

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LAURENS COUNTY  
Court of Common Pleas  
Frank R. Addy, Jr., Circuit Court Judge  
2016-002337

S.C. SUPREME COURT

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

v.

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

Appellate Case No. 2016-002337

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RETURN TO PETITIONER/RESPONDENT'S  
PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Questions Presented and Arguments	
I. 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. ....	1
II. The Court of appeals correctly did not accept the PR's attempt to increase his compensation. ....	2
III. The Court of Appeals did not err in upholding the Probate Court's ruling reducing the PR's compensation. ....	3
IV. The Court of Appeals was correct to use the Two-Judge Rule to affirm the lower courts' rulings reducing the PR's compensation. ....	4
V. The evidence shows that the lower courts correctly reduced the PR's fees. ....	5
Conclusion. ....	6

## ARGUMENTS

The Petitioner/Respondent is not entitled to the granting of his Petition for Writ of Certiorari. His arguments in support of his Petition are defective for the following reasons:

**I. 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.**

Petitioner has admitted that the hearing below was on his Petition for Settlement, which is to say the Respondents accepted his offer for that hearing. He never asked for any sort of pleadings from them and agreed to the hearing proceeding without such pleadings. He has therefore waived his right to assert that pleadings were required. As has been noted earlier, there was a lengthy pause in the middle of the hearing, so he had plenty of time to prepare for the issues raised and was not prejudiced.

Petitioner misapprehends the import of the rulings below. They do not hold that a single disgruntled beneficiary can inevitably cause personal expense for a PR by claiming that his fee is too much. This is a case where the probate judge gave the PR the benefit of every doubt and still found that he had overcharged by \$ 42,475.00. This is not a case of a PR being disadvantaged by judicial hairsplitting or a decision he could not have anticipated. The PR treated the Estate as his own personal piggy bank and suffered the consequences.

Petitioner tried to bolster his case by elevating a minor part of the hearing into a central factor. Ms. Brown- only one of the Respondents- was forced to assert her claim

for 5 acres by Petitioner's Petition for Settlement. This was a small side issue, as can be seen from the brief time her testimony on direct consumes in the transcript (R. 319, l. 19-329, l. 4) , and it is not a part of this appeal.

The Probate Court, the circuit court and the Court of Appeals all held that the PR was focused, both at the hearing and on appeal, with benefitting himself. After he had paid himself and found that his fees were under scrutiny, he hired experts to bail him out of trouble with such dubious opinions as one that selling property for less than its appraised value is an "extraordinary result". The Estate did not benefit from these efforts, so the PR was not entitled to reimbursement.

**II. The Court of Appeals correctly did not accept the PR's attempt to increase his compensation.**

The Petitioner correctly notes that "South Carolina lacks a definitive standard for assessing reasonable compensation for a personal representative when a will provides for 'reasonable compensation.'" (Petitioner/Respondent's Petition for a Writ of Certiorari, p. 12). What this ignores is that the Probate Court is a court of Equity, which means that it is supposed to have a great deal of discretion to determine fair compensation. Had the General Assembly desired to impose a statutory framework, it would have done so. Had the Testatrix here (whose Will was written by the PR) desired to define "reasonable compensation", presumably she would also have done so.

The fact that neither of these entities undertook to provide standards to determine reasonable compensation means that they left it up to the probate judge's discretion.

Even if this Court should think it wise to provide new standards, those standards would apply only prospectively.

The standards which the PR now urges are not what he argued to the probate judge in his testimony. There, he admitted that his charges were based on what he alone considered to be fair in the beginning of his work and that thereafter he began charging toward that goal (R. p. 174, ll. 14-24). The PR faults the probate judge for using S.C. Code Section 62-3-719 in the exercise of his discretion. While this is not wrong *per se*, it did fail to take into account how the PR's self-dealing prejudiced the Estate and the lack of any finding of extraordinary services as required by the statute.

**III. The Court of Appeals did not err in upholding the Probate Court's ruling reducing the PR's compensation.**

The Petitioner wrongfully attributes the lower courts' reduction of the PR's compensation only to a disagreement with his decision to file a partition action. This was just a part of the reason for the reduction, because it was only a part of the Court's finding that the PR had unnecessarily complicated the Estate to his benefit. Of greater importance was the finding of all the courts below that the Petitioner totally failed to prove that he was entitled to the extra compensation. He was the moving party in his Petition for Settlement, so the burden of proof was his.

Even assuming that the unnecessary partition action was a major part of the courts' decisions on compensation, Petitioner has confused his power to do something with the wisdom of doing it. (See R. p. 538, ll. 2-3). The bringing of the partition action

was just one more example of the PR's goal of doing things the hard way to maximize his compensation.

Even assuming that Lisbon Church could not have worked something out with its member, Mary Moses, and with her sister, Martha Brown, this does not mean that the best way to proceed was for the PR to hire his Columbia law firm to burn through a multitude of billable hours. S.C. Code Section 62-3-703(a) imposes on the PR a duty to act expeditiously and efficiently for the benefit of the Estate as a fiduciary. Bringing the partition action instead of allowing the beneficiaries to deal with this themselves violated that duty, especially after the PR poisoned the well for any negotiations by surprising the Respondents with some other heirs at what was supposed to have been a private meeting to work out a solution (R. p. 309, l. 5- 311, l. 7).

**IV. The Court of Appeals was correct to use the Two-Judge Rule to affirm the lower courts' rulings reducing the PR's compensation.**

While Respondents agree that the Court of Appeals erred in its application of the Two-Judge Rule to Respondents, that court correctly applied it as to Petitioner. Both the Probate Court and the circuit court judges found that the PR had increased his fee by unnecessarily complicating the Estate and had failed to prove entitlement to the fee he sought. As the Court of Appeals found, the record supports these findings.

The Court of Appeals correctly applied the "any evidence" standard of review mandated by the Two-Judge Rule, but even if they had applied the preponderance of the evidence standard advocated by Petitioner, the result would have been the same.

**V. The evidence shows that the lower courts correctly reduced the PR's fee.**

The evidence is clear that the PR unnecessarily complicated the Estate in numerous ways. "The twin flaws in the PR's position are his failure to provide adequate proof for the hours he claims and his failure to prove a necessity for most of the hours he claims." Final Order, R. 8, No. 1. The circuit court judge, a former probate judge, agreed that a partition action was unnecessary (R. p. 532, ll. 4-25).

The probate judge found the fees he claimed to be "clearly excessive." Final Order, R. p. 10, No. 13. Not only did he complicate the Estate with an unnecessary partition action, he changed the Will's eight month option to purchase a one half interest into an indefinite right to purchase smaller fee simple. Final Order, R. p. 8, No. 3. (The Petition did not except to this finding.) He glosses over this violation of the Testatrix's intent, though he asserts that his primary duty was to carry that out.

The circuit court judge also pointed out that the PR spent \$ 18,000 to value personalty in the Estate (R. p. 534-35), even though the Estate was not taxable (R. p. 524, ll. 2-4) so this was unnecessary. The PR claimed to have great expertise for which he now wants to charge, but he spent a huge amount of time researching what authority he had under the Will (R. p. 531, l. 10- 532, l. 3).

The Petitioner in his testimony argued that he was not charging on an hourly basis (R. p. 174, ll. 9-11), nor was he charging a commission R. p. 182, l. 2). Only "a little bit" of his charges was for his legal services (R. p. 172, ll. 15-17) and there was little attorney work to be done (R. p. 206, ll. 6-7), so the standards for legal fees do not apply. The main basis for his fees was his decision in the beginning about what a reasonable fee

should be, followed by draws toward that "target" (R. 174, ll. 21-24). Petitioner's later attempts to undue the damage of his testimony with a memorandum giving new standards imported from other states rings hollow.

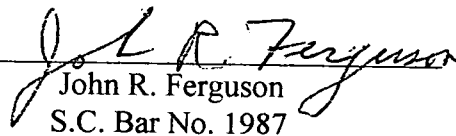
The Probate Court in its discretion could have used the statutory 5% standard, but the essence of judicial discretion is showing that discretion was actually exercised. A mere statement that 10% of the Estate for the PR's fee was a compromise (Final Order, R. p. 10, No. 14) is insufficient to show that judicial discretion was actually employed, especially in the absence of the essential finding of extraordinary services. Even the Petitioner notes, "The lower court itself offers no support of its finding that a fee of \$ 51,300 is reasonable compensation other than it is about 10% of the value of the Estate." Petitioner/Respondent's Petition for Writ of Certiorari, p. 21.

#### CONCLUSION

Petitioner/Respondent's Petition for a Writ of Certiorari must be denied, as there is no basis to grant it. Respondents/Petitioner's Petition for Writ of Certiorari should be granted so that the errors below can be rectified and the law clarified.

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