents on the property, while Brown and Moses would have controlled the property (since Brown and Moses as the Heirs of W.H. Milam owned the other 50 percent undivided interest, their combined interest, when including that under the will, would have totaled 60 percent). These beneficiaries would have been placed in the position of filing a partition action themselves, continuing with the expense and risks of co-tenancy or selling to Moses and Brown at conceivably heavily discounted prices. As testified to by Paul Major, qualified by the Court as an expert "in the field of real estate appraisals and in the field of real estate - agent work" (R. p. 232, Line 15 - p. 233, Line 1), undivided fractional interests on property similar to the real property at issue in this case, has a diminution of value of 30 percent to 35 percent. (R. p. 233, Line 25 - p. 234, Line 15).

This is a result that these beneficiaries did not want. See Testimony of Penny Arnold, Presbyterian Home of South Carolina. (R. p. 243, Line 12 - p. 244, Line 2); and letter dated April 21, 2008 from Robert Fuller (See, PR Exhibit C-9; R. pp. 630-631).

C. The PR had the absolute right by statute to seek partition of the Farm property.

As stated above, the Church, The Presbyterian Home and Bart Heard representing 70% of the residual Estate interests, all expressed a strong preference to receive cash as opposed to an undivided interest in real estate. (R. p. 78, Lines 12-22). See, testimony of Penny Arnold, Section II B, infra. S.C. Code Ann. § 62-3-911 provides in part, "When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the Estate, the PR or one or more of the

interested heirs or devisees may petition the court prior to the closing of the Estate to make partition.” The PR deemed that partition was in the best interests of the Estate and invoked the power granted by the probate code to file such an action. The Probate Court and Circuit Court erred as a matter of law in finding, and then affirming, that the PR wrongfully filed an action for Declaratory Judgment and partition of the Farm and accordingly decreasing the amount of compensation he was entitled to.

D. The PR acted reasonably in exercising his discretionary powers granted by the will and probate code because he acted on the advice of counsel and successfully addressed all competing claims to real estate and cleared up title defects.

The sale of the real estate was necessary to carry out the intentions of Ms. Kay and attempt to clear title defects. The will and other evidence, including letters from Ms. Kay before she passed away prove, that the testator intended for the real property to be sold and/or that the PR had a reasonable belief that such was the intent of Ms. Kay. The PR was in fact Ms. Kay’s counsel for years prior to her death, had prepared the will, and had first-hand knowledge of Ms. Kay’s intentions.

One purpose of filing the partition action and the Declaratory Judgment action, after numerous attempts to reach a compromise amicably, was to clear up title to the real estate and to determine the rights of the parties who had claims to the real estate. This was a bona fide purpose and completely within the powers of the PR as granted by the will and by statute. Item VII of the will empowers and authorizes the PR to “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 Person Representative may seem best, and to execute and deliver any and all instruments and to do all acts which [he] may deem proper or necessary to carry out the purposes of this my will...”. This language is perfectly plain and capable of legal construction. “In determining the intent of the deceased, a court

must always look first to the language of the will itself.” Holcombe-Burdette, 371 S.C. 16 656. Thus, the will provided the PR with the discretion as to take such action as he might choose if it were his own property and as he did. Furthermore, if the PR had deeded the property by Deed of Distribution, the title to the real property, in the opinion of the PR would have been defective. The Court does not address the role of title insurance in real property transactions and did not consider the problems to be encountered by heirs who would have received a deed of distribution rather than a cash disbursement. During the administration of the Estate, the PR consulted with title counsel concerning these issues including insurability and marketability of title. (See, PR Exhibit C-1; R. p. 561, Paragraph 15). Issues included (a) the competing right of “First Refusal” and “Option to Purchase,” (b) the continuing dispute [predating the decedent’s death] as to the real property, (c) the refusal of Charles Copeland who had the “Option to Purchase” to consent to any sale (until well after the initiation of the lawsuit and the execution of a contract), (d) the dispute as to the approximately five (5) acre tract, (e) the outstanding interests of the heirs of W.H. Milam, and (f) the competing interests of a Church and other non-profit in the real property per the decedent’s will.

Furthermore, Ms. Kay’s will expressly provides “Powers for PR”. (See, PR Exhibit B; R. pp. 555-556, Item VII). The powers are exhaustive and after providing a comprehensive list of powers which are described in the will as being “[b]y way of illustration and not of limitation and in addition to any inherent, implied, or statutory powers granted to PR generally, . . .” This provision regarding powers concludes with “. . . 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.” This provision not only gives extremely broad powers to the PR but expressly grants the PR the discretion to use

these powers as he “may deem just and proper.” This language is perfectly plain and capable of legal construction.

Thus, the PR was granted the authority to make decisions, subjectively, not objectively. The Probate Court’s Order overlooks or misapprehended the subjective discretion granted in that the Court’s Order makes no such reference. The PR had both the discretion and statutory authority to file the partition. (As a further illustration provided to the PR by Ms. Kay’s will, Item IX grants the PR discretion in reference to tax matters and elections; Item VIII provides that the PR shall act as trustee for beneficiaries under age 21 and provides that the PR “shall have with respect to each share or property so retained all the powers and discretions conferred upon it as PR” (emphasis added). The Probate Code does not restrict these powers and expressly defers to the will. See, S.C. Code Ann. §62-3-715 (1976).

The lower courts hold that a deed of distribution was preferable to them and would have satisfied the PR’s duties under the will. The lower courts overlooked the complications and potential defects in title that would have resulted from such a transfer and exposure of the PR to litigation over the transfer. As noted, there were competing claims to the real estate, including the claim of Brown and Moses to an interest in 5 acres of land belonging to the Estate. S.C. Code Ann. § 62-3-709 specifically empowers the PR to “take possession of property or maintain an action to recover property or to determine the title thereto.” In exercising this statutory power, the PR acted reasonably.

Section § 62-3-910, subsections (A) and (B), do not protect all parties to transfer against the claims or interests of others. Subsection (A) protects only the *purchaser*; Subsection (B) was added in 2000 to provide protection to a *purchaser for value* from the PR and squarely places any liability on the PR. Neither Section 62-3-910, subsection (A) or (B) would prevent a title company from having to defend a purchaser in an action by a beneficiary, devisee or third party to challenge the purchaser’s clear title

including Brown and Moses' claim of a 1972 right of first refusal as asserted in their Answer and Counter Claim in the DJ/partition action.

A deed of distribution would not resolve these outstanding title defects. A deed of distribution is not an instrument of conveyance, so it cannot convey the interests of outstanding heirs. Further, it cannot resolve the disputes among the beneficiaries nor the competing rights and options. To use a Deed of Distribution would merely distribute uninsurable and unmarketable real property plagued with potential or real title defects. It might be simple but it would not be a solution here.

Based on the title issues involved in the Estate, the risk in insuring over these issues and the liability of the PR, the only prudent action to take with regard to the sale of the real property was to have all parties consent to the sale and/or to have the court's approval through a final order of a court of competent jurisdiction. This was the only logically safe option that would make the title insurable and marketable and provide reasonably for the competing interests and thus the procedure chosen by the PR in his discretion and as allowed by law. A mere deed of distribution or sale by the PR without court approval would leave the title issues unaddressed, thereby leaving a cloud on the title to the Estate's real property.

As a matter of law, the PR acted reasonably because he relied on counsel and used his discretion and powers provided by the will and by law as well as his understanding of testator's intent to sell the property.

- II. **The Circuit Court erred in affirming the Probate Court's erroneous ruling that the PR was paid excessive compensation based on the Probate Court's determination that the PR did not use a proper method for determining the amount of reasonable compensation.**
 - A. **The PR's method for determining reasonable compensation was proper and should have been allowed because the amount was not subject to arbitrary statutory or arbitrary percentage limitations.**

South Carolina does not have a definitive standard for assessing reasonable compensation for a PR when the will provides for "reasonable compensation". There is neither a statutory standard nor case law which defines this standard. The formula chosen by the PR in determining compensation where a will directs "reasonable" compensation should be adopted by this Court.

The Probate Court erred in limiting the PR's compensation to essentially 10% of the Estate and in not setting forth a standard, basis or method for evaluating and determining reasonable compensation. The Probate Court referenced S.C. Code Ann. § 62-3-719, which provides that, unless otherwise approved by the Probate Court for extraordinary services, a PR shall receive compensation not to exceed five percent of the personal property of the probate Estate plus the sales proceeds of real property. However, S.C. Code Ann. § 62-3-719 (c) provides that "the provisions of this Section do not apply . . . where the will otherwise directs." In this case Item V(3) of the will provides "For [his] services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses. (See, PR Exhibit B; R. p. 555). Reasonable compensation should be determined by an analysis of various such as the law relating to legal fees in South Carolina. Other jurisdictions have used such factors as the law pertaining to compensation for PRs. See, for example, Fla. Stat. § 733.617 (1973). Also, see Estate of Painter v. First National Bank of Greeley, 567 P.2d 820 (1977) providing:

The percentage method which existed in the statute prior to enactment of the [Colorado Probate Code] was based on the

premise that the amount of work required in Estate administration is directly proportion to the value of the asses. See In re Estate of Bloomer, 43 N.J. Super, 414, 129 A.2d 35; In re Robinson's Will, 202 Misc. 231, 109 N.Y.S.2d 67. The General Assembly recognized the error of the premise when it enacted the CPC, accepting the reality that the duties of a PR and those employed by him if any, vary greatly depending upon numerous factors, only one of which is the monetary value of the Estate. Id at 822.

This Court should adopt a standard for determining reasonable compensation for a PR, and consider the following factors which are based upon the laws pertaining to compensation of a PR in Florida (Fla. Stat. § 733.617), as well as Rule 1.5 of the South Carolina Rules of Professional Conduct:

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.

If the above factors are applied by this Court, it will lead to the inevitable conclusion that the PR in the instant case exceeded the standards as set forth by Florida and Colorado law, and Rule 1.5 of the South Carolina Rules of Professional Conduct.

Perhaps the strongest evidence presented supporting the reasonableness of the fees claimed by the PR's compensation and the difficulties in administering the Estate was the testimony offered by Penny Arnold.

Ms. Arnold was the only witness with experience in PR's fees and Estate work. Ms. Arnold was the Director of Charitable Foundation and Church Relations for The Presbyterian Home, one of the Estate beneficiaries. (R. p. 241, Lines 14–25). In this role, she was the person that signed Release forms and receipts and worked with attorneys, bank trust officers and PRs. Ms. Arnold testified as follows that the Presbyterian Home preferred cash as opposed to an interest in land.

The Board of Trustees . . . would have had quite a discussion and deliberation on receiving property with other heirs. We do not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds. And the proceeds from Marion Kay's Estate, would actually, at this point, pay for five days of resident aid for our residence [sic] who have simply lived longer than their resources have lasted. (R. p. 243, Line 12 – p. 244, Line 2).

When asked if she had at any time been dissatisfied with Mr. Sullivan in his role as PR, Ms. Arnold responded:

No sir. We were really excited when we heard the amount of the sale of the property because that, as I said, that meant that we would receive enough for the resident aid. (R. p. 246, Lines 1–7).

When asked if she had any objection to the fee that the PR requested for his services, she responded, "No, sir." Later, when asked by opposing counsel if she was aware of the legal fees paid by the Estate, she responded, "Yes, sir." (R. p. 246, Lines 9–11 and 18–25).

Ms. Arnold had seen firsthand the difficulty faced by the PR in working with Brown and Moses to resolve the claims involving the property, as described by this exchange:

- Q. Ms. Arnold, did you ever attend any meeting with the other heirs to try to work out the . . . Was there a point in time when you recognized that there was a problem with taking the bequest and turning it into cash?
- A. Yes, sir. The heirs were all invited to the meeting that Mr. Major indicated that we had in July in Newberry. And Reverend Hunter and I took the opportunity to meet the opportunity to meet with the other heirs in Mr. Major's office at that time. No, we were not well received as being there at that time. And, unfortunately, we didn't know whether the meeting was going to happen or not because some of the other heirs were not happy that Reverend Hunter and I had been invited and were there. And, of course, as beneficiaries, we have a vested interest and we have to do due diligence also and hold up the interest of our entity, that is the beneficiary. And so it—things did not get off to a good start. (R. p. 244, Lines 3–21).
- Q. Let me ask it differently. Was it the ladies to my right, Ms. Brown and Ms. Moses?
- A. Yes. They—they were unhappy. They didn't know we were going to be there.
- Q. When you returned to your office, did you give any kind of a report to the other people there that were involved in this, the Board or others, about your perception of where things now stood?
- A. With the President of our organization. I just shared with her what had happened and the discomfort and that I was really sorry about that. And I said I didn't believe this would be a short resolution. That we might not ever see any funds from this Estate.
- Q. And if I understand it, you deal with Estates and PRs, it's part of your business as a daily occurrence? More or less, a regular occurrence?
- A. Yes, sir.

(R. p. 245, Lines 2–19).

Thereafter, beneficiary Martha Brown testified afterward as follows:

- Q. Did you hear Ms. Arnold testify at the first hearing?
- A. Yes.
- Q. Did you hear her testify that she's been working with Estates and PRs as her job professionally since 1985?
- A. Right. I did hear that.
- Q. She does it on behalf of varies [sic] groups but within the Presbyterian Home setting as regard to (inaudible).
- A. Right (inaudible).

- Q. And didn't she help with dozens, hundreds, perhaps, of PRs in the state? Did you hear that testimony?
- A. Right.
- Q. But she didn't have any objection to the fees that Mr. Sullivan has asked to be compensated for in this case. Did you hear that testimony?
- A. Yes. And, I guess we've got a difference of opinion [sic].
- Q. Well, you would agree that she has a lot more experience dealing with Estates than you do, wouldn't you?
- A. Probably so.

(R. p. 364, Line 11 – p. 365, Line 9).

- B. The PR's method for determining reasonable compensation was proper and should have been allowed because the amount was based upon several factors including time, novel issues, extraordinary services including litigation and sale of real Estate, skills required, and results achieved.**

The Probate Court erred in finding that the PR "failed to provide any legitimate basis for fees he claimed and instead testified that he had no method or formula for determining the amount of the four draws he gave himself other than pulling a figure out of the air." (See, Final Order; R. p. 9, Paragraph 8). Furthermore, the court makes a manifest error of law and misstates the record in finding that he failed to provide the [c]ourt with an alternate proposal for valuing his services." (See, Final Order; R. p. 10, Paragraph 13). The Probate Court misstates the testimony as the PR did in fact provide a legitimate basis for determination of compensation. The PR 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 final [amount] was based on all the factors and the rule, the time, and the result obtained, and the novelty of the issues." (R. p. 174, Line 19 – p. 175, Line 3). When alluding to the "rule", the PR, a lawyer, was referring to factors used by our courts in determining a reasonable fee for lawyers. He also relied on probate law in Florida for factors to determine reasonable compensation. He consulted with Alan Medlin of the USC Law School and other counsel

to determine reasonable compensation. (R. p. 175, Line 11 – p. 176, Line 9). The court also misstates the number of draws. (R. p. 203, Line 10 - p. 204, Line 1).

The PR testified in direct response to one of the Probate Court's questions that he had devoted more than 450 hours to the Estate administration and explained to the court how the hours were reflected in various exhibits, including the Law Firm invoices. (R. p. 202, Line 2 – p. 203, Line 9); (PR Exhibit D; R. pp.729-795). Based on these hours and a billing rate of \$225.00 per hour, the amount earned on a lodestar basis was \$101,250.00, \$7,475.00 more than was actually paid to the PR. Here the PR had another factor for consideration regarding the relationship with the client. In this case, the PR belonged to the same small church as Ms. Kay and had represented her for nearly ten years at the time of her death.

In determining reasonable compensation, the PR relied in part, for guidance on Rule 1.5 of the Rules of Professional Conduct governing fees for lawyers, which lists the following factors (in addition to being a CPA, the PR is an attorney licensed to practice in South Carolina and with an LLM in Tax).

- 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
- 2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer,
- 3) The fee customarily charged in the locality for similar legal services,
- 4) The time involved and the results obtained,
- 5) The time limitations imposed by the client or by the circumstances,
- 6) The nature and length of the professional relationship with the client,
- 7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- 8) Whether the fee is fixed or contingent.

Rule 1.5, RPC, Rule 407, SCACR.

In addition, the PR used by analogy what courts in other jurisdictions consider to be extraordinary service in determining "reasonable compensation". As noted, the PR took into consideration a Florida statute, §733.617 Fla. Stat (1973), governing reasonable compensation of PRs. (See, testimony of Edward D. Sullivan, R. p. 174,

Line 5 – p. 176, Line 9). These factors are similar to the Rule for Fees for lawyers in South Carolina but include litigation and the sale of real property. This Estate administration included routine matters dealing with personal effects, but more importantly, both litigation and the sale of real property. In this case, the PR filed a partition/declaratory judgment action to resolve the issues described above and finally negotiated and sold real estate, achieving an outstanding result, which effectively ended the litigation and resolved the issues. In doing so, the PR provided extraordinary service to the Estate. Contrary to the Court's finding that the PR "pulled an amount out of the air," the PR weighed all of the foregoing factors to determine reasonable compensation for his services as provided by the will. (R: p. 174, Line 19 – p. 176, Line 9); (R. p. 204, Lines 8-25).

The lower courts erred in apparently overlooking that legal fees for Collins and Lacy were discounted by more than \$20,000.00 at PR's request (See, PR Exhibit D; R. pp. 729-795) and apparently gives that fact little, if any, weight or consideration. The Court also does not seem to give consideration to the PR's sale of the real estate without incurring a real estate commission of \$36,700.00 (10% of \$367,000.00). (The PR is also a licensed real estate broker and showed the real property to two potential purchasers before selling the Estate's interest to Rowland Milam.) (See, PR Exhibit A; R. pp. 548-549); (PR Exhibit C-1; R. p. 564, Item n)).

In addition, many of the issues were novel and the questions involved were very difficult to resolve among the parties involved. In addition, to the "usual" duties and responsibilities such as gathering and distribution of personal effects and filing tax returns, the PR in this case dealt with the competing claims of various individuals for over three and one-half years. He was faced with a will that provided an "Option to Purchase" with co-tenants that claimed a "right of first refusal". In fact, the co-tenants challenged the very right of the decedent to leave her interest to anyone other than

them. They also claimed that five acres or so that were a part of the undivided tract should be deeded outright to them. The PR had the tract surveyed and appraised. He met with the co-tenants. He met with the appraiser and the co-tenants in an effort to reach an agreement on a division of the property. Finally, after 18 months, he was forced to file a partition action and a declaratory judgment action to divide the property and/or determine the rights of the parties. He consulted with a title attorney. He was faced with judgments filed against one of the co-tenants which could have affected title to the tract.

The Probate Court erred in finding there were no novel issues in the administration of this Estate. The PR was confronted with competing interests of an Option to Purchase, a Right of First Refusal, and a claim to five acres by certain beneficiaries. (See, PR Exhibit B; R. p. 558, Item XIV); (PR Exhibit C-4; R. pp. 568-569). The PR was advised that the Right of First Refusal may be void by the Rule against Perpetuities. (R. p. 69, Lines 7-20). These issues, if not novel, certainly added to the complexity and difficulty of settling the Estate in such a manner as to clear title to the real estate and to distribute sales proceeds to the beneficiaries.

Based on the evidence, the Probate Court made a specific finding that "[t]he [PR] did an excellent job in securing the sales price for the real estate . . . ". (See, Final Order; R. p. 9, Item 6). The PR should be compensated accordingly because he achieved an outstanding result for the Estate by liquidating the real estate for an excellent price so that cash could be distributed to the beneficiaries in accordance with the intent of Ms. Kay and the preference of 70% of the residuary interests of the Estate.

By way of further analogy to legal fees, the South Carolina Supreme Court has held that under the state action statute a lodestar analysis is the proper method for determining an award of "reasonable" attorneys' fees and can be used by analogy for the services of a PR. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case and [initially] is calculated by multiplying a reasonable

hourly rate by the reasonable time expended.” Layman at 57. In this case, an hourly rate of \$225.00 for an attorney with The PR’s exemplary credentials is reasonable. Given the complexities involved in partitioning the property and selling the real estate, 465.80 hours is also reasonable. (The PR worked three and one-half years to partition the property and sell the real estate, a period of approximately 175 work weeks or 875 work days. 465.80 hours spread over 875 work days is .53 hours or only about 30 minutes per day on average the PR devoted to the administration of the Estate.) The lodestar calculation is therefore \$105,367.50. Using this lodestar calculation as a starting point for a reasonable enhancing the lodestar figure, though a multiplier is necessary to reflect the exceptional result. (Id., holding that a multiplier of 1.25 was appropriate to arrive at a reasonable fee). In this case, using a multiplier of only 1.10 would yield a fee of \$115,904.25 or \$22,129.25 more than the paid to the PR.

Lastly, the PR has in excess of 25 years practicing law, having been admitted to the South Carolina Bar in 1988. In addition, he is a Certified Public Accountant with several years of business, tax and accounting experience, and has a Master of Accountancy degree and an LL.M.-Taxation degree. The PR is also a licensed real estate broker. His billing rate of \$225.00 per hour is reasonable, and his total compensation of \$93,775.00 through November 12, 2010, is reasonable when the relevant factors as outlined above are taken into consideration.

C. The PR’s testimony concerning the time spent administering the Estate is substantiated by other evidence including exhibits provided to the court, testimony of beneficiaries and the PR’s efforts achieving an excellent sales prices for the real estate . . .

Contrary to the court’s ruling, the evidence supports that the PR worked more than 450 hours on the Estate. The Law Firm invoices reflect some of the services provided and the number of hours that the PR worked for the Estate; 249.7 of these hours were “no charge” by the law firm because they were performed by the PR. See,

PR Exhibit D; August 17, 2010 invoice; R. pp. 794-795, 173.3 hours plus; August 16, 2010 invoice, 76.4 hours, R. p. 775. These “no-charge” hours are also set forth in Grounds for Appeal. (See, Appendix B, R. pp. 1278-1298).

On the day before the hearing, the PR provided to the Probate Court and opposing counsel a comprehensive affidavit with supporting exhibits setting forth the issues confronted during the administration of the Estate, a detailed analysis of the PR’s time spent administering the Estate and the basis for his compensation. Included in this affidavit was Exhibit E reflecting 216.10 hours of time spent on the Estate in addition to the 249.7 listed above. These hours were referenced by the PR in response to questions from the Probate Court. (R. p. 202, Line 15 – p. 203, Line 9). See aforementioned “Exhibit E”, Grounds for Appeal, Appendix C (R. pp. 1299-1302). The court declined to admit the affidavit into evidence requiring the PR to testify. It was intended that all of the exhibits attached to the affidavit be admitted into evidence during his testimony, however, “Exhibit E” pertaining to a portion of the PR’s time during administration of the Estate was apparently inadvertently omitted. Exhibit E was referenced in the PR’s Post Trial Brief clearly reflecting that it was believed to have been admitted into evidence during the hearing. (See, Post-Trial Brief; R. pp. 898-905; 902, Paragraph 9).

It is error for the court to find that it was not presented with a basis for determining the PR’s compensation. In addition to his testimony, the PR provided a pre-hearing brief which clearly sets forth in detail the PR’s method (or formula) for determination of his compensation. (See, Memorandum in Support of Petition for Settlement; R. pp. 857-864). The testimony in the hearing was consistent with the brief.

The PR testified in detail for several hours about his education and work experience, degrees, the results achieved and the factors used in determining his compensation. Why the Court ignored this testimony in its ruling is unknown.

During direct examination by the Probate Court about his time, the PR made references to time reflected on an exhibit as the time spent in addition to that listed as "no charge" on invoices, trial Exhibit D. (R. p. 202, Lines 2-9). The Court did not inquire further. It is error for the Court to find the PR's time is unsubstantiated.

The Probate Court did not seem to recognize the entries on the Law Firm bills as documenting time of the PR's administration of various aspects of the Estate. "Exhibit E" is documentation of time recorded by the PR on other matters related to the Estate. This was an Exhibit to the Affidavit of the PR submitted but not accepted by the Court prior to the hearing. The Court should have considered this documentation as substantiating the time spent on behalf of the Estate.

The Probate Court's ruling that the PR did an excellent job in securing the sales price for the real estate does support in part the reasonableness of the amount of compensation paid to the PR. While result is not the only factor in determining a reasonable fee, it should be given great weight. The result obtained by the PR was in fact outstanding and exceeded the market by \$147,000.00 or more. It appears, however, this fact, was given very little, if any, weight by the Court.

III. The Circuit Court erred in affirming the erroneous ruling by the Probate Court because a refund of monies by the PR to the Estate would unjustly enrich one or more of the Estate beneficiaries who requested cash from the Estate and have benefitted from the services of the PR.

"Restitution is a remedy designed to prevent unjust enrichment". Sauner v. Public Service Authority of South Carolina, 354 SC 397, 409, 581 S.E.2d 161 (2003) citing Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984). "To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to

retain the benefit without paying the plaintiff for its value". Id. citing Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct.App.1988).

In this case, a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly the Probate Court's ruling unjustly enriches these beneficiaries. In addition, the unwillingness of Brown and Moses to cooperate with a division of the Estate's property is the primary reason the Estate was not settled almost two years earlier. If not for their contentiousness, including the ongoing claims relating to rights of first refusal, a claim for five acres, the unwillingness to join in a sale of a portion of land to Copeland or to agree to, or propose a division of the property, or the matter concerning unsatisfied judgments against Moses, the administration would not have taken three years and six months requiring additional devotion of time and expense on the part of the PR. Ultimately, the real estate was sold at a high value and all title issues were cleared up by the PR avoiding possible future claims against the beneficiaries.

The PR conferred a non-gratuitous benefit on the beneficiaries by liquidating the real estate so that cash distributions could be made, avoiding title issues and claims against the real estate and securing an excellent price for the real estate. All of the beneficiaries realized value from the benefit of the PR's services. It would be unjust and inequitable for these beneficiaries to retain the benefit of the PR's services without just payment for the reasonable value of the services. In this regard, a refund of compensation by the Personal Representative would unjustly enrich all of the beneficiaries.

Additionally, all of the beneficiaries were aware of the PR's actions and desire to effect the intent of Ms. Kay to divide and sell the real estate for years, yet no one, including Brown and Moses who were represented by counsel, ever asserted any

challenge to the PR's actions in Probate Court. Any position taken against the amount of the PR's fees based solely on his actions are waived and precluded by the doctrines of estoppel and ratification.

IV. The Circuit Court erred in affirming the Probate Court's erroneous ruling requiring the PR to refund a portion of his compensation because Brown and Moses did not petition the Probate Court to review the PR's compensation.

S.C. Code Ann. § 62-3-721(a) provides the procedure seeking the review of PR compensation. This section provides "[a]fter notice to all interested persons, on petition of an interest person, ... the reasonableness of compensation determined by the PR for his own services, may be reviewed by the court. Any person who has received excessive compensation from an Estate for services rendered may be ordered to make appropriate refunds." S.C. Code Ann. § 62-1-201 (34) provides "'Petition' means a complaint as defined by the rules of civil procedure adopted for the Circuit Court. A petition requires a summons and is governed by and subject to the rules of civil procedure adopted for the Circuit Court and other rules of procedure in this title." SCRPC 8(a), Claims for Relief, provides, "a pleading which sets forth a cause of action . . . shall contain (2) a short and plain statement of the facts showing that the pleader is entitled to relief and (3) a prayer or demand for judgment for the relief to which he deems himself entitled."

Moses and Brown did not follow this procedure for requiring a review and a refund. No pleadings were filed and accordingly the PR was not given reasonable notice as to claims of Moses and Brown. Had they followed the proper statutory procedure, additional testimony and other evidence could have and would have been presented, including the testimony of title counsel Teri Stomski, if proper procedures had been followed for purposes of requesting a refund. (See, Affidavit of Teri K. Stomski, Rule 59

Motion; R. pp. 930-933). Accordingly, the PR was denied due process rights to reasonable notice and an opportunity to be heard on the issues that were raised.

V. The Circuit Court 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.

A. The will provides for the PR to be reimbursed for reasonable costs incurred during the administration of the Estate.

Pursuant to the express provisions of the will, the PR is entitled to reimbursement for costs incurred as well as reasonable compensation for ongoing services provided to the Estate. Counsel for PR at a hearing requested by two heirs on PR's Petition for Settlement should be included as reasonable – particularly the expert witness fees of Real Estate Appraiser, Paul Major. At the hearing, when the PR sought to introduce evidence on appraisal, Counsel for Brown and Moses insisted that he be allowed to examine Mr. Major about Mr. Major's real estate appraisal. (R. p. 85, Line 3 - p. 88, Line 18). Neither the will nor SC Law require a PR to "prevail" at a settlement hearing as a pre-condition to the Estate paying reasonable costs including attorney's fees, expert costs, witness fees, and expenses.

B. The probate code provides for the PR to be reimbursed for reasonable costs incurred during the administration of the Estate.

S.C. Code Ann. § 62-3-720 provides, "[i]f any PR or person nominated as PR defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the Estate his necessary expenses and disbursements including reasonable fees incurred." Brown and Moses continuously pursued a claim for five acres from the Estate, successfully resisted by the PR. He was required to attend hearings on behalf of the Estate. In doing so, he appropriately chose to be represented by counsel. The Probate Court made a specific finding that the PR did not act in bad faith during the administration of the Estate. The Probate Court denied the PR's request for

reimbursement of costs and ordered that he be responsible for legal fees incurred in connection with the hearing as well as witness fees and half of the court reporter costs. S.C. Code Ann. § 62-3-720, however, entitles the PR to be reimbursed for these legal fees and costs. Accordingly, the Probate Court erred in ruling otherwise and in holding that the PR needed to “prevail” in order to have attorney’s fees, costs and expenses paid by the Estate.

C. Preparing for, and attending the hearings on the Petition for Settlement, as well as retaining counsel for the hearing, are reasonable costs incurred by the PR.

The Probate Court erred in denying fees and reimbursement of costs to the PR for preparation for and attendance on the petition for settlement as this is in direct contravention of the provisions of the will. A hearing on the PR’s Petition for Settlement was requested by two interested persons, Brown and Moses. As such, the PR was required to be there and be prepared to present his Petition for Settlement.

Furthermore, the Probate Court erred in disallowing PR’s trial expenses as the will provides for reimbursement of reasonable expenses. (See, PR Exhibit B, R. p. 555, Item V(3)). The PR did not have an alternative. Once the hearing was requested it necessitated both his appearance and preparation for the appearance. S.C. Code Ann. § 62-3-1001. (a) (3) provides in part “ a PR must file with court . . . a petition for settlement of the Estate . . .” Furthermore, S.C. Code Ann. § 62-3-1—1(c) provides “ . . . if any interested person files with the court a demand for hearing . . . , the court may enter its order or orders only after notice to all interested persons and hearing.” Accordingly, the PR had to give notice of the hearing to all of the interested persons as required by the court, prepare for the hearing, and travel from his home in Columbia, SC to Laurens, SC and attend the hearing. His attendance was mandatory, and he is entitled to compensation for services rendered and reimbursement for reasonable

expenses, including legal fees, witness fees, court reporter expenses and travel costs. (See, PR Exhibits N-S; R. pp. 808-816).

Furthermore, PRs are justified in incurring necessary and legitimate expenses in the defense of their course of procedure in good faith when attacked while in office. Estate of Breeden v. Gelfond, 87 P.3d 167 (2003) citing In re Estate of Phipps, 713 P.2de 412 (Colo. App. 1985), Tuckerman v. Currier, 54 Colo. 25, 129 P. 210 (1912) and Weidlich v. Comley, 267 F.2d 133, 134 (2d Cir. 1959) ("When the [PR's administration of the assets is unjustly assailed it is a part of his duty to defend himself, for in so doing he is realizing the [decendent's] purpose). The Probate Court made a specific finding that the PR did not act in bad faith. Furthermore, Brown and Moses continued to make a claim for five acres of the Estate's property (or its monetary equivalent), successfully resisted by the PR, until the Probate Court ruled otherwise almost one and a half years after the Petition for Settlement was filed. Accordingly, the PR is entitled to be reimbursed for his expenses, including legal fees, witness fess, and court reporter costs.

VI. The Probate Court erred in awarding fees to Counsel for Brown and Moses.

The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintain a suit for the creation, recovery, preservation, or increase of a common fund or common property. Layman, 368 SC at 452. However, because the PR compensation was reasonable in this case, the common fund doctrine is not applicable because there is no common fund.

Furthermore, Brown and Moses have not maintained a suit for the creation, recovery, preservation or increase of a common fund or common property. By letter to the Probate Court, they requested a hearing on the Petition for Settlement. While the

probate code provides for actions for the disgorgement of fees or expenses by the filing of a petition, Brown and Moses did not do so. They filed no Petition.

Additionally, the common fund doctrine provides for fees for those whose efforts are made for the benefit an entire group or class. In this case, Moses and Brown were motivated by their self-interest as evidenced by their ongoing pursuit of their claim for five acres from the Estate.

Counsel for Brown and Moses submitted an invoice that goes back to January 2008. In fact, the charges appear to include 18.30 hours (\$3660.00) that pre-date the Petition for Settlement and are not related to the Petition for Settlement or the request for hearing in this matter. Furthermore, it appears from a review of the invoice that Counsel for Brown and Moses also included in his charges at least .60 hours (4/4/11 – 4/5/11 entries) or \$120.00 for time related to preparation of a “Motion to replace PR”, clearly an inappropriate charge since this motion was to benefit his clients only and subsequently denied.

It is inequitable and unjust for the Probate Court to award counsel for Brown and Moses in March of 2011, \$19,800.00 for representation in this proceeding which was only requested in December 2010 while the PR worked for the Estate since May 2007, achieved an excellent result and would receive only \$51,300.00 under the Court’s ruling. Further, the fees awarded include time, in December 2008 related to the Declaratory Judgment/Partition Action.

The Probate Court erred in accepting an affidavit of counsel for Brown and Moses in support of his requested fees but refusing to accept the PR’s affidavit resulting in manifest injustice and unfairness.

The Probate Court erred in awarding fees to counsel for Brown and Moses and ordering the PR to refund a substantial portion of his fee because in doing so the

disparity between the awards to counsel for Brown and Moses and the PR is manifestly unjust given the respective length of engagements, efforts, and results of their services.

VII. The Circuit Court erred in affirming the Probate Court's erroneous denial of PR's Rule 59 Motion.

A. The Probate Court ruling that the time claimed by the PR was not substantiated is erroneous as a matter of law.

"The denial of a motion for a new trial is within the trial judges' discretion and will not be reversed on appeal absent an abuse of discretion." Waring v. Johnson, 341 S.C., 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). However, "the exercise of that discretion must be in accord with sound legal principles and practice." Harrington v. Nicholson, 182 S.C. 38, 41, 188 S.E. 372, 373 (1936). "An abuse of discretion arises when the trial court was controlled by an error of law or when the order is without evidentiary support." Miller v. Miller, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003). (See, PR Rule 59 Motion and Supporting Memorandum; R. pp. 906-968).

The trial court's order is without evidentiary support in that the PR's time devoted to the Estate was substantiated by his testimony, the time entries included on PR Exhibits D and E which were referenced by the PR in response to the court's direct examination but inadvertently omitted from admission into the record. In order to prevent manifest injustice, the trial court should have taken into consideration the time reflected in Exhibits D and E, as well as the time sheets which were submitted to the Court. The court should have also considered the Affidavit of Teri K. Stomski (R. pp. 930-933) who advised the PR during the administration about title issues surrounding the Estate's property and the need to clear title by filing the partition action.

B. The Probate Court's rulings were controlled by errors of law.

The trial court also abused its discretion because it was controlled by errors of law in its misinterpretation and misapplication of S.C. Code Ann. § 62-1-102 pertaining

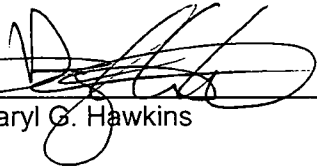
to discovering and making effective the intent of decedent, S.C. Code Ann. § 62-3-719, pertaining to compensation of PRs and S.C. Code Ann. § 62-3-720, pertaining to reimbursement of PRs for expenses as well as the express provisions of Ms. Kay's will providing for reasonable compensation and reimbursement for reasonable expenses, and failing to recognize that S.C. Code Ann. § 62-3-911 expressly allowed for the filing of a partition action. Accordingly, the trial court should have taken into account the errors cited by the PR's Rule 59 Motion, considered the additional evidence, approved the Petition for Settlement, and approved the PR's request for compensation for additional services as well as reimbursement for legal fees and costs.

CONCLUSION

For the foregoing reasons, the orders below should be reversed to the extent they require a refund of compensation by the PR and deny payment for additional services to the Estate and reimbursement for the fees and costs incurred by the PR, and the Petition for Settlement and Proposal for Distribution approved subject to the further award of fees and costs to the PR in accordance with the terms of the will, and the case remanded and orders vacated insofar as they are inconsistent with the foregoing. The case should be remanded for final accounting/settlement and distribution of remaining assets.

RESPECTFULLY SUBMITTED,

LAW OFFICE OF DARYL G. HAWKINS, LLC

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Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

September 26, 2014

Calculation of Result Obtained by Personal Representative
in Selling the Estates' ½ interest in 330 Acres

Sales Price per Acre	\$	1,629	
Comparable sales price	(	1,112)	per Wilson testimony, Transcript p. 191, line 1-15 (R. p. 221)
	\$	517	
	÷	2	to account for ½ undivided interest
		258	
	X	330 Acres	
	\$	85,300	Gross amount above comparables before consideration of Market Discount due to undivided interest per Wilson testimony

Sales Price	\$ 292,500	
	(85,300)	Calculation above
	\$ 207,200	Market Value
	30%	Market Discount per Major testimony, Transcript p. 204, Line 15
	\$ 62,160	30% Market Discount (R. p. 234)

Sales Price	\$ 292,500	
	(85,300)	Calculation above
	\$ 207,200	Market Value
	35%	Market Discount per Major testimony, Transcript p. 204, Line 15
	\$ 72,520	35% Market Discount (R. p. 234)

Discounted Market Value with 30% Discount	Discounted Market Value with 35% Discount
\$ 207,200 Market Value (62,160) 30% Market Discount \$145,040 Discounted Market Value	\$207,200 Market Value (72,520) 35% Market Discount \$134,680 Discounted Market Value

Excess of Sales Price above Discounted Market Value (30% Discount)	Excess of Sales Price above Discounted Market Value (35% Discount)
\$292,500 Sales Price (145,040) 30% Discounted Market Value <u>\$ 147,460</u>	\$292,500 Sales Price (134,680) 35% Discounted Market Value <u>\$ 157,820</u>

The price obtained by the PR exceeded the market by approximately \$147,460 - \$157,820 despite the downturn in real estate sales and the worst economic recession since 1933.

APPENDIX A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

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

RECEIVED

SEP 26 2014

SC Court of Appeals

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,

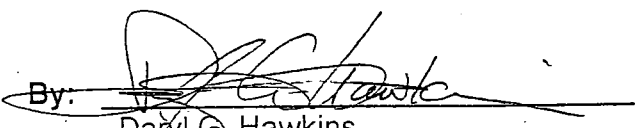
vs.

Martha Brown and Mary Moses Respondents-Appellants.

CERTIFICATE OF COUNSEL

Counsel for the Appellant-Respondent certifies that the Brief of Appellant-
Respondent complies with Rule 211(b).

LAW OFFICE OF DARYL G. HAWKINS, LLC

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September 26, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

**APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS**

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

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.

RESPONDENT'S FINAL BRIEF OF CROSS-APPELLANTS/RESPONDENTS

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(864) 984-2126
(864) 984-7372 - Fax

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents

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ARGUMENT

I. The courts below did not err in requiring the Personal Representative to refund a portion of what he had paid himself without authorization.

The Personal Representative (PR) is apparently of the opinion that the Probate Court does not have the power to judge his exercise of discretion. Brief of Appellant-Respondent (hereinafter Appellant's Brief), p.17, para.1. He then makes the incredible claim that "There is no evidence that the PR abused...the powers granted under the will or acted in bad faith in any way." Appellant's Brief, p. 17. This ignores the numerous findings to the contrary made in the Judge Hocker's Final Order (R. pp. 7-14). See also Summary of Position of Defendants Moses and Brown (R. pp. 875-80) and Addendum to Response of Appellants (R. pp. 1414-27).

Although it is true that courts seek to carry out the intent of the testatrix, the PR's conclusion that it was Ms. Milam's intent that he loot her estate and deprive her beneficiaries of her bequests to them beggars belief. Any powers she granted the PR were for the purpose of benefitting those she loved enough to make her beneficiaries, not for the enrichment of the PR at their expense. Without court approval or notice to the beneficiaries the PR secretly paid himself \$ 93,775 and brazenly sought an additional \$ 13,447.05 once he had to defend his administration in court (Final Order, R. pp. 7-14). Nothing supports his conclusion that such self-dealing was the decedent's intent.

In support of his extremely expensive handling of what should have been an uncomplicated estate (Final Order, # 2 and # 3, R. p. 8), the PR says without pointing to anything in the will that the decedent, Marion Kay, wanted him to drag her relatives to court. He based this upon a conversation 3 ½ years before she died asking him to explore voluntary partition with Ms. Brown and Ms. Moses (Plaintiff's Ex. C-2, R. p. 567). They were not receptive, and Ms. Milam chose not to pursue the matter further.

Although the PR professes his dedication to the will, he totally rewrote its grant of an 8 month option to Charles Copeland to purchase all the Estate's half interest in a farm. "The PR

unnecessarily complicated the Estate by converting an eight month option to purchase the Estate's one half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will." (Final Order # 3, R. p. 8). He also dragged his feet beyond the 8 month period to get an appraisal (Appellant's Brief, p. 19, para. 1), but this would not have delayed Copeland's making a bid. The PR dragged out the option for years as an excuse not to settle the estate and to generate fees. Then he required Mr. Copeland's consent before he would close out the Estate long after the option had expired and suggested that Mr. Copeland sue the Estate. (Plaintiff's Ex. C-15, R. p. 817).

To advance his position, the PR repeatedly misstates the support he has among the beneficiaries by claiming that 70% of the residuary beneficiaries support his position (Appellant's Brief, pp. 21, 34 and 38). Pages 6-7 of Appellant's Brief correctly set forth the shares of the beneficiaries, and the PR has provided letters indicating that Presbyterian Home and Bart Heard support his proposed division. Together they own 20% of the residuary estate, not 70%. The PR claims that Lisbon Presbyterian Church supports his approach (Appellant's Brief, p. 9), but he has provided no proof to sustain this conclusion, and the church has not endorsed his position. It is also worth noting that Respondents/Cross-Appellants Brown and Moses owned a total of 60% of the farm at issue (Appellant's Brief, pp. 20-21).

The PR attempts to justify his prolonged failure to bring the Estate to a conclusion by an alleged concern about a possibly defective title, the existence of a right of first refusal, the refusal of the option holder to consent to the sale, a dispute concerning a 5 acre parcel and his right to do whatever he wanted to do because he gave himself broad powers in the will he wrote.

As to the claim that the PR was compelled to launch his lawsuit to clear title in preparation for a sale of the property, S.C. Code Section 62-3-910(A) provides that anyone buying from the Estate "takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested persons, whether or not the distribution was

proper or supported by court order....” This protects the buyer; and if the buyer is protected, he (and anyone taking through him) has no reason or ground to sue the PR. A deed of distribution would also not have created any liability because a deed of distribution is not an instrument of conveyance (Appellant’s Brief, p. 25). As an alternative, the PR could have signed a quitclaim deed (which he ultimately did), or he could have signed a warranty deed which listed as exclusions the items he was concerned about. The potential liability issue is baseless.

“This was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution.” (Final Order, #2, R. p. 8). Filing suit instead violated the PR’s obligations under S.C. Code Section 62-3-703 to settle the estate expeditiously and efficiently and consistent with the Estate’s best interests. He should not be rewarded for that.

The PR did not need the consent of the option holder to convey the real estate in the Estate. Under the terms of the will, the option holder had 8 months to exercise the option; and he did not attempt to do so during that time (R. p. 144, lines 7-8). Time is of the essence in exercising options to purchase land. *Faulkner v. Millar*, 319 S.C. 216, 460 S.E.2d 378 (1995). In fact, the option holder never offered to exercise what the will’s option granted him, the right to buy an undivided one half interest in the farm. It was only because the PR attempted to rewrite the option that a problem arose. “The PR unnecessarily complicated the Estate by converting an eight month option to purchase the Estate’s one half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will.” (Final Order, # 3, R. p. 8)

The PR wrongly argues that only he could partition the farm. First of all, any partition under S.C. Code Section 62-3-911 would have involved only what the estate owned, i.e., an undivided one half interest. The PR overlooks that the heirs could have managed a partition themselves much more cheaply than the \$ 93,775 (and counting) he paid himself.

Had the PR really been serious about getting the agreement of Ms. Brown and Ms. Moses, he would not have ambushed them with the other heirs at what was supposed to have

been a private meeting to discuss settlement. (See the first 2 questions and answers of the quoted testimony on p. 29 of Appellant's Brief.) And he would not have attempted to impose the boundaries he wanted. His treatment of Cross-Appellants was designed to prevent settlement, and it worked. He reluctantly admitted, though, that when it came time to sell the farm, Ms. Brown and Ms. Moses went along without any problems (R. p. 112, lines 6-8).

As to the PR's alleged concern about the right of first refusal, the simple and quick way to deal with this is to grant the right. If the offer is not accepted, the right has been satisfied.

The PR misstates the situation with the 5 acres. This was not a joint claim by Ms. Brown and Ms. Moses; it was asserted only by Ms. Brown, who made no attempt to litigate the matter until the PR invited her to a hearing to settle all the issues with the estate. The PR has stated, "[N]o one, including Brown and Moses...ever asserted any challenge to the PR's actions in Probate Court." (Appellant's Brief, p. 39, para. 1). Ms. Brown's claim, which was supported by Defendants' Ex. 8-12, is not part of this appeal.

II. The courts below correctly found that the PR paid himself excessive compensation.

Under S.C. Code Section 62-3-719 the standard commission is 5%. Respondents/Cross-Appellants reject the PR's entitlement to this because of his flagrant violation of his fiduciary duty to the Estate for the purpose of unjustly enriching himself at the Estate's expense. That Code section provides for an increased fee where the judge finds "extraordinary services". The PR has admitted that the probate judge not only did not find extraordinary services, he also failed to make any findings in support of a large fee (Personal Representative's Grounds for Appeal, R. 1258). ("The Probate Court erred in...not setting forth a ... basis... for... determining reasonable compensation." Appellant's Brief, p. 26) The PR now claims he is entitled to a fee of \$ 225 per hour because of his education, but he let Collins and Lacey handle the legal work and hired an accountant to do the accounting work. The PR testified that he was not charging as an attorney. (R. pp. 172, line1- 173, line7; 175, lines 5-8) and that there was very little attorney work to be done (R. p. 206, lines 6-7). (But his law firm was paid \$ 25,806.38 for this very little work.)

The probate judge questioned the PR on his charges:

Judge: So you were, as a Personal Representative, you were charging on an hourly basis?

PR: No, I wasn't.

Judge: Well what did you mean when you said you looked at the time you had into it to figure your charges?

PR: I looked at what I thought was a reasonable fee. And as we went down the road, I took draws...toward what I thought was a reasonable fee....

Judge: So you were charging on a time basis for your Personal Representative fees?

PR: No. ...I thought I knew what...a fair and reasonable fee would be for this administration as we started down the road. And I set... my draw against that target. (R. p. 174, lines 9-16, 19-24).

The probate judge found that most of the PR's charges were not related to the litigation surrounding his final accounting (Final Order, # 12, R. p. 10). The Estate should not pay him for needless work and expertise he did not use for the Estate, and the Estate had no unusual issues requiring legal or accounting expertise (Final Order, #7, R. p. 9).

The PR attempts to get around Code Section 62-3-719 by pointing out that the will provides for reasonable compensation. What is reasonable is a matter for the probate judge to decide, and the judge quite rightly started with the statute. The PR's attempts to add to the record documents and arguments not part of the record below is improper. What he told the judge in his testimony was that he did not charge a percentage and he did not charge by the hour. Instead, he decided in the beginning what he was going to pay himself and busily set about making that happen without regard to other factors (R. p. 174, lines 14-16, 21-24; p. 205, lines 1-4, 16-20). Before his representation really got underway and before anything was contested, he determined that his fee would consume the Estate's \$ 60,500 in stocks and bonds (Plaintiff's Ex. C-17, R. p. 707). The value of these securities increased R. pp. 116, line 21- 117, line7) so the PR's fee was even more inflated than the number in the Final Order, but there has been no accounting for that.

The lengths to which the PR will go to justify his fee are almost comical. He tells us that we should be grateful that the nearly \$ 26,000 paid to his law firm for work of questionable necessity (Final Order # 17, R. pp. 10-11) was not worse (Appellant's Brief, p. 33, para. 1). He goes on to inform us we should be grateful that he did not grab a broker's fee for selling the real estate (Appellant's Brief, p. 33, para. 1), even though he was not selling the property as a broker. He neglects to mention that his law firm billed the Estate for many hours of his time for which he now seeks compensation. See Addendum to Response of Appellants, p. 8 (d), R. p. 1421).

Throughout the case the PR has tried to improve his position by adding materials after the record has closed. See Order Disposing of Post-Trial Motions, R. pp. 11-18. Even with this Court, he has made numerous references to a document he calls "Exhibit E", although this document was never introduced into evidence and is not a proper part of the appellate record. Throughout the case he has also attempted to gain an advantage through the use of hearsay. He tried to substitute an affidavit for his testimony (the infamous Exhibit E) and unsuccessfully attempted to introduce affidavits of a Teri Stomski and of a Professor Medlin, whose only knowledge of the facts came from what the PR told them, in lieu of their testimony. This was contrary to Rules 801 and 802, SCRE, and to Respondents/ Cross-Appellants' due process right to confront the witnesses against them.

The judges below correctly denied the PR costs and attorney fees, because he would be entitled to reimbursement under S.C. Code Section 62-3-720 only if he had incurred these costs on behalf of the Estate. Instead they found that these costs and fees were incurred by the PR in an attempt to benefit himself (Final Order, # 19, R. p. 11), which diminished the Estate.

Finally, the PR has benefitted from a mistake in the probate judge's calculation of the value of the Estate. In Paragraph 10 of the Final Order R. p. 9), Judge Hocker valued the Estate at \$ 513,491.00, but this used the PR's inflated value of the personal property (\$ 122,491.00) even though he questioned the necessity of the 204.6 hours of paralegal time (at \$ 90/hr.) used to generate this number (Final Order, # 17, R. 10).

III. Affirming the rulings of the courts below requiring that the Personal Representative refund his excessive compensation would not result in unjust enrichment.

Except for Bart Heard, the heirs have not received any distribution from the Estate. They have therefore not been unjustly enriched. The findings of the judges below about how the PR mismanaged the Estate assets for his own benefit destroy any equitable argument the PR might make. The probate judge correctly found, “The commissions sought by the PR are clearly excessive....” (Final Order # 13, R. 10). Making the PR to disgorge his excess commissions cannot result in unjust enrichment. Far from being a sign of “contentiousness”, the Respondents/Cross-Appellants’ devotion to the interests of all the heirs prevented the PR from further looting the estate; and this came at the expense of considerable time, effort and money. (See also R. p. 112, lines 6-8 where the PR admits that Ms. Moses and Ms. Brown readily consented to the sale of the farm once a suitable buyer was found.)

The PR makes the incredible assertion that Ms. Brown and Ms. Moses are precluded from getting relief because “no one, including Brown and Moses..., ever asserted any challenge to the PR’s actions in Probate Court.” (Appellate’s Brief, p. 39, para. 1). The Court’s attention is directed to the Summary of Position of Defendants Moses and Brown (R. pp. 875-80), to the Probate Court’s Final Order (R. pp. 7-14) and to Rule 3.3(1) of the S.C. Rules of Professional Conduct.

IV. The Probate Court had the power to consider and rule upon the Personal Representative’s request that his compensation be approved.

The PR had tried to get the heirs to agree to his handling of the Estate without letting them know what he did and how much he had paid himself (R. p. 185, lines 11-16). Because he was unable to persuade Ms. Moses and Ms. Brown to consent to his unknown activities, he was forced to make known to them their right to have a hearing at which the PR would justify his handling of the Estate (R. pp. 23, 853). Ms. Brown and Ms. Moses accepted his offer (R. pp. 851-2). The PR did not provide or request pleadings, and given that he was the moving party

under S.C. Code Section 62-3-1001 and that it was his burden to justify his handling of Estate assets, none were required from Ms. Moses and Ms. Brown. There was an intermission of more than two weeks during the trial (Appellant's Brief, p. 3, para. 3), so the PR had plenty of notice of the issues and time to prepare. The PR himself made detailed advance notice of the issues almost impossible by dumping on the heirs three and a half years' worth of accountings not long before the hearing was to take place (Final Order # 9, R. p. 9), but he did know that attorney fees were an issue (R. p. 123, lines 3-7). As to the PR's duty of timely full disclosure see *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) and *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013). See also S.C. Code Section 62-3-712 concerning the PR's liability for the improper exercise of his power.

The PR did not make a contemporaneous objection to the hearing he offered to the heirs and then set up, so he can not now be heard to say that the court did not have the power to consider the issues he presented, including his compensation. At the very least this issue was argued by consent, so the PR has waived his right to claim that S.C. Code Section 62-3-721(a) is the exclusive method to review PR compensation and he is estopped to assert this position.

V. The courts below properly ruled that the Personal Representative was not entitled to be reimbursed for attorney fees and costs expended in pursuit of his own private interests.

The courts below did not find that a PR is entitled to fees and costs only if he prevails as the PR alleges (although that should be an equitable consideration). They considered the reasonableness and the necessity of what the PR wanted to charge the Estate and whether the Estate benefitted. The reason the PR had the costs and attorney fees he did was because he looted the estate and tried to hide that from the heirs until the scheduling of a hearing made that impossible. This was not service to the Estate for which he could seek reimbursement. See Final Order's Conclusions of Law, # 5, R. p. 12).

S.C. Code Section 62-3-720 provides that a PR can seek reimbursement for necessary expenses and disbursements. The Estate should not be required to pay for a PR's defense of his

own malfeasance and misfeasance which damaged the Estate. As the *Weidlich v. Cromley*, 267 F.2d 133, 134 (2nd Cir. 1959) case cited by Appellant states, reimbursement is appropriate “When the [PR’s] administration of the assets is *unjustly* assailed....” The Final Order below (R. pp. 7-14) shows that this is most definitely not the case here. A court of Equity cannot allow the PR to be the beneficiary of his own wrong. See *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920).

The PR’s ultimate problem is quite simply that he did not prove the existence and the necessity of the 468.6 hours he claimed to have worked (Final Order, para. 1, R. p. 8). He sought a total of \$ 157,179 in fees and costs (Final Order, p. 2, R. p. 8) for what was not a complicated estate (Final Order, # 2, R. p. 8) and failed to provide any legitimate basis for the fees he claimed (Final Order, #8, R. p. 9). There were no novel issues (Final Order, # 7, R. p. 9), and the probate judge rightly found that the PR’s commissions were “clearly excessive” (Final Order, # 13, R. p. 10). Even his claim to have gotten a good price for the farm from the buyer Respondent Mary Moses dropped into his lap requires the Court to ignore that the purchase price was \$ 24,000 less than the appraisal (Plaintiff’s Ex. C-14 and C-17, R. pp. 669-674, 707).

VI. The Probate Court and the Circuit Court correctly determined that Counsel for Brown and Moses is entitled to attorney fees.

The heirs of the Marion M. Kay Estate are \$ 42,475.00 (plus post-judgment interest) better off because of the efforts of the counsel for Ms. Moses and Ms. Brown. His efforts have led to the creation and preservation against post-trial attack of a common fund. (Final Order, Conclusions of Law # 4, R. p. 12).

The PR attempts to make a technical argument about whether a petition had been filed, but the PR himself brought the matter to court with an informal petition for settlement. Ms. Brown and Ms. Moses made known that they would be seeking costs and attorney fees, and the issue of attorney fees and costs for both sides was argued without objection. See R. p. 123, lines 3-7 for the PR’s admission that he knew that attorney fees were an issue. Counsel for the PR did not object to the introduction of the undersigned’s time sheet, examined the undersigned under oath about his charges and has raised a question about only 0.6 of an hour. The PR has waived

his objection and is estopped to assert it.

As to the definition of suit, cause and action, see 33 S.C. Digest2d 5, "Action". As to the inherent power of courts to do all things reasonably necessary to insure that just results are reached to the fullest extent possible, see *Simpson v. Simpson*, 404 S.C. 563, 579, 746 S.E.2d 56 (Ct. App. 2013).

The undersigned's work on the case began in January of 2008, and that work proved crucial for unraveling how the PR had abused his position and determining that a hearing was necessary. The probate judge correctly found that an attorney fee was warranted and that the undersigned had "necessarily devoted 99.3 hours to this case to date (all of which appears related to the merits of the matter)...." and he stated that he had considered all the *Glasscock* factors. (Final Order, # 21, R. p. 11). The undersigned should likewise be compensated for post-trial work.

VII. The courts below correctly disposed of the Personal Representative's Rule 59 motion.

The PR correctly states that the reversal of the denial of his request for relief under Rule 59 requires that he establish an abuse of discretion. He has not done so.

The PR's discretion is not unbounded. He is a fiduciary and must direct his efforts to advancing the interests of the Estate, not his own private interests. *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004); S.C. Code Section 62-3-703.

The court below found wrongdoing when it delicately noted that the sale of the real estate was not necessary but that it generated proceeds for the PR (Final Order, # 4, R. p. 8), when it found that the commissions sought by the PR were "clearly excessive" (Final Order, para. # 13, R. p. 10), and when it found that the PR charged the Estate for work he allegedly did for the Testatrix before she died (Final Order, para. 5, R. pp. 8-9). The PR claimed payment for more hours than the evidence supported (Final Order, para. # 8, R. p. 9), and the bases he provided for his charges were not legitimate (Final Order, para. # 8, R. p. 9).

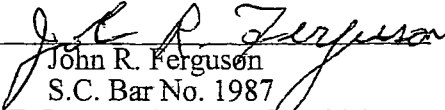
Though the Estate was non-taxable and most of the personalty of value was individually

designated to go to particular people, the PR spent vast quantities of time and money valuing property to increase his compensation, vastly expanded the Copeland option and filed an unnecessary partition action instead of signing a deed of distribution, which resulted in litigation profitable to the PR. The record shows that the PR was far more dedicated to his own gain than to the welfare of the Estate. Contrary to granting the PR post-trial relief, the judges below should have found a breach of fiduciary duty and forced him to disgorge more of his ill-gotten gains. See *In the Matter of Hanna*, 301 S.C. 310, 391 S.E.2d 728 (1990) and *In the Matter of James*, 267 S.C. 474, 229 S.E.2d 594 (1976). If a PR improperly exercises his power in connection with the estate, he is liable. *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013), citing S.C. Code Section 62-3-712. It must also be noted that by defying the Probate Court's direction in its May 24, 2011 Final Order that he return \$ 42,475.00 to the Estate (Final Order, # 14, R. 10), the PR has had the use of the Estate's money for three years and should pay for that.

Conclusion

The Personal Representative is not entitled to relief. His compensation must be greatly reduced or eliminated to reflect the damage he has done to the Estate by his flagrant violation of his fiduciary duty. What the Respondents/Cross-Appellants and their counsel have received thus far should be affirmed with post-judgment interest. The additional relief due Respondents/Cross-Appellants should come from the PR and not from the Estate, but if the relief is to come from the Estate, the payments to heirs Bart Heard and Presbyterian Home should be limited to what they agreed to in the documents they signed, which were filed with the court. The PR and not the Estate should pay all fees and costs associated with this appeal.

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September 15, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

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

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SEP 26 2014

SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT-RESPONDENT

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ARGUMENT

Appellant-Respondent Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, respectfully submits this reply to brief of Respondents-Appellants.

- I. **The PR's decision and efforts to pursue a division and sale of the Farm including the filing of a partition/declaratory judgment action, as opposed to simply filing a deed of distribution to the heirs, comported with Ms. Kay's testamentary intent and fulfilled his duty to the Estate and its beneficiaries because Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard, together owning 70% of the residuary interests of the Estate, expressed to the PR a desire to receive cash rather than an undivided interest in real estate.**

Brown and Moses are unwilling to admit the undeniable fact in this case that none of the other beneficiaries of Ms. Kay's Estate wanted to own property as co-tenants with them. Other beneficiaries desired a distribution of cash as opposed to an undivided interest in real estate and expressed this desire to the PR. The allegations of Brown and Moses concerning excessive fees and expense are nullified by the desires and needs (and support of the PR's actions) of other beneficiaries whose interests in the Estate equal or exceed that of Brown and Moses. The Circuit court erred as a matter of law in affirming the probate court's ruling to require the PR to refund a substantial portion of his compensation because in addition to carrying out Ms. Kay's testamentary intent, he has a statutory right to seek partition in his discretion to aid the settlement of the Estate and in this case satisfy the needs and desires of a majority of the beneficiaries.¹

¹ Replying to Argument I of Respondents-Appellants Moses and Brown Respondent Brief at page 3.

Penny Arnold of the Presbyterian Home, a 10% residual beneficiary, testified that her organization did not want to be owners of real property and wanted and needed a cash distribution. Ms. Arnold, the point person for the Presbyterian Home, has been handling estate trusts and/or bequests since 1985, even prior to the Presbyterian Home. (R. p. 242, Lines 12-25). She approved the PR's compensation and as well as the amount of legal fees and was pleased with the results. (R. p. 246, Lines 1-11 and 18-25). Bart Heard, another a 10% residual beneficiary, testified in essence that he approved of the PR's actions to divide the Estate as well as the amount of the PR's compensation.² (R. p. 133, Line23; R. p. 105, Line 10).

As to the contention by Brown and Moses that the PR "has provided no proof" to sustain his position that the Church preferred cash over title to real estate, there is ample documentation in the record. There is testimony of the PR, that the Church did not want an undivided interest in real property and preferred a cash distribution. The PR testified without objection that, "Bart Heard and the church and the Presbyterian Home Session all told me that they wanted to be paid—they wanted cash. They could not – didn't want the dirt. . And now I find out that the Presbyterian Home says they could not have taken the dirt, I'm sorry—an interest in the real estate." (R. p. 78, Lines 17–22).

The testimony related to the Church's expressed position is corroborated by the April 21, 2008 letter of Attorney Robert Fuller to Neely Blackmon, Clerk of Session of Lisbon Presbyterian Church, in response to a letter written by Church

² Marla Orias, also a 10% residual beneficiary, is the sister of Bart Heard. Ms. Orias did not testify in the case.

Reverend Hunter. Mr. Fuller quotes Reverend Hunter as stating, "the Lisbon congregation's hope is that the property in Marion's estate will be sold at the appraised value and the congregation will receive the cash value of the congregation's portion." (R. p. 630). Attorney Fuller's letter goes on to explain how the congregational action should be memorialized by resolution with "[t]he stated objective is to realize the value of Ms. Kay's generosity for the benefit of the church." (R. p. 631). (This correspondence was copied to the PR and Reverend Hunter.) Likewise, the purpose of the PR in seeking to divide and sell the Estate's interest in the Farm was "to realize the value of Ms. Kay's generosity for the benefit of the Church" and the other beneficiaries as well. The Church's position was expressed to the PR repeatedly through telephone conferences and meetings. The record shows that the PR met with the Church Session and Reverend Hunter on multiple occasions including May 23, 2008. (R. p. 782). In addition, the PR communicated with Reverend Hunter repeatedly via meetings, telephone conference and written correspondence:

1. June 20, 2007; R. p. 736;
2. April 10, 2008; R. p. 779;
3. April 15, 2008; R. p. 779;
4. May 13, 2008; R. p. 782;
5. May 20, 2008; R. p. 782;
6. June 25, 2008; R. p. 783;
7. August 11, 2008; R. p. 784;
8. September 4, 2008; R. p. 784;
9. October 21, 2008; R. p. 785;
10. December 3, 2008; R. p. 755;
11. February 25, 2010; R. p. 791; and
12. April 15, 2010; R. p. 792.

Furthermore, Reverend Hunter met with (1) the PR and consultant John Wilson (July 25, 2007) (R. p. 747), and roughly a week later met with (2) the PR,

Wilson, Appraiser, Penny Arnold of The Presbyterian Home, and Moses and Brown to discuss a proposed division of the property (July 31, 2007). See, Testimony of Appraiser Paul Major (R. p. 236, Lines 9–11); Testimony of Penny Arnold (R. p. 244, Lines 3-21). It is undeniably clear that the Church desired a cash distribution from the Estate rather than an ownership in real estate. In fact, there is no evidence in the record otherwise. Given that Marla Orias, the sister of Bart Heard is not on record as to her wishes, no less than 70% of the residuary beneficial interests in the Estate made it clear to the PR from the beginning of the estate administration that they wanted a cash distribution from the Estate rather than an ownership in real estate.

Perhaps the most compelling evidence of the incontrovertible fact that the other beneficiaries, including the Lisbon Presbyterian Church, wanted a cash distribution rather than an interest in undivided property is the admission of Respondent-Appellant Brown at the February 21, 2011 hearing in response to a direct question from her counsel, John Ferguson.

Q. All right. And when you got to the meeting in Newberry, who was there

A. Mrs. Penny Arnold (phonetic), I believe is her name, and Reverend Hampton Hunter.

Q. All right. These other parties who were there, the other heirs, were they looking for land; or were they looking for money?

A. Money.

(emphasis added.) (R. p. 310, Lines 6-13).

Accordingly, the PR acted reasonably in pursuing the partition action.³ (Ms. Brown also contended at the hearing that she had wanted to divide the property before Ms. Kay's death too. (R. p. 357, Lines 1-3). In addition to the partition action, the PR also sought declaratory judgment relief as a separate cause of action to sort out the claims of the parties. In affirming the probate court's erroneous ruling that the PR should not have pursued a division and sale of the estate's property but should have simply deeded out the property to the beneficiaries (against the 70% majorities' wishes), the circuit court made a manifest error of law.⁴

³ Assuming arguendo that only one or none of the beneficiaries expressed a desire to partition the property, the PR properly exercised his right granted by South law governing estates in South Carolina. S.C. Code Ann. § 62-3-911 provides that the PR or any beneficiary can seek partition. Further, these statutory rights are in addition to the powers granted by Ms. Kay's will.

⁴ Brown and Moses assert they own 60% of the Farm, citing as authority for this proposition Appellant-Respondent's brief at pp. 20-21. Brown and Moses, claiming title to an undivided half-interest as "The Heirs of H.W. Milam" together had an undivided 50% interest in the Farm. The Estate owned the other 50%. The argument advanced in Appellant-Respondent's brief is that if the PR had deeded out the Estate's interest in the Farm to the beneficiaries rather than selling it, the undivided interest of Brown and Moses would have been increased to 60% and the other beneficiaries would have been responsible for taxes and upkeep and faced with liability issues.

II. The resistance by Brown and Moses to the PR's efforts to partition the Farm as well as Brown's ongoing claim for an interest in 5 acres created the delay and expense about which Brown and Moses now complain.

Brown and Moses allege the PR unnecessarily complicated the Estate. Yet it was their resistance to the PR's efforts to reach a fair and amicable resolution in dividing the Farm that created the delay in settling the Estate and thereby causing the expense that they now question⁵. In fact, they succeeded in preventing the division just as they had while Ms. Kay was alive. (See letters of Edward D. Sullivan as attorney for Marion M. Kay to Martha Brown and Mary Moses giving notice of Ms. Kay's desire to divide the Farm. (R. pp. 566-567). Also, see Testimony of Bart Heard (beneficiary). (R. p. 134, Lines 12-16). "I hate that all this has happened. I feel that if the land was divided way back when before [Ms. Kay] passed away, all this could have been resolved. I don't object to any of Mr. Sullivan's fees that he's – that's accrued at all. . . .") Further, a June 21, 2010 letter from counsel for Moses and Brown regarding Brown's ongoing claim for an interest in approximately 5 acres of the Farm reflects their continued resistance to the efforts of the PR to divide the property and/or reach an amicable resolution to settle the Estate early and belies their contention that the claim for the approximate 5 acres was a non-issue. (R. p. 685).

In attempting to reach an amicable resolution related to the Farm, the PR reached out to Brown and Moses and proposed a compromise whereby Charles Copeland would pay fair value for a portion of the Farm (ending his option) and they could then exercise the Right of First Refusal for the remaining acreage if

⁵ Further replying to Argument I, Respondents-Appellants' Respondent Brief at page 3.

they elected to do so. As an incentive, the PR agreed to ask for the co-operation of the other beneficiaries to approve the transfer of the Estate's interest in the approximately 5 acres (4.59 acres) claimed by Brown **free of consideration**. Sullivan letter to Brown and Moses dated May 2, 2008. (R. pp. 632-633). Neither Brown nor Moses responded.

Later, the PR reached out to Brown and Moses, met with them and the appraiser and made a proposal for division of the Farm. Again, they never made a written response or proposal.

Brown and Moses contend that the "PR misstates the situation with the 5 acres" and "it was asserted only by Ms. Brown, who made no attempt to litigate the matter until the PR invited her to settle all issues with the Estate." Brief of Appellant-Respondent at Page 6. This is factually incorrect. When the PR filed the partition/declaratory judgment action, Brown and Moses filed, among other things, a Counterclaim claiming an interest in the 5 acres. Answer to Amended Complaint and Counterclaim dated March 20, 2009. (R. pp. 657-663).

Perhaps the most compelling evidence of the fact that Brown's claim regarding the 5 acres created an ongoing issue in the settlement of the Estate is that on June 21, 2010, her counsel John Ferguson wrote to counsel for the Estate:

I am please [sic] to enclose for your file the executed consent and waiver documents you prepared for Martha Brown and Mary Moses. I hope that this will help you move things along. **I remind you that a condition precedent for my clients' cooperation was Rowland's⁶ agreement with Martha about the portion of the property agreed to be hers.** I am pleased that everybody would

⁶ Rowland Milam purchased the Estate's real estate. See, Deed (R. pp. 686-693).

up on the same page.

(emphasis added.) See, John Ferguson letter dated June 21, 2010 (R. p. 685).

- III. **In addition to carrying out the intent of Ms. Kay and responding to the expressed desire of the beneficiaries to sell the property, the partition action cleared up title defects arising from various claims to the property as well as judgments against Moses.**

The PR was advised by counsel, among other things, to pursue a partition action in order to clear up title defects. Brown and Moses are wrong when they assert the PR could have simply signed a quitclaim or a warranty deed because the probate code provides that a transfer of title from an estate to a beneficiary is reflected by a deed of distribution. As to the point that the PR ultimately signed a quitclaim deed, that conveyance was made to a third party and not a beneficiary of the Estate.

The Circuit Court affirmed the probate court finding "that this was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution." Although the PR could have handled the estate that way by dumping the undivided interest problem on 80% of the residuary interests of the Estate, he would have been ignoring the intent of Ms. Kay to sell and distribute cash to her beneficiaries. Perhaps just as importantly he would have been ignoring the expressed desire of at least 70% of the residual beneficial interests to receive a cash distribution as opposed to a minority ownership of an undivided interest in real estate and the obligations and risks that come with it. In basing its ruling for the PR to refund a substantial portion of his compensation on the finding that a deed of distribution would have been preferred given the intent of

Ms. Kay, the expressed desire of a majority of the beneficiaries, the authority granted by the will and SC law, the Court made a manifest error of law.

- IV. The filings by the PR of the four interim accountings was provided to Brown and Moses and the other beneficiaries in accordance with the requirements of the Probate Code and made full and fair disclosure of the receipts and expenditures of the Estate to all , including the compensation paid to the PR.**

Brown and Moses seek to convince the Court that the PR sought to have the heirs consent to a distribution and final settlement of the Estate without disclosing the amount he had been paid. That is false.

The first three interim accountings were filed prior to the Petition for Settlement and interim accounting 4 for the period ending November 12, 2010 was filed on November 15, 2010 together with the Petition for Settlement⁷, Proposal for Distribution, and Notice of Right to Request a Hearing. Brown and Moses possessed all of these accountings and final documents when their counsel requested a hearing on December 6, 2010.

S.C. Code Ann. § 62-3-715(16) authorizes personal representatives to pay personal representative compensation. S.C. Code Ann. § 62-3-1001 provides that personal representatives file a final accounting with the probate court in accordance with the various time limitations as set forth therein. In this case, the PR sought, and received, extensions for the filing of the final accounting every six (6) months pending the sale of the real property. See, for example, PR Exhibit D; 7/13/07 JPR Time Entry (R. p. 745); 6/11/08 PKB Time Entry (R. p. 783); 6/12/08 EDS Time Entry (R. p. 783); 12/1/08 PKB Time entry (R. p. 786); 12/22/09 PKB

⁷ The Probate Code has been amended so that the "Petition for Settlement" is now "Application for Settlement".

Time entry (R. p. 790); 12/30/09 PKB Time entry (R. p. 790); 6/16/10 EDS Time entry (R. p. 790).

Upon the sale of the real property, the PR filed interim accountings. Interim Accounting 1 for the period ended December 31, 2007 was filed October 18, 2010 (as well as a Supplemental Inventory and Appraisalment). Interim Accounting 2 for the year 2008 was filed October 25, 2010. Interim Accounting 3 for the year 2009 was filed on or around November 1, 2010. Interim 4 for the period ending November 12, 2010 was filed on November 15, 2010. On November 15, 2010, the PR filed the Petition for Settlement and Proposal for Distribution and notified the beneficiaries of their right to a hearing as required by the probate code. Accordingly, at the time the beneficiaries received the Petition for Settlement, they had received a full accounting of the Estate receipts and expenditures, including the compensation for the PR paid to date. The PR did not "tr[y] to get the heirs to agree to his handling of the Estate without letting them know what he did and how much he paid himself" nor did he attempt to "persuade Brown and Moses to consent to unknown activities" (Brief of Appellant-Respondent at Page 9). Furthermore, throughout the Estate administration, all beneficiaries were well aware of the efforts of the PR to divide and sell the real estate. (R. pp. 632-633). (See also, Testimony of Penny Arnold (R. p. 243, Line 1 - p. 246, Line 11). The allegations of Brown and Moses that the PR "looted the estate and tried to hide that from the heirs until the scheduling of a

hearing made that impossible" are utterly false (Brief of Appellant-Respondent at Page 10).⁸

The PR is entitled to compensation and expenses from the requested hearings at which Brown continued to press their claim for acreage against the Estate. Despite the settlement of the litigation concerning the claims against the Estate in June 2010, Brown continued to press her claim against the Estate for 5 acres. (See, Testimony of Brown; R. p. 326, Line 8 - p. 329, Line 4) (See also, Revised Return to Motion, R. p. 991). The PR, with the aid of legal counsel, successfully contested this claim (again). Thereafter, in January 2012, counsel for Brown and Moses raised the claim again. (R. p. 444, Lines 15 - p. 450, Line 9). Once again, the PR successfully, again with legal counsel, resisted this claim. (See, Order Disposing² of Post-trial Motions; R. p. 18).

The PR was required to attend the hearings on his accounting, Petition for Settlement and Proposal for Distribution. S.C. Code Ann. § 62-3-720 provides that the PR is entitled to received from the estate his necessary expenses and reasonable expenses, including reasonable attorneys fees incurred if he defends

⁸ Replying to Respondents-Appellants' Respondent Brief, Argument IV. Throughout these proceedings, counsel for Brown and Moses has sprinkled his briefs and court correspondence with inflammatory language and unfounded accusations against the PR including "loot", "looted", "bilked", and "ill-gotten gains". These slurs are perilously close to a violation of the oath of civility required by those who practice law in the State of South Carolina. See, In the Matter of Anonymous Member of the South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011) where our Supreme Court quoting with approval from In Re Goude, 374 S.E.2d 496, 497 (1988) that a lawyer, "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client."

or prosecutes any proceeding in good faith, whether successful or not. Item V(3) of Ms. Kay's will provides that the PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses. The PR attended the hearings in his capacity as personal representative; accordingly the PR is entitled to be paid for his services and reimbursed for expenses including attorneys' fees. In addition to being required by law to attend the hearings on behalf of the Estate, he also defended against the ongoing claim of Brown for yet more of the Estate (the five acres). The Circuit Court erred in affirming the probate court's ruling that the PR was not entitled to be paid for his services or reimbursed for legal fees or costs of witnesses subsequent to the filing of the Petition for Settlement on November 15, 2010 and therefore should be reversed and remanded for determination of the value of service of the PR, costs/expenses and reasonable attorney's fees.⁹

V. The Court overlooked or misapprehended the evidence substantiating the hours of the PR.

Contrary to the probate court's findings, the record contains evidence supporting the hours claimed by the PR. The probate court finds that the PR failed "to provide adequate proof for the hours he claims." In making this finding, the court ignores the documentation put into evidence at the hearing (and pointed out by the PR's Rule 59 motion. See Section IX below).¹⁰

A substantial portion of the PR's time in the administration of the Estate is reflected as "no charge" hours or offset by discounts. These hours are reflected

⁹ Replying to Argument V.

¹⁰ Further replying to Argument V.

by the Law Firm invoices admitted into evidence as PR Exhibit D (R. pp. 729-795). Furthermore, time sheets of the PR supporting these hours were submitted to the probate court as part of the PR's Rule 59 motion. (R. pp. 993-1204). (See, Section IX. below). An analysis of the Law Firm Invoices reflects the following:

File 1147.100 173.30 hrs (R. pp. 794-795) (R. pp. 1278-1298; 1279-1291)
File 1147.101 76.40 hrs (R. p. 775) (R. pp. 1278-1298; 1292-1298)

Total: 249.70 hours

Unquestionably, this evidence supporting the PR's time in the administration is contained in the record. (Exhibit E included in the Affidavit of the PR reflecting an additional 216.10 hours including hours served after August 31, 2010 was also filed with the probate court administration and proffered to the court.) (See, Brief of Appellant-Respondent at Pages 33-35). In affirming the probate court's finding that the PR failed to substantiate his time, the Circuit Court erred in that there is no evidence to support the court's finding.

As to the allegations of Brown and Moses that the legal fees were too much for what should have been a simple estate, but for their ongoing unwillingness to co-operate the fees would have been much less. Furthermore, the PR only paid \$13,499 in legal fees to the Law Firm prior to submitting the balance for approval to the probate court, which approval was received.

VI. Brown and Moses misstate the record concerning the hours charged by the PR during the administration of the Estate.

During the 3 years and 6 months of Estate Administration (May 3, 2007 – November 12, 2011), the PR worked 465.8 hours. The no-charge hours listed in the Law Firm invoices reflect some of the services provided and the number of hours that the PR worked for the estate. 249.7 of these hours were “no charge”

by the Law Firm. See, August 17, 2010 invoice, 173.3 hours (R. pp. 794-795); plus August 16, 2010 invoice, 76.4 hours (R. p. 775), totaling 249.70. In other words, these hours **were not** billed by the Law Firm. Brown and Moses misstate the record when they write "[h]e neglects to mention that his law firm billed the Estate for many hours of his time for which he now seeks compensation." (See, Brief of Appellant-Respondent at Page 8).

Some of the PR's hours at the Law Firm were billed by the Law Firm during the administration, however, these hours are not included in the "no charge" hours noted above.¹¹ Additionally, at the PR's request, there were \$20,268.50 of Law Firm charges that were discounted or written off, which more than offset the PR time that is reflected as billed by the invoices (R. p. 729), the net effect of which is that the Law Firm did not charge for the PR's services to the Estate. Lastly, the PR was an employee and not an owner or partner while working at the Law Firm (R. p. 173, Line 9), as corrected by Transcript Corrections (R. p. 29) ("No, I was not a partner there. I was an employee.") The legal fees were paid to the Law Firm as opposed to the PR.

Brown and Moses claim that "the PR used 204.6 hours of paralegal time from his law firm to value personalty". Brief of Respondents-Appellants (Cross-Appeal) at Page 5. Their position is both factually incorrect and without merit. They also misrepresent as their authority for that claim a finding of the probate court (R. pp. 10-11, Paragraph 17). The probate court did not find that the PR

¹¹ November 26, 2007 invoice - \$7,395.00; November 26, 2008 - \$1,305.00; August 16, 2010 invoice - \$522.00; August 17, 2012 - \$319.00. These hours are not included in the 465.8 hours used in support of the PR's compensation.

used 204.6 hours of paralegal time from his law firm to value personalty nor did that occur. The court ruled, "I approve the previous payment of \$13,499.58 to Collins and Lacey and find that Collins and Lacey is entitled to be paid an additional \$12,306.80. Although, the Court questions the necessity of 204.60 hours of paralegal time, they should be compensated for their work." (R. pp. 10-11). Judge Hocker's ruling does not support their claim. Neither does the record.

Paralegals at the Law Firm did not spend 204.60 hours appraising personal property of the Estate as claimed by Brown and Moses.¹² Of the total paralegal time, 4.00 hours were spent related to the valuation of personal property. (See Exhibit 1 to Personal Representative's Reply to Addendum to Response of Appellants Moses and Brown (R. p. 1460). 1.70 of these hours were not billed. (See Exhibit 7 (R. p. 1528). There was a .50 hour listed pertaining to determining the value of a vehicle. (.50 hours on June 25, 2007 (R. p. 1469).

The remainder of the paralegal time was spent on estate administration (131.70 hours), including contacting heirs, drafting probate court filings, analyzing Ms. Kay's extensive Memorandum of Personal Property to begin the distribution process to beneficiaries, preparing receipt and release forms for execution by beneficiaries, preparing forms to obtain federal identification number for the Estate, working with bankers concerning account information, obtaining and paying final bills of Ms. Kay, securing keys to Ms. Kay's home, paying pharmacy bills, corresponding with beneficiaries, finding addresses for beneficiaries,

¹² Respondents-Appellants' Respondent Brief at Page 8.

working with life insurance companies, seeking refunds of overpayments, retaining the service of a monument company, preparing contracts, reviewing invoices, transferred property to beneficiaries, reviewing plats, seeking to recover benefits from life insurance companies, and preparing correspondence to surveyors. Of these 131.7 hours, however, 28.6 hours were not billed at all (R. p. 1482), reflecting 25.7 and 2.0 calculated at "0.00/hr". Another 68.40 hours were related to the partition and declaratory judgment action (R. p. 1508).

All of the time is reflected in detail in the Law Firm invoices (R. pp. 729-795), so there can be no dispute as to how this time was spent.

Furthermore, the Supplemental Inventory and Appraisement reflects that of the \$122,491 referred to by Brown and Moses as personal property, only \$38,621 is actual tangible personal property subject to valuation. While the remaining balance is cash or cash and cash equivalents and life insurance of which valuation was not an issue at all since the amounts were simply listed on bank records. The tangible personal effects were appraised by qualified appraisers – not Law Firm paralegals. Furthermore, the personal representative's "reasonable compensation" should be determined by an analysis of several factors, not just the value of the estate. The PR has proposed a formula for making such a determination. (See, Brief of Appellant-Respondent at Pages 25-27). The PR's compensation is not a percentage-based commission because the will provides that he shall receive "reasonable compensation."

S.C. Code Ann. § 62-3-706 requires the personal representative to prepare and file with the probate court an inventory and appraisement of probate

property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each item, its fair market value as of the date of the decedent's death. S.C. Code Ann. § 62-3-707 authorizes personal representatives to hire qualified appraisers, which the PR in this case did. The ongoing allegation of Brown and Moses that the PR somehow used paralegals at the Law Firm to inflate valuation of personal property so as to increase his compensation is patently false and a misrepresentation of the evidence in the record.

In any event, the PR presented more than \$12,300 of the Law Firm invoices to the probate court for approval prior to making payment. See, Amended Proposal for Distribution (R. pp. 26-27). The probate court approved these fees including the paralegal charges (R. pp. 10-11). Brown and Moses' complaint is without merit.

VII. Requiring the PR to refund compensation relating to services rendered in seeking to divide and sell the Farm would unjustly enrich those beneficiaries who requested those services.

The beneficiaries who held no less than 70% of the residuary interests of the Estate requested that the PR make cash disbursements rather than an interest in real estate. To require the PR to refund compensation relating to his services rendered in seeking to divide and sell the Farm would unjustly enrich those beneficiaries. (See, Brief of Appellant-Respondent, Argument III at Pages 35-37).

Brown and Moses state that the heirs (other than Bart Heard who has received advances) have not been unjustly enriched because they have yet to receive a distribution from the Estate. (See, Respondents-Appellants'

Respondent Brief at Page 9). However, the Circuit Court's ruling requiring the PR to refund approximately \$40,000 to the Estate because the court disagreed with the PR's actions to partition the Farm and seek a declaratory judgment on title issues would unjustly enrich the beneficiaries, all of whom benefitted from the PR's efforts and success in selling the Farm.¹³

Accordingly, the ruling of the courts below should be reversed and the case remanded.¹⁴

VIII. Brown and Moses misrepresent the testimony of the PR concerning the basis for his determination of "reasonable compensation".

In seemingly quoting from the record, Brown and Moses distort the testimony (and the record) of the PR concerning the basis for his determination of "reasonable compensation." First, the questions attributed to the probate judge (See, Brief of Appellant-Respondent at Page 7) were actually questions from opposing counsel. Secondly, the quoted testimony misleads because it omits crucial portions of the PR's testimony. The entire testimony of the PR to the questions of opposing counsel at this point in the hearing is as follows (the portion omitted from Respondents-Appellants' representation of the record is underlined):

Q. So you were, as a Personal Representative, charging on an hourly basis.

¹³ Of the approximately \$40,000 refund, counsel for Brown and Moses would receive nearly half- \$19,860 in attorney's fees - under the probate court's order. After deducting these fees and the cost of court reporter transcripts, Brown and Moses, 10% beneficiaries, each would net approximately \$1,000 of the refunded amount.

¹⁴ Replying to Respondents-Appellants' Respondent Brief, Argument III, at Page 9.

- A. No, I wasn't.
- Q. Well what did you mean when you said you looked at the time you had into it to figure your charges?
- A. I looked at what I thought was a reasonable fee. And as we went down the road, I took draws, I guess you might say, toward what I thought was a reasonable fee, given the amount of time that I had into it and the result that I expected.
- Q. So you were charging on a time basis for your Personal Representative fees?
- A. No. I had a --I thought I knew what the bill--what a fair and reasonable fee would be for this administration as we started down the road. And I set, I guess, my draw, against that target. And then as we went down the road and we got a bigger and better result, the final result was based on all the factors and the rule, the time, and the novelty of the issues.¹⁵

The PR consistently testified that he based his charges on several factors, including time, novelty and complexity of the issues, and results obtained. Contrary to Brown and Moses implication that the PR did little or no work ("he let Collins and Lacey [sic] handled the legal work and hired an accountant to do the accounting work"), the PR prepared pleadings, contracts, consents, and other legal documents, responded to discovery requests, met with counsel, met with appraisers and surveyors, researched courthouse records, researched legal issues, showed real estate to prospective buyers, settled a property claim with an insurance company, negotiated and received an excellent result for the real estate, prepared probate documents, included Inventory and Appraisement(s), and Accountings, all of which were in addition to his other duties in the

¹⁵ Based on the PR's 465.8 hours (at \$225 per hour), the total fee based on number of hours would be \$104,805, more than \$10,000 than actually paid. (See Brief of Appellant-Respondent at Pages 14-16).

administration of the Estate. See, PR Exhibit D, and the various time entries of the PR describing his services to the Estate (R. pp. 729-795).¹⁶

Brown and Moses nonsensically allege that "[b]efore [the PR's] representation really got underway and before anything was contested, he determined that his fee would consume the Estate's \$60,500.00 in stocks and bonds" and rely upon an entry in the Inventory and Appraisement, Supplemental #1. (See, Brief of Appellant-Respondent at Page 7). That is false and in no way supported by the referenced exhibit. Furthermore, the allegation that the value of the securities increased (and somehow correspondingly increased the PR's "fee") but that has not been accounted for is also false and without merit. The gain on the sale of securities is reflected in "receipts" on Interim Accounting 1. (R. p. 714). Interest earned is also reflected in Interim Accountings 1 through 4 as receipts. (R. pp. 714-720).

The PR provided valuable services to the Estate and is entitled to "reasonable compensation."

IX. The Court erred in affirming the Probate Court's Order Disposing of Post-trial motions.

The PR's Rule 59 motion for reconsideration cited various errors of law and oversight of evidence by the Probate Court. (See, Brief of Appellant-Respondent at Pages 44-46). At a hearing on the Rule 59 motion, the Court allowed the PR to submit for its consideration certain time records in support of time entries of the PR contained (but not charged) in the Law Firm invoices. (R. p. 401, Line 11 – p. 403, Line 21). These invoices were clearly in the record.

¹⁶ Replying to Argument II.

The time sheets were submitted by the PR's counsel as allowed. See Letter of Daryl G. Hawkins dated January 20, 2012 to The Honorable Donald B. Hocker, together with enclosures. (R. pp. 993-1204). The time sheets reflect the contemporaneous entries by the PR of time devoted to the administration of the Estate. Nevertheless, the Court declined to re-consider its finding that the PR "failed to provide adequate proof for the hours he claimed." In affirming the probate court's finding, the Circuit Court erred and its order should be reversed.

X. Brown and Moses did not maintain a suit for the creation of a common fund or property and are not entitled to attorneys' fees.

Brown and Moses did not maintain a suit for the creation, recovery, preservation, or increase of a common fund or common property. Accordingly, Brown and Moses are not entitled to attorneys fees pursuant to the common fund doctrine. See Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). In addition to the numerous reasons previously provided by Appellant-Respondent precluding recovery of fees by Brown and Moses (See, Brief of Appellant-Respondent at Page 40, Argument VI), they simply requested a hearing through their counsel on the PR's Petition for Settlement.¹⁷ Counsel for Brown and Moses filed no pleadings. Brown and Moses did not follow the procedures outlined in S.C. Code Ann. § 62-3-721 "Proceedings for review of employment of agents and compensation of personal representatives and employees of estate." Furthermore, at the hearing, he requested that the Court award Brown the

¹⁷ S.C. Code Ann. § 62-3-1001(a)(3) now provides for an "Application for Settlement" rather than a "Petition for Settlement", amended by 2013 Act No. 100, Section 1, eff. January 1, 2014. "The 2010 amendment revised subsections (3) and (4) to conform to current practice allowing the personal representative to pursue informal proceedings to close the estate by filing an application rather than a petition." Reporter's Comment, Id.

monetary interest of Brown's alleged share of 5 acres once owned by the Estate. Not only did Brown and Moses not have a common interest with other beneficiaries, their interests as presented by their counsel were diametrically opposed. Finally, more beneficiaries testified in support of the PR's compensation and expenses (Heard and Arnold) than opposed (Brown). For these and other reasons previously stated, the common fund doctrine does not apply and neither Brown and Moses nor their counsel are entitled to legal fees and expenses they have requested.¹⁸

CONCLUSION

After 3 years and 6 months of estate administration, including negotiations and litigation to secure the liquidation of the Estate's real estate and make a cash distribution to the beneficiaries, the PR filed the required final settlement documents with the probate court. Brown and Moses requested a hearing. No pleadings were filed by Brown and Moses. Prior to the hearing, the PR filed a pre-hearing memorandum and a detailed Affidavit describing the Estate administration, the various issues and conflicting claims and competing interests of those named in the will, a timeline of events of the administration, a description of estate assets and accounting, the costs incurred including personal representative compensation and legal fees, the time devoted to the administration by the PR, and the factors used by the PR in determining his compensation. Supporting documentation attached as part of the affidavit included the will, the inventory and appraisal, 4 interim accountings from the

¹⁸ Replying to Argument VI, Respondents-Appellants' Respondent Brief at Page 11.

beginning of the Estate through the date of the filing of settlement documents with the court, and supporting documentation describing the will, inventory and appraisal of estate assets, accountings, law firm invoices and other time records of the Personal Representative.

At the hearing, the personal representative testified as to the testamentary intent of Ms. Kay, the nature and amount of her assets, the methods involved in valuing the estate including the hiring of a surveyor and appraisers, valuation methods, estate beneficiaries, their expressed desires as to a distribution of cash rather than an undivided interest, the option granted to Ms. Kay's neighbor, Charles Copeland, the issues confronted including the various claims and competing interests of those named in the will, the efforts to reach a settlement of the estate, the reasons for filing the partition action/declaratory judgment action, his reliance on the advice of counsel, the litigation, the negotiation and sale of the real estate, the legal fees and his efforts to reduce the fees including a reduction in hourly rates and discounts, his hours devoted to the estate during the administration, the nature and amount of his services rendered to the Estate, and the factors relied upon in determining "reasonable compensation." In doing so, he responded to questions from both opposing counsel and the court. Beneficiary Bart Heard testified in essence to his regret that the Farm had not been divided during Ms. Kay's life and his approval of the PR's compensation. Penny Arnold testified as to the beneficiary Presbyterian Home's need for a cash distribution as opposed to an interest in real estate and her approval of the PR's fees and expenses, including the legal fees. Two real estate experts testified as to the

outstanding result obtained by the PR in selling the Farm. Rowland Milam, called by opposing counsel, testified as to the negotiations with the PR and the resulting agreement and purchase of the real estate. Exhibits were introduced into evidence including the inventory and appraisal of assets, accountings, appraisals, legal invoices, and time records.

On the other hand, Brown testified that the PR made the simple complicated - yet admitted that Lisbon Church and The Presbyterian Home wanted "money" not land.

In the face of all of this evidence and legal memoranda, the probate court found that that the PR failed to prove the necessity for his actions and that the PR should have simply deeded out the real estate to the beneficiaries, failed to prove the hours that he claimed, and did not present to the court a method for the determination of reasonable compensation. Based on these findings, the court ruled a reasonable fee would be \$51,300, about 10% of the Estate, that the PR refund approximately \$40,000 to the Estate, and that of this "common fund", opposing counsel who requested a hearing be paid nearly \$19,860 pursuant to the common fund doctrine. The court also ruled that the PR should not be paid for preparing for and attending the hearing and further ordered that the PR bear the costs of his counsel, the expert witnesses, and the cost of the court reporter and transcripts (later revised so that Brown and Moses pay one-half of the court reporter and transcripts). In affirming these findings and rulings, the Circuit Court erred because the factual findings of the probate court are not supported by the overwhelming evidence presented at the hearing in support of the PR's actions,

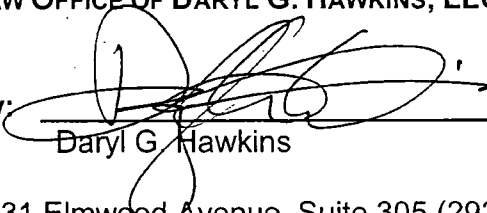
his compensation and expenses. Furthermore, the rulings of the probate court are in direct conflict with South Carolina statutory and case law.

Now, 3 years and 10 months after filing the settlement documents, the PR and his counsel have spent untold hours filing and responding to briefs, filing and responding to motions, traveling out of town to attend hearings, meeting with beneficiaries, attempting to resolve the issues so that the Estate can be concluded, bearing the responsibility and duties of being the personal representative, all the while enduring the ongoing insults and slurs of counsel for Brown and Moses. This is a gross injustice that must be addressed.

For the foregoing reasons, the orders below should be reversed to the extent they require a refund of compensation by the PR and deny payment for additional services to the Estate and reimbursement for the fees and costs incurred by the PR, including attorney's fees, and the Petition for Settlement and Proposal for Distribution approved subject to the further award of fees and costs to the PR in accordance with the terms of the will, and the case remanded and orders vacated insofar as they are inconsistent with the foregoing. The case should be remanded for final accounting/settlement and distribution of remaining assets.

[Signature Page to Follow]

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September 26, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

**APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS**

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

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.

CERTIFICATE OF COUNSEL

Counsel for the Appellant-Respondent certifies that the Reply Brief of
Appellant-Respondent complies with Rule 211(b).

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THE STATE OF SOUTH CAROLINA
In the 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

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VIII. Did the Court below err in failing to find that the Personal Representative did not settle and distribute the Estate in compliance with S.C. Code Section 62-3-703?

Statement of the Case

This is a case in which the Appellant/Personal Representative of the Estate of Marion M. Kay, who is a member of the South Carolina Bar, drew a Will for an aged friend and gave himself vast powers to administer her estate. He then used those powers to maximize his fees from the Estate and tried to get the heirs to sign off on his administration without revealing to them that he had already paid himself \$ 93,775 and was seeking to boost that to \$ 102,222. When the present Cross-Appellants raised questions, he sent them a letter inviting them to send the Probate Court a letter seeking a hearing to review his administration, and they did this.

The probate judge found that this was not a complex estate but that the PR had unnecessarily complicated it by unilaterally converting an 8 month option to purchase all the Estate's interest in a farm into an indefinite option to purchase part of the farm and by filing an unnecessary suit to partition the estate when a deed of distribution was all that was required. The partition action, which featured the PR's attempts to impose the drawing of property lines as he thought best, became contested. The PR spent vast quantities of paralegal time to value the Estate's personalty, despite the fact that there was no controversy over to whom the personalty was to go and the Estate was not taxable. The PR, who began charging the Estate before the testatrix died, also charged for putting the Estate files back in order after he had disorganized them. The court below found that the PR's actions did not benefit the heirs, but increased the PR's commissions.

When he was questioned about the basis for his substantial charges, the PR said that he did not base his charges on concrete factors but rather charged what he thought he was due. The probate judge referred to this as pulling numbers out of the air. The judge

required the PR to refund \$ 43,475 (which he has not done) and denied extra compensation. The judge did not make factual findings justifying the elevated level of compensation he allowed.

Both sides appealed to the Court of Common Pleas, but the Honorable Frank R. Addy, Jr. denied relief to both sides. This appeal timely followed.

Argument

I. The Court below erred in finding that the Personal Representative has acted in good faith in his handling of the Estate and awarding him a large fee, because this is contrary to the Court's factual findings, the law and the evidence. (Issues I, II and III)

In his Order below, the Honorable Donald B. Hocker, Associate Probate Judge for Laurens County, found that the Personal Representative (PR) had not acted in bad faith (Final Order #16, R. p. 10) and was entitled to a fee of \$ 51,300 (Final Order #14, R. p. 10). These findings are contrary to the evidence before him and to his own factual findings.

The Addendum to Response of Appellants (R. pp. 1414-27) contains a detailed analysis of the evidence proving the Personal Representative's violation of his fiduciary duty to the Estate. There are multiple instances of the PR's increasing the complexity of what should have been a simple estate in order to increase his commissions. The judge below found that the PR unnecessarily complicated the Estate by changing the Will's provisions concerning an option (Final Order # 3, R. p. 8). He found that the PR unnecessarily sold real estate in the Estate and noted that this generated proceeds for the PR. (Final Order # 4, R. p. 8) He found that the PR unnecessarily complicated the Estate by filing a partition action instead of just issuing a deed of distribution as he should have (Final Order #3, R. p. 8), even though no heir was pushing for partition .

The Testatrix (whose Will was drafted by the PR) made a detailed Memorandum of Personal Effects (R. p. 71, lines 22-24; p. 72, lines 15-17) and labeled many items to show who was to get what (R. p. 72, line 18- p. 73, line 7). The Estate was plainly not taxable (R. 707), and there were no disputes about the ownership or distribution of the Estate's personalty. Despite this, the PR used 204.6 hours of paralegal time from his law firm (Final Order # 17, R. pp. 10-11) to value the personalty. Plainly, the point of this was to boost the value of the Estate and thereby boost his commission. See S.C. Code Section 62-3-719.

Not content to wait until the Will he drafted went into effect, the PR began charging the Estate before the Testatrix died and before he was appointed PR (Final Order #5, R. pp. 8-9). This is not the only odd charge. He billed the Estate for 3.3 hours spent preparing and summarizing all the decedent's documents (Ex. D, R. p. 734). Three years after his appointment he charged the Estate for 6.9 hours to "Put file back in order." (Invoice dated August 17, 2010, R. p. 777) The PR had relatives living in Laurens County, and he charged the Estate for 23 trips there from Columbia (R. pp. 828-9), far more than administering the Estate required.

These are but some of the shocking charges the PR made against the Estate, but even by themselves they add up to a pattern of bilking the Estate with any charge he can think of. This was a garden variety non-taxable Estate where the Testatrix died testate with a clear Will (Final Order # 2 and # 7, R. pp. 8, 9). It should not have been complicated or expensive to settle, but the PR attempted to charge the Estate \$ 102,222 for his services (Final Order, p. 1, R. p. 7), and secretly (Final Order # 9, R. p. 9) paid himself \$ 93,775 before Respondents demanded a hearing to find out what he was up to, including giving himself at an early stage \$ 60,000 worth of stocks and bonds owned by the Estate (R. p. 316, lines 3-21), the value of which had been rising. At the hearing he claimed that special factors justified the charges. Judge Hocker found, "Although the PR

argued the existence of novel issues regarding the real estate, I do not find any.” (Final Order # 7, R. p. 9) The judge ordered him to return \$ 42,475 to the Estate (Final Order # 14, R. p. 10), but he has refused to do this.

While the judge reduced the PR’s fees to \$ 51,300 (Final Order #14, R. pp. 9-10), that was 10% of the Estate (using the inflated personalty valuation numbers) and there were no findings justifying this compensation exceeding the usual 5% as suggested by S.C. Code Section 62-3-703 (assuming that the PR was entitled to any fee). This was despite a finding that the PR’s charges to the Estate had no legitimate basis and were the product of “pulling a figure out of the air.” (Final Order #8, R. p. 9).

Under the statute, the judge was required to find “extraordinary services” to award more than 5%, but no such finding was made. Given the PR’s looting of the Estate, he was not entitled to even a 5% fee. The Court’s award of this baseless and excessive PR commission was an abuse of discretion. Even the PR in his Grounds for Appeal to the Court of Common Pleas (p. 38, R. p. 1258) admitted that “The Court uses a ten percent compromise without explanation for arrival at that amount.”

It must be noted that the PR is a member of the S.C. Bar and is held to a higher standard of conduct. (See Rule 1.8(c) of the S.C. Rules of Professional Conduct concerning lawyers preparing instruments to benefit themselves.) It is thus all the more startling that Judge Hocker found, “The PR failed to provide any legitimate basis for the fees he claimed....” (Final Order, # 8, R. p. 9) Through his efforts, his law firm was awarded \$ 25,806.38 (Final Order #17, R. pp. 10-11) for unnecessary work, including \$ 7441.57 (Final Order, p. 1(g), R. p. 13) for work on what the Court found to be an unnecessary partition action (Final Order # 2 and #4, R. p. 8). In addition, “[T]he Court questions the necessity of 204.6 hours of paralegal time....” (Final Order # 17, R. pp. 10-11) But it was this unnecessary paralegal time which produced the very personalty values the judge used in computing the value of the Estate and then the PR’s commission.

The PR failed to prove the hours he claimed (Final Order # 1, R. p. 8) and the necessity of most of the hours he claimed. (Final Order # 1, R. p. 8). He unnecessarily complicated the Estate (Final Order # 2 and # 3, R. p. 8), and “The commissions sought by the PR are clearly excessive....” (Final Order # 13, R. p. 10) None of this adds up to good faith or the basis for a commission.

II. The Court below erred by not requiring the Personal Representative to pay the costs associated with his personal appeals, including post-judgment interest, court costs and attorney fees. (Issue IV)

In denying the PR’s request for attorney fees, the Court below found that the PR’s actions in court were for his own personal benefit and not for the benefit of the Estate. (Final Order #19, R. p. 11 and # 5 on p. 6, R. p. 12; Order Disposing of Post-Trial Motions, R. pp. 16-18) It is therefore grossly unfair for the heirs to pay for the PR’s attempts to increase his compensation and further obscure his wrongdoing. See *Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007) and *Darby v. Furman Co., Inc.*, 334 S.C. 343, 513 S.E.2d 848 (1999). A personal representative is a fiduciary of the Estate, *Ex Parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 838 (Ct. App. 2009). If the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that. See *In the Matter of Hanna*, 301 S.C. 310, 391 S.E.2d 728 (1990).

III. The Court below erred by omitting to rule on the significance of the written agreement of three of the heirs to limit the amount they receive from the Estate. (Issue V)

At the request of the PR, three of the heirs signed statements for filing stating that they were satisfied with the distribution he proposed, which awarded him commissions far in excess of what the Court below awarded. It is the position of the Respondents this should be treated as an admission against their interest and that those heirs thereby

waived their right to receive more from the Estate and are estopped to claim more. That portion of the Estate which they have waived should be returned to the Estate to be distributed to Respondents. Among other things, this would defray the Respondents' costs of appeal, especially if the PR is not made to bear these costs. It would be inequitable for the settling heirs to receive the benefits of the appeal without participating in its costs. (See Final Order #4, p. 6, R. p. 12; Order of Judge Addy dated August 20, 2013 R. p. 19); Motion to Alter, Amend or Rehear Tr. 1566; Order of Judge Addy dated September 30, 2013, R. p. 21.)

IV. The Court below erred by improperly and inconsistently limiting the compensation for counsel for Cross-Appellants Brown and Moses based upon an error of law. (Issue VI)

The Court below recognized that all the heirs benefitted from the work of the undersigned and that the Estate should pay for his services. (Final Order #4, p. 6, R. p. 12) This finding dealt with the undersigned's work through the hearing. This in turn necessitated a post-trial motion seeking further compensation for work after the hearing. In his Order Disposing of Post-Trial Motions (R. pp. 16- 18), Judge Hocker found that he could not award the undersigned attorney fees as a matter of law in that "the Common Fund Doctrine does not apply because no extra assets were generated for the Estate." (P. 3 of order, R. p. 18) This is an error of law.

In its Final Order (#4 under Conclusions of Law, R. p. 12), the Court below stated that its award was for both preserving and protecting the common fund. This is consistent with *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). Defending against the PR's post-trial assaults on the order continued to preserve and protect the common fund and should be compensated. It is also true that the Court below abused its discretion, even under its restrictive reading of the law, in not awarding the undersigned compensation for drafting the proposed order for the Court, including the extensive

discussions which accompanied that.

V. The Court below erred in granting the Personal Representative equitable relief, because he came before the Court with Unclean Hands. (Issue VII)

Much of the relief awarded by the Court below to the PR was in equity. See *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 13 (Ct. App. 1988). The Clean Hands Doctrine is therefore relevant: "Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Associates*, 340 S.C. 98, 107, 531 S.E.2d 287, n. 2 (2000).

The Court below made numerous findings detailing how the PR consistently sacrificed the interests of the Estate in favor of his own unjust enrichment. He is held to a higher standard, both because he is a member of the Bar and because he is a fiduciary. He is not entitled to any fee and should be required to disgorge the grossly inflated fee he has already received. See *In the Matter of James*, 267 S.C. 474, 229 S.E.2d 594 (1976).

VI. The Court below erred in failing to find that the Personal Representative did not settle and distribute the Estate in compliance with S.C. Code Section 62-3-703. (Issue VIII)

S.C. Code Section 62-3-703 states

A personal representative is a fiduciary.... A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of the probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the Will, and any order in proceedings to which he is a party for the best interests of successors to the estate.

The Final Order (R. p. 6) in this case reads like an indictment of the PR, and the undersigned also requests this Court to review his Addendum to Response of Appellants (R. pp. 1414-27), which summarizes the evidence of the PR's misdeeds. Despite its

findings that the PR consistently benefitted himself to the detriment of the Estate, the Court below failed to draw the conclusion called for by its own factual findings that the PR had not fulfilled his obligations under Code Section 62-3-703. Instead, without proper factual findings, the Court below rewarded the PR's malfeasance with a fee of \$ 51,300 (Final Order # 14, R. p. 10) or 10% of the Estate (Final Order # 11, R. pp. 9-10) as inflated by the PR. It made no effort to justify this excessive fee, as even the PR acknowledged: "The Court uses a ten per cent compromise without explanation for arrival at this amount.") (Personal Representative's Grounds for Appeal, R. p. 1258) Having found that the PR inflated his fee by performing unnecessary work and inflating the value of the Estate's personalty, the judge then used these inflated numbers to reward the PR for his "service". This is an abuse of discretion.

CONCLUSION

The Personal Representative is not entitled to any relief. Instead, he should be forced to disgorge the money he has already received with post-judgment interest, and he should be required to pay the costs and attorney fees of Respondents/Cross-Appellants. The three heirs who filed statements with the Court limiting their recovery should have their recovery limited to those amounts. Counsel for Respondents/Cross-Appellants should be fully compensated for his work in this case. The PR should bear all costs associated with the appeal, including the attorney fees for Respondents/Cross-Appellants' counsel, the amount of which should be determined on remand.

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September 15, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

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

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.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Circuit Court err in affirming the Probate Court's decision that the Personal Representative's good faith efforts to settle the estate, his exemplary credentials and good standing in the Bar, his excellent work in securing a sales price for real estate, and approval by beneficiaries support an award of compensation for services rendered as intended by the will?
- II. Did the Circuit Court err in affirming the Probate Court's decision to award the PR compensation for services rendered as intended by the will because the findings of the Probate Court offered by Brown and Moses to negate the award were not supported by the evidence and applicable law?
- III. Did the Circuit Court err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all costs associated with the appeal or post-judgment interest?
- IV. Did the Circuit Court err in affirming the Probate Court's decision to limit its award of legal fees to counsel for Brown and Moses?
- V. Did the Circuit Court err in not addressing the effect of the PR's settlement with three beneficiaries which was not properly before the Court?

INTRODUCTION

This case involves rulings by the Probate Court and Circuit Court on appeal related to compensation of the Personal Representative (PR), the costs of the proceeding and appeals, awards or denials of attorney's fees and Respondents-Appellants Brown and Moses attempts to raise some issues on appeal not properly raised below.

Respondents-Appellants Martha Brown and Mary Moses were bitterly disappointed when they learned they did not inherit the entire estate of Marion M. Kay. (See, R. p. 74, Line 19 – p. 75, Line 21); (R. P. 343, Line 22 – p. 344, Line 13); (PR Exhibit C-3; R. p. 561, Item 9). Ms. Kay chose to leave half of her estate to her church and its Cemetery Fund (25% to Lisbon Presbyterian Church and 25% to its Cemetery Fund), 10% to a retirement community center, The Presbyterian Home of South Carolina, and 10% each to her step-grandchildren Bart Heard and Marla Orias. Brown and Moses were also each named as 10% beneficiaries. Ms. Kay also granted an option on real estate to a neighbor, Charles Copeland. (See, PR Exhibit B; R. p. 554, Item IV). This case is about the disputed claims to Ms. Kay's property, the efforts of the PR to sort out these claims and carry out Ms. Kay's testamentary intent, and the amount of compensation as provided by the will to be paid to the PR for his successful efforts.

Ms. Kay owned a ½ undivided interest in a 330 acre tract in Mountville, SC (the "Farm"). (See, PR Exhibit C-17, Supplemental Inventory and Appraisement; R. pp. 707-712). Brown and Moses together owned the other ½ undivided

interest.¹ (See, PR Exhibit C-1; R. p. 560, Item 1). Upon learning of the testamentary intent of Ms. Kay, Brown and Moses made various claims relating to the Farm, including first refusal rights, that Ms. Kay had no right to leave her interest in the Farm to anyone other than them, and a claim for an unspecified five acres in the Farm that allegedly were due to be given to Brown. (See, R. p. 74, Line 19 - p. 75, Line 21); (PR Exhibit C-1, R. p. 561, Item 10). During the administration of the Estate, Brown and Moses resisted the good faith efforts of the PR when he attempted to carry out the testamentary intent of Ms. Kay to divide the Farm and liquidate and distribute proceeds to all of the Estate beneficiaries. (See, R. p. 74, Line 19 - p. 79, Line 11); (R. p. 97, Line 14 - p. 102, Line 22). The resistance of Brown and Moses was time consuming and costly to the Estate.² To try and resolve the competing interests and clear title to the property, the PR initiated a declaratory judgment action including a claim to partition the disputed Farm. The PR was ultimately able to resolve the various claims to the Estate's interest in the Farm and sell the Estate's interest at an outstanding price (approximately 94% of the 2007 appraised value though sold in the post-economic crash of real estate values) so that the proceeds could be

¹ The ownership of the Farm was actually listed in the register of deeds and county records as "Marion M. Kay and The Heirs of W.H. Milam." Brown and Moses claim their interest as the heirs of W.H. Milam. (See, PR Exhibit C-1; R. p. 560, Paragraph 1).

² The PR sent a letter to Brown and Moses on May 2, 2008 outlining a compromise proposal. (See, PR Exhibit C-11; R. pp. 632-633). The Estate had been opened less than 1 year. The amount of PR compensation paid through December 31, 2007 was \$7,500. Attorney's fees paid through December 31, 2007 were \$12,196.

distributed to the estate beneficiaries. (See, R. p. 222, Lines 5-15 and R. p. 233, Lines 14-24).

Upon the PR's filing of the Petition for Settlement, Brown and Moses requested a hearing. The hearing(s) resulted in the Probate Court finding that the PR should not have pursued liquidation of the Farm and other real estate and simply deeded the property to the estate beneficiaries, despite the powers granted to the PR by the will and statutory provisions and the desires of at least 70% of the residual interests in the Estate. Based on this finding, the Court ordered the PR to refund approximately \$40,000 of compensation and denied his request for fees in preparing for and attending the hearing(s) and his request for reimbursement of expenses relating to the hearing(s), including legal fees and expert witness fees. The Court also ruled that counsel for Brown and Moses was entitled to be paid \$19,860 in legal fees from the Estate pursuant to the Common Fund Doctrine. After a hearing on the PR's Rule 59 motion (R. pp. 906-968), the Court ordered Brown and Moses to pay one-half of the transcript costs incurred during the litigation. The net gain to Brown and Moses from the litigation based on the Court's orders is approximately \$1,000 each.

The PR appealed the orders of the Probate Court as well as the orders of the Circuit Court affirming the Probate Court. This Respondent's Brief of Appellant-Respondent is offered in the cross appeal of Brown and Moses.

STATEMENT OF THE CASE

Marion M. Kay died on May 3, 2007. On November 12, 2010, the PR, Edward D. Sullivan, filed a Petition for Settlement and a Proposal for Distribution. Counsel for Martha Brown and Mary Moses, each 1/10 residual beneficiaries and defendants in the aforementioned litigation wrote a letter to the Probate Court requesting a hearing. No pleadings were filed other than the PR's Petition for Settlement.

Hearings were held on February 2, 2011 and February 21, 2011. At the hearing, the PR testified as to the complexity of the issues confronted in the administration, the hours he had devoted to the administration, the results achieved, and his method for the determination of his compensation. The PR based his compensation on several factors, including his time, billing rate, the issues confronted, the work involved, his relationship with Ms. Kay, and the results achieved. The PR also presented the estate inventory and accountings, invoices for legal fees and expenses, and addressed questions and provided explanations about the amount of and need for the charges, including the miscellaneous charges by the Collins and Lacy Law Firm ("Law Firm") questioned by Brown and Moses that were offset by more than \$20,000 in discounts and charge-offs, and the hours of the PR that were reflected in the invoices but not charged as legal fees.

The hearings resulted in the Probate Court's order ruling that (1) the PR is entitled to a reasonable fee of \$51,300, which equated to about 10% of the Estate value; (2) the PR is to refund to the Estate within 30 days the amount paid

in excess of \$51,300, that amount being \$42,475 or, if the PR completed the settlement, \$39,975, reflecting additional compensation of \$2,500 for winding up the Estate, (See, Final Order, R. p. 10, Paragraph 14); (R. p. 13, Items a) and b); (3) the PR is not entitled to compensation for preparing for and attending the hearing and additional services, or reimbursement of legal fees and witness fees; and (4) counsel for Brown and Moses is entitled to be paid \$19,860 by the Estate pursuant to the Common Fund Doctrine. (Final Order, R. p. 11, Paragraph 21); (R. p. 13, Item e).

Thereafter, the PR timely 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.³ After a hearing on the Rule 59 motion, the Court upheld its earlier decision and declined to re-open the record to allow in certain timesheets offered by the PR as well as allow testimony or an Affidavit of Teri Stomski, an attorney who had earlier counseled the PR on the wisdom of filing a partition action due to title issues regarding the Estate Property. The Court further denied a claim brought by Brown and Moses for an interest in an unspecified five acres of the Farm owned by the Estate; denied additional legal fees sought by Brown and Moses and ordered that Brown and Moses be responsible for one-half of the Court reporter costs. (See, Order Disposing of Post-Trial Motions; R. pp. 16-18).

³ Counsel for Brown and Moses simultaneously appealed and thereafter the PR, in an abundance of caution, cross-appealed to preserve his rights to an appeal. These appeals were later dismissed so that the Probate Court could entertain the PR's timely filed Rule 59 motion.

The PR and Brown and Moses filed Grounds for Appeal pursuant to statute. A hearing was held in the Circuit Court on July 19, 2013 resulting in the two Orders of the Probate Court being affirmed. (See, Order dated August 20, 2013; R. pp. 19-20). Brown and Moses filed a Rule 59 Motion for Rehearing. The motion was denied. (See, Order dated September 30, 2013; R. pp. 21-22).

The PR timely filed and served his notice of appeal in this matter on or about October 24, 2013. He later timely filed and served an amended notice of appeal on October 30, 2013. Brown and Moses served a notice of cross-appeal on October 29, 2013.

A more comprehensive Statement of the Case is set forth in the Brief of Appellant-Respondent in his appeal and is incorporated herein by reference in its entirety.

STATEMENT OF FACTS

A more comprehensive Statement of the Case is set forth in the Brief of Appellant-Respondent in his appeal and is incorporated herein by reference in its entirety.

STANDARD OF REVIEW

"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." University of Southern California v Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the Appellate Court must look to the essential character of the cause of action alleged by the petitioners below. Dean v Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993). "An action in accounting sounds in equity." Morris v Tidewater Land & Timber, Inc., 388 S.C. 317, 696 S.E.2d 599 (S.C. App. 2010) citing Historic Charleston Holdings, LLC v Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009).

The Appellate Court is free to decide questions of law with no particular deference to the lower court. Moriarty v Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Furthermore, the interpretation of a statute is a question of law, which is reviewed *de novo*. Layman v State, 376 S.C. 434, 444 658 S.E.2d 320, 325 (2008).

ARGUMENT

As a matter of law, PR's are given both specific and general authorities in the administration of Estates. See, generally, S.C. Code Ann. § 62-1-100, et seq., and more specifically, S.C. Code Ann. § 62-3-715. (Transactions authorized for personal representatives) and S. C. Code Ann. § 62-3-911 (allowing partition actions by a PR where two or more persons would have undivided interests in real property). The failure to recognize and give weight to those authorities is an error of law.

- I. **The Circuit Court did not err in affirming the Probate Court's decision that the Personal Representative was entitled to compensation for services rendered as intended by the will because the Personal Representative used his good faith efforts to settle the Estate, is well qualified, achieved an excellent sales price for the real estate, and his amount of compensation was approved by beneficiaries.**

Item V(3) of Ms. Kay's will provides "For [his] services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses. (See, PR Exhibit B; R. p. 555). Reasonable compensation should be determined by an analysis of various factors such as the law relating to legal fees in South Carolina. See, Rule 1.4, RPC, Roy 407, SCAR. Also See, Layman, supra. Other jurisdictions have used such factors as the law pertaining to compensation for personal representative. See, for example, Fla. Stat. § 733.617 (1973).

In this case, the Probate Court made specific findings supporting an award of reasonable compensation of \$51,300 despite his disagreement with PR's actions to liquidate the estate based on the PR's understanding of Ms. Kay's intent and the desire of 70% of the residuary interests. These findings include (1)

the outstanding result in the sale of real estate (May 24, 2011 Order; R. p. 9, Paragraph 6); (2) the approval of beneficiaries (R. p. 10, Paragraph 14); (3) the exemplary credentials of the PR (R. p. 10, Paragraph 15); and (4) the good faith efforts of the PR (R. p. 10, Paragraph 16). There is substantial evidence in the Record to support the Probate Court's award of fees.⁴

The evidence is clear and well supported factually in the Record that the PR acted in good faith. He sought and relied upon legal counsel and other advisors. (See, PR Exhibit C-3; R. p. 561, Paragraph 15 and R. p. 564, Paragraph 34-z); (R. p. 175, Line 23 - p. 176, Line 9); (R. p. 189, Lines 16-24); (R. p. 204, Lines 8-25). He attempted to address all claims to the real estate, first through negotiation and compromise and secondly by filing a partition/declaratory judgment action. (See, PR Exhibit C-11; R. pp. 632-633); (PR Exhibit C-12A; R. pp. 634-656); (PR Exhibit C-1; R. p. 562, Paragraph 23). At his request, his legal counsel reduced their normal billing rates. (R. p. 93, Lines 14-22). He also requested and received substantial discounts to legal fees incurred. (R. p. 94, Line 15 - p. 65, Line 7).

Likewise, the PR achieved what two expert witnesses stated to be an outstanding result in the sale of the real estate and performed numerous tasks to enhance the value of the Estate. The PR showed the property. He negotiated with the Purchaser who paid approximately 94% of the fair market value of the property, most of which was for a one-half undivided interest. (See, PR Exhibit

⁴ Appellant has argued in his own brief why the award should be increased but here merely responds to Respondents-Appellants' arguments for a decrease in the fee.

C-1; R. p. 563, Paragraphs 29 and 30). Based on those negotiations, he received an excellent price in the opinion of experts. (R. p. 222, Lines 5-15; R. p. 233, Lines 14-24). A licensed real estate broker, he did not charge a sales commission. (R. p. 107, Lines 13-25); (R. p. 108; Line 20 – p. 109, Line 16). The PR's efforts to liquidate the sale were desired by no less than 70% of the residuary beneficiaries of the Estate, including Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard; (See, PR Exhibit C-9; R. pp. 630-631); (R. p. 78, Lines 12-22); (R. p. 133, Line 2 – p. 135, Line 10); (R. p. 243, Line 12 - p. 244, Line 2); (Brief of Appellant-Respondent at Pages 9, 35-37).

Finally, the Probate Court determined that the PR has "exemplary credentials and good standing in the Bar". (See, Final Order of Judge Hocker dated May 24, 2011; R. p. 10, Paragraph 15). The Record shows he is an attorney with more than 25 years experience practicing law, a Certified Public Accountant, has a Master of Accountancy degree and an LL.M. Taxation degree. (See, PR Exhibit A; R. pp. 548-549).

For these reasons, the Court did not err in affirming that the PR is entitled to compensation as provided by Ms. Kay's will and argued in the PR's appeal, the fees allowed should be increased not decreased.

Respondents-Appellants erroneously rely on S.C. Code Ann. § 62-3-719(a) as serving to limit the compensation to five (5%) percent. Such reliance is misplaced. S.C. Code Ann. § 62-3-719(c) provides that "[t]he provisions of this section do not apply . . . where the will otherwise directs . . ." In this case, the will does otherwise direct and provides "the individual personal representative shall

receive reasonable compensation for the services rendered and reimbursement for reasonable expenses.” (Emphasis added) Since the will “otherwise directs”, the 5% limitation of Section (a) does not apply.

Nevertheless, assuming arguendo, that Section (a) did apply, even that provision expressly authorizes the Court to approve greater amounts for extraordinary services– which the Probate Court in this instance obviously elected to do based on the aforementioned factors of outstanding result, approval by beneficiaries and exemplary credentials of the PR, and despite its disagreement with the efforts of the PR to liquidate the Estate and distribute the proceeds in the manner specifically allowed by law (e.g. filing of a partition action).

The Respondents-Appellants make reference to the “unclean hands doctrine”. This issue was not ruled upon in the Lower Courts. In any event, the unclean hands doctrine does not apply because the Probate Court affirmed by the Circuit Court made a finding that the PR did not act in bad faith.

- II. The Circuit Court did not err in affirming the Probate Court’s decision to award the Personal Representative compensation for services rendered as intended by the will because the findings of the Probate Court offered by Brown and Moses to negate the award are not supported by the evidence and applicable law.**

The Probate Court’s findings upon which the Court based its ruling to reduce the PR’s compensation from \$93,775 to \$51,300 and now relied upon by Brown and Moses seeking to further reduce an award of reasonable compensation are not supported by the evidence and applicable law. The evidence does in fact support the number of hours claimed, the necessity for the hours, the desire of the beneficiaries to partition the property, complexity of the

issues, including the option to purchase and the right of first refusal, and the number of draws and method used by the PR to determine reasonable compensation, all more fully discussed in Appellant's Brief in support of the PR's appeal.

As to Item 5 of the Court's order, the "Court does not understand why the PR began charging the Estate before the Testatrix died on May 3, 2007 and before he was appointed PR on May 16, 2007," the PR explained that the one four (4) hour charge consisted of services rendered on behalf of Ms. Kay 3 days before she died and was related to a Power of Attorney for Ms. Kay. A file could have been opened for this matter and a claim made against the estate and the effect would have been the same. It should be noted that the charges of Law Firm, overall, were discounted by more than \$20,000 so the net effect was that the entry was not material to any aspect of the PR's fees.

Respondents-Appellants argue in their brief that they did not have knowledge of the PR's fees until he filed his Petition and suggest by innuendo that some accounting or report should have been earlier provided. However, S.C. Code Ann. § 62-3-704(d) and S.C. Code Ann. § 62-3-1001 do not require interim accountings. The final accounting was extended by the Probate Court pending the sale of the real estate. (See, R. p. 184, Line 22 - p. 185, Line 10). All disclosures were timely made and in total compliance with the Probate Code.⁵

⁵ Item 10 of the Order seems to take issue with math related to the Supplemental Inventory. The difference is simply that the Supplemental Inventory values the real estate at its fair market value based on the appraisals rather than sales proceeds. In addition, the Inventory, which is a valuation at date of death, does not include additional income that came into the Estate after the date of death.

Brown and Moses repeatedly misstate and mischaracterize the record. The PR did not bill the Estate for 3.3 hours spent preparing and summarizing all the decedent's documents. An item appears on the Law Firm invoices for another law firm employee. To the extent this item is contestable, it is more than offset by \$20,000 in discounts requested and received from the Law Firm by the PR. Again, the PR did not charge the Estate 6.9 hours for "putting the Estate files back in order"; it was a Law Firm employee who performed this task. Again this charge was more than absorbed by the discounts. The trips to Laurens are all accounted for and explained as noted in the exhibits offered at trial. (See, PR Exhibit D; R. pp. 729-795); (See also, PR's testimony; R. p. 177, Line 22 - p. 181, Line 13).

The Appellant-Respondent contends the Probate Court abused its discretion in making these findings now cited by Brown and Moses to reduce the compensation of the PR and that in many instances there is no evidence to support the conclusion.

The Court was controlled by errors of law in its misinterpretation and misapplication of S.C. Code Ann. § 62-1-102 pertaining to discovering and making effective the intent of decedent, S.C. Code Ann. § 62-3-719, pertaining to compensation of personal representatives and S.C. Code Ann. § 62-3-720, pertaining to reimbursement of personal representatives for expenses as well as the express provisions of Ms. Kay's will providing for reasonable compensation and reimbursement for reasonable expenses, and failing to recognize that S.C. Code Ann. § 62-3-911 expressly allowed for the filing of a partition action.

Accordingly, the Circuit Court did not err in affirming an award of compensation to the PR to the extent that the Court did not give weight to the aforementioned erroneous Probate Court findings which are not supported by the evidence and were controlled by errors of law. Again, while the PR has argued on appeal that the compensation should be increased, the Circuit Court had substantial evidence to allow the fees and costs found by the Probate Court to be appropriate to stand and be affirmed.

III. The Circuit Court did not err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all costs associated with the appeal or post-judgment interest.

The Probate Court properly required Brown and Moses to pay a portion of the cost pursuant to its plenary powers. The Circuit Court did not err in affirming the Probate Court's decision denying the request of Brown and Moses to order the PR to pay all of the costs. On the other hand, the Court's ruling to deny a recovery of legal fees and costs by the PR was improper because both the will and statutory law provide for such recovery by the PR. Item V (3) of the will provides that the PR "shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." In addition, S.C. Code Ann. § 62-3-720 provides "[I]f any personal representative or person nominated as personal representative defends or prosecutes any 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." (See, Brief of Appellant-Respondent at Pages 38-39).

Post-judgment interest was not raised in the Respondents-Appellants' Grounds for Appeal.

IV. The Circuit Court did not err in affirming the Probate Court's decision to limit its award of legal fees to counsel for Brown and Moses.

"It is recognized generally by the Courts that the allowance of counsel fees from a fund is capable of great abuse, and should be exercised with the most jealous caution and circumspection with regard to the rights of litigants, lest thereby the administration of justice be brought into reproach." Johnson v Williams, 196 S.C. 528, 14 S.E.2d 21 (1941). "Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* citing Sprague v Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 184 (1939). The Court did not err in denying the request of Brown and Moses for legal fees beyond that already awarded because the amount awarded is nearly 50% of the "common fund." As such the amount already awarded by the Court, \$19,860, exceeds a "reasonable fee." More important, however, is that Brown and Moses are not similarly situated and in fact their interests conflict with the other beneficiaries because during the litigation they sought to take 5 acres or the monetary equivalent from the Estate. In addition, beneficiary Bart Heard was represented by counsel during some of the proceedings. (See, R. p. 379, Lines 16-19). Penny Arnold, Director of Charitable Foundations and Church Relations with The Presbyterian Home of South Carolina and Heard testified in support of the PR's efforts and compensation paid. (R. p. 133, Line 23 - p. 135, Line 10); (R p. 132, Line 24 - p. 135, Line 10); (R. p. 246, Lines 1-25); (Brief of Appellant-Respondent at Page 27). This is not a case where members of a general class "stood aloof and without counsel". See, Johnson at 193. Also, as noted by Brown and Moses, three of the beneficiaries have reached a settlement with the

PR. (See, Section VI, infra). Therefore, the Common Fund Doctrine is not applicable in this case.

Lastly, because the Court below erred in ordering a refund of compensation from the PR, there should not be a common fund and therefore **no** fees awarded to Brown and Moses. (See, Brief of Appellant-Respondent, Argument VI at Page 40).

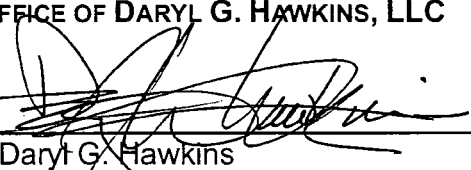
V. The Circuit Court did not err in not addressing the effect of the PR's settlement with three beneficiaries as this issue is not properly before Court.

Brown and Moses raise for the first time on appeal the issue of the PR's settlement with three beneficiaries (Heard, Orias, and The Presbyterian Home) post-trial. After the litigation was initiated and long after the present appeals had been noticed, these parties essentially agreed to a settlement and distribution as outlined in a Petition for Settlement and waiving further claims against each other. This settlement was not before the Courts below so the Lower Courts did not err in addressing the effect of the settlement on the distribution of the Estate. Nevertheless, the effect of the proposal settlement with the three beneficiaries certainly does not benefit Brown and Moses. Rather, the settlement is for the benefit of the PR and the other three respective parties to the settlement, the purpose of which is to limit the risk of loss to the PR and the other three respective parties from the ongoing litigation pursued by Brown and Moses for little or no gain to themselves.

CONCLUSION

For the foregoing reasons, the orders below should be reversed to the extent they require a refund of compensation by the PR and deny payment for additional services to the Estate and reimbursement for the fees and costs incurred by the PR, and the Petition for Settlement and Proposal for Distribution approved subject to the further award of fees and costs to the PR in accordance with the terms of the will, and the case remanded and orders vacated insofar as they are inconsistent with the foregoing. The case should be remanded for final accounting/settlement and distribution of remaining assets.

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September 26, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2013-2319

APPEAL FROM LAURENS COUNTY
COURT OF COMMON PLEAS

RECEIVED

SEP 26 2014

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

SC Court of Appeals

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,

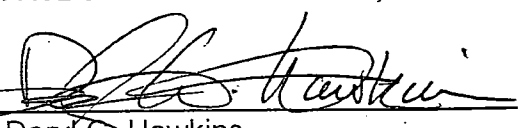
vs.

Martha Brown and Mary Moses Respondents-Appellants.

CERTIFICATE OF COUNSEL

Counsel for the Appellant-Respondent certifies that the Respondent's
Brief of Appellant-Respondent complies with Rule 211(b).

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September 26, 2014

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THE STATE OF SOUTH CAROLINA
In the 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

CROSS-APPELLANTS' /RESPONDENTS' FINAL REPLY BRIEF

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INTRODUCTION

This case involves the rectification of a Personal Representative's looting of a decedent's estate. It is all the more egregious because the PR is a member of the Bar and the author of the will he used to loot the estate.

In his Respondent's Initial Brief of Appellant-Respondent (hereinafter PR's Brief) at page 2, paragraph 2 the PR asserts that Ms. Brown and Ms. Moses were so bitterly disappointed with the Testatrix's will that they were unalterably opposed to any settlement; but the fact is that they did not make any effort to contest the PR's handling of the estate until his malevolent breach of his fiduciary duty became clear, and they consented to the sale of the Estate's interest in the farm to a legitimate buyer. This case is about the efforts of Cross-Appellants to unravel the PR's wrongdoing and to bring to light what he has tried to hide so that equity and justice could prevail.

Once the Cross-Appellants requested that the PR file for a hearing to justify his handling of the Estate, he was forced to disclose that he had paid himself \$ 93,775 for what the probate judge found to be an uncomplicated estate. When he was pressed to justify this, he revealed that he did not base his charges on his time or the amount of the Estate assets, but rather he gave himself what he in his discretion thought he was due. Ultimately, the probate judge, while not finding bad faith, determined that the PR's charges were clearly excessive and had no legitimate basis. As a result, he ordered the PR to return \$ 42,475 to the Estate (which the PR has refused to do) and awarded Cross-Appellants' counsel a fee pursuant to the common fund doctrine.

Cross-Appellants' are appealing the large fee the PR was awarded and seeking post-trial compensation for their attorney. The probate judge determined that much of the PR's work was unnecessary, and he boosted the value of the Estate with what the probate judge found to be an unnecessary and expensive valuation of the personalty by paralegals in his law firm. This bloated value was then used by the probate judge to compute the PR's compensation. The probate judge did not state the basis for his award to the PR, and it is the position of Cross-Appellants that this award does not have a sufficient factual basis.

ARGUMENT

I. The courts below erred in granting the Personal Representative excessive compensation after findings negating a large award and a lack of findings supporting the award.

The PR points to the will's provision for reasonable compensation. The Final Order does not elucidate how the probate judge arrived at the large number he chose, and this number is without factual support. The PR has hunted through the Final Order to find anything he can to support his fee award and presents a meager list.

The first is the supposedly outstanding result in the sale of the real estate. This sale was made to a buyer sent to the PR by Cross-Appellant Mary Moses. The "outstanding result" was the sale of the property for \$ 24,000 less than its appraised value (Cf. Plaintiff's Ex. C-14 and C-17, R. pp. 669 and 707), so this finding is without sufficient factual support.

As to the approval of the beneficiaries factor, the PR has produced proof that only three of the beneficiaries having a total of 30% interest agreed with his proposed settlement, and one of these had been given substantial advances by the PR. The PR's oft-repeated assertion that 70% of the heirs approved his proposal is quite simply untrue. As the letter of Trinity Presbytery's attorney states (R. p. 630), in order for Lisbon Presbyterian Church to agree to the PR's proposal for dividing the Estate, there would have to be a congregational vote, and this has not occurred.

The "exemplary credentials" of the PR are irrelevant, because the PR hired others to do the legal and the accounting work. The probate judge found that the PR's assertion that there were novel issues was without basis (Final Order, # 7, R. p. 9), and the PR testified that there was very little legal work to be done on the Estate (R. p. 206, lines 6-7). In short, he did not use his "exemplary credentials" to advance the interests of the Estate, so they avail him not.

What that leaves is the PR's demand that he be paid \$ 51,300 plus \$ 13,447.05 (See Final Order, # 14, R. p. 10) for his supposed good faith. He wants to be paid \$ 64,747.05 more for a duty he already owed to the Estate. (See S.C. Code Section 62-3-703(a).) Perhaps we should call it a tip instead of payment for legitimate work.

The finding of good faith is on appeal, and with good reason. The courts below found that the PR failed to prove the existence and the necessity of the 468.6 hours he claimed to have worked (Final Order, para. 1, R. p. 8), that there were no novel issues supporting a large fee (Final Order # 7, R. p. 9) and that the PR's secret payments to himself (\$ 93,775) were "clearly excessive" (Final Order, #13, R. p. 10) and without a legitimate basis (Final Order, # 8, R. p. 9). It is an abuse of discretion to call this conduct good faith.

In attempting to justify his handling of the Estate, the PR makes the claim (PR's Brief, p. 4) that "The net gain to Brown and Moses from the litigation based on the Court's orders is approximately \$ 1000 each." This is another attempt of the PR to mislead the Court. In order to understand what the PR had done and to prevent its approval, Ms. Brown and Ms. Moses hired counsel who devoted a considerable amount of time to the case. They are obligated to pay their attorney for his efforts, and the Final Order offset their obligation by \$ 19,860 (Final Order, # 21, R. p. 11). There was nothing frivolous about their decision to call the PR to accounts.

The PR again misleads the Court on p. 14 of his Brief when he claims that "Brown and Moses are not similarly situated and in fact their interests conflict with the other beneficiaries because during the litigation they sought to take 5 acres or the monetary equivalent from the Estate." Only Ms. Brown made that claim, and she did not push it until the PR offered her a hearing to resolve all the issues with the Estate. Ms. Brown's claim is not a part of this appeal.

The PR also misleads the Court (PR's Brief, p. 3, para. 2) with his assertion that beneficiaries with interests in the residuary estate totaling 70% have agreed to this proposed distribution. He has provided documentation only that Heard, Orias and Presbyterian Home, who each have a 10% interest in the residuary estate, support his proposal. The PR never obtained the consent of Lisbon Presbyterian Church, so it was wise that later in his Brief he backed off his claim to have the agreement of 70% of the heirs for his proposed distribution (PR's Brief, pp. 14-15).

It is also worth noting that, having claimed a benefit in his briefs from his post-trial

settlement with Heard, Orias and Presbyterian Home, the PR has sought to block the inclusion of their acceptances of his offer into the appellate record. These documents are admissions against interest by those heirs and should be considered by whatever court determines the shares of the various heirs. The PR himself gave these documents to this Court as Exhibits F-1, F-2 and F-3 attached to his Return to Motion for Escrow of Funds (pp. 39-51).

The PR has also attempted to block the inclusion into the record of his letter inviting Ms. Brown and Ms. Moses to request a hearing and of their letter to the Probate Court in response accepting his offer. Both these letters were filed with the Probate Court and the latter document was filed with this Court by the PR as an attachment to his Return to Motion for Escrow of Funds (p. 37). They should be part of the appellate record. Though in his previous brief the PR states that the issue of his fees could not have been ruled on by the Probate Court because no petition was filed, in his Brief (p. 4) he refers to “the PR’s Petition for Settlement”.

II. The record supports the denial of fees and costs to the Personal Representative at trial and on appeal.

The PR tells this Court that “reasonable compensation” is what he says it is, and no judge should get between him and his pay check. Because the will does not define “reasonable compensation”, this is a matter for judicial construction by a court of Equity. The ultimate result should be well-supported by factual findings.

As both sides have observed, the probate judge did not set out his reasoning for giving the PR a large fee after making numerous findings supporting a conclusion that the PR was looting the Estate and violating his fiduciary duty. The judge denied an award of fees and costs to the PR, because he rightly found that the PR’s efforts at the hearing were directed toward benefitting himself rather than the Estate (Final Order, # 19 and Conclusions of Law # 5, R. pp. 11, 12).

III. The Circuit Court erred in affirming the Probate Court’s decision to limit its award of legal fees to counsel for Brown and Moses.

The probate judge awarded the undersigned a fee pursuant to *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) for his work to the end of the hearing. This case allows a fee to an

attorney whose efforts have led to the creation or preservation of a common fund. The common fund in this case is the \$ 42,475 in excess compensation which the PR was ordered to return to the Estate (although he has refused to do so). The PR has made repeated attempts (including this appeal) to destroy that common fund, but the undersigned has successfully preserved it after causing it to be brought into existence. He is entitled to be paid for his efforts.

It must be noted that the PR is not seeking to benefit the Estate. If he prevails, the Estate will not increase; the extra money will go into his pocket. If the Cross-Appellants prevail, the Estate will benefit. This is especially true if the Court directs that more money come from the PR's pocket. The PR's appeal is to benefit himself, and it is causing post-judgment interest which he and not the Estate should pay.

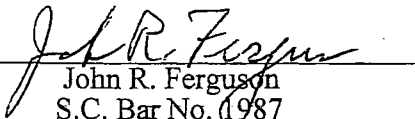
IV. The Circuit Court erred in failing to address the effect of the Personal Representative's settlement with three beneficiaries.

The PR has taken contradictory positions concerning his settlement with Bart Heard, Marla Orias and Presbyterian Home. On the one hand he claims a benefit from this, but on the other hand, he asserts that the Court cannot see the documents on which he bases his claim. These documents were filed by the Personal Representative multiple times, most recently as Exhibits F-1, F-2 and F-3 to his Appellant/Cross-Respondent's Return to Motion for Escrow of Funds filed with this Court. While it is true that they were generated after the Probate Court hearing, they constitute admissions against interest which the court considering division of the Estate must take into consideration, and the PR has waived any objection to their inclusion by his providing them to this Court.

CONCLUSION

The PR is not entitled to any of the relief he seeks, and his claims must be denied. The claims of the Cross-Appellants are well-supported by the record and should be granted.

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