

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2016-002337

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S.C. SUPREME COURT

In the Matter of the Estate of Marion M. Kay

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

v.

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

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

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II. A novel question of law involving the proper measure for “reasonable compensation” for Personal Representatives should be reviewed by this Court. 2

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Pursuant to Rule 242(g), SCACR, Petitioner-Respondent Edward D. Sullivan, Personal Representative ("Petitioner"), respectfully submits the following reply to the Respondents/Petitioners Brown and Moses' ("Respondents") Return to Petition for Writ of Certiorari:

ARGUMENT

I. As noted by the dissent, the Petitioner should be awarded fees and costs pursuant to the will and Probate Code because (1) he acted within his right to partition the land pursuant to the will and probate code (2) he did not act in bad faith and (3) he was required by the Probate Code to file the Petition for Settlement and he attended the hearing in good faith.

As argued below and as agreed by Justice Few in dissent, the probate code required the Petitioner to file a petition for settlement, and at the requested hearing, he both prosecuted and defended in good faith his decisions in administering the Estate, the results obtained, and his ongoing efforts to wind-up the Estate. See S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015) and testimony of Petitioner at R. p. 62 - 209. See also, dissent of Justice Few (App. 17). He also successfully defended the Estate against Respondent Brown's claim for approximately five (5) acres of land. Contrary to Respondent's argument that the Petitioner's focus at the hearing(s) was to benefit himself, the Petitioner was fulfilling his duties as required by the Code. Therefore, he is entitled to be reimbursed as provided by the statute (and will provisions) for his fees and costs.

Accordingly, this Court should grant the Petition for a Writ of Certiorari to review the decision below interpreting the will and SC Code Section 62-3-720 providing for reimbursement of reasonable fees and costs.

II. A novel question of law involving the proper measure for “reasonable compensation” for Personal Representatives should be reviewed by this Court.

As noted in the Petitioner's Petition for a Writ of Certiorari, South Carolina lacks a definitive standard for determining reasonable compensation when a will provides for “reasonable compensation.” In response, the Respondents agree. Return to Petitioner/Respondent's Petition for Writ of Certiorari, page 2.

The legislature has set forth a default provision for determination of compensation of a personal representative in SC Code Section 62-3-719(a). However, that section does not apply where the will “otherwise directs.” SC Code Section 62-3-719(c). In making this exception to the default provision, the legislature intended that the testator's intent should govern, as is the case and overriding policy in probate law. (See SC Code Section 62-1-102(b)(1) - the underlying purposes of the SC Probate Code include “to discover and make effective the intent of the decedent in the distribution of property.”) In this case, the will provides for “reasonable compensation.” Because of the difficult circumstances faced by the Petitioner to carry out the intent of the testatrix in settling her estate, reasonable compensation should be based on an analysis of all facts and circumstances.

In order to determine his compensation, the Petitioner referred to the law of other jurisdictions, including Florida (Florida statute, Section 733.617 Fla. Stat. [1973]), that provide factors for consideration in determining reasonable compensation for personal representatives. R. 175, line 23 –R . 176, line 176. Also see Brief of Appellant-Respondent at p. 29 – p. 33. The Petitioner, an attorney, also testified he looked for guidance in an ethical rule (Rule 1.5) governing “reasonable fees” for attorneys and also sought guidance from USC Law School Trust and Estates Professor Alan Medlin. (R. 174, 19 – R. 176, line 9. Also, see R. p. 204, ll. 8 – 25. The Respondents misrepresent the record in contending the Petitioner did not raise such a standard in his testimony at the hearing.

The probate court considered the “excellent result” in selling the real estate and the Petitioner’s “exemplary credentials” but seemingly ignored the complexities confronted by the Petitioner in the administration of the Estate and the time devoted and effort involved. Instead, the court limited the compensation to 10% of the Estate. This Court should grant certiorari to interpret the will and statutory framework in this regard and set forth a standard with factors to be considered for the determination of “reasonable compensation.”¹

¹ For further discussion of factors to be considered in setting a standard. See Brief of Appellant-Respondent at p. 25 - p. 29. Also, see Petitioner’s Petition for a Writ of Certiorari at p. 13 – p. 14.

III. The Court of Appeals Erred in Affirming the Probate Court's reduction of the PR's fees because the PR properly carried out his duties, acted according to his rights under the will and the probate code, relied upon legal counsel, and acted in good faith.

As noted by the dissent, the probate court's decision to deny the Petitioner's request for fees and expense was “. . . driven by his disagreement with [Petitioner's] decision to sell the estate's interest in the real estate. . . .” despite the Petitioner's right by will and statute to do so. In fact, the probate court's Order, including the substantial reduction of the Petitioner's compensation, is infected with this disagreement, including his finding that the Petitioner had complicated a “relatively simple estate.” The Petitioner acted within his rights in the best interests of the estate, carried out the intention of the testatrix, and fulfilled his duties in liquidating the Estate so as to be able to disburse cash proceeds and not burden the various beneficiaries with the risks of ownership and ongoing expense and problems of an undivided interest in real estate.

Respondents' contention that the partition action did not allow the beneficiaries to “deal with this themselves” ignores the undeniable fact that the Petitioner worked diligently from May 2007 to January 2009 before filing the partition action making various settlement proposals to the Respondents and inviting their comments and participation to find an amicable resolution for all of the residual beneficiaries. No counter-proposals or responses were received.

Respondents' position also ignores the fact that the testatrix specifically left a bequest for monies from the residuary estate to go to the "cemetery fund," thus requiring the real estate to be converted to cash.

Accordingly, this Court should grant certiorari to consider the dissent's view of the impact of the probate court's unfounded disagreement with the Petitioner's decision to seek partition and liquidation of the estate's undivided interest in real estate.

IV. The Application of the "Any Evidence" Standard of Review in Accordance with the "Two-Judge Rule" conflicts with prior decisions of this Court and provided further basis for Dissent in the Court of Appeals

This Court should grant Petitioner's Petition for a Writ of Certiorari because the Court of Appeals wrongly applied the "any evidence" standard to a record that amply supported weighing the evidence in favor of the Petitioner rather than against, especially the contention that he "increased his fee by unnecessarily complicating the Estate." As noted by Justice Few in dissent, "whether the standard of review in an appeal from an equity case question is any different simply because two judges have made the same factual determination" is questionable (citing Nienow v. Nienow, 268 S.C. 161, 172, 232 S.E.2d, 504, 510 (1977) and Lewis v Lewis, 392 S.C. 381, 390-91, 709 SE.2d 650, 654-655 (2011)).

V. The Court of Appeals Erred in Affirming the Probate Court's decision because, under any standard, the Probate Court's findings of fact are not supported by the record.

Respondents' Response misrepresents the record. The Petitioner, Ms. Kay's attorney for many years, explained that he knew that Ms. Kay wanted the option referenced by Respondents to be meaningful. The holder of the option wanted to exercise this option but did not want to purchase an undivided interest in land. The Petitioner presented several proposals to Respondents. They were nonresponsive and uncooperative. R. p. 97, Line 14 – p. 99, line 10; R. 562, paragraphs 20 – 22.

Respondents have misrepresented the record multiple times. For example, there is no finding by the probate court that Petitioner (or law firm paralegals) spent \$18,000 to value personalty of the estate as alleged by the Respondents. In fact, only 4.5 hours of paralegal time was used to value the personal inventory. Of these, 1.7 hours were not billed. (See Reply Brief of Appellant-Respondent, p. 15). There is nothing in the record supporting this contention. In arguing to the circuit court, the Respondents misrepresented this record to the Court. Respondents' counsel stated, "But he used, according to Judge Hocker's findings, 204.6 hours of paralegal time from his law firm to value personal property." R. 524, lines 14 – 16. A review of the Order, R. pp. 7 – 14 reveals that this representation to the court was incorrect. The circuit court judge cited by the Respondents based his comments on this falsehood. Other

examples have been briefed previously. In fact, the Court of Appeals noted numerous mischaracterizations and unsubstantiated allegations by Respondents. See Opinion, Section II, Part A, App. at pp. 14 and 15.

In short, the Petitioner, an experienced attorney, exercised his rights under the will and statute to effect the intent of his client, Ms. Kay. In doing so, he devoted more than 3 ½ years and 465 hours of his time and efforts and achieved an “excellent result” in selling the Estate's real estate. The fee that he charged was based on the amount of time, issues confronted, and these results. Nevertheless, the probate court reduced his fees by more than \$40,000 and denied reimbursement of fees and expenses as authorized by will and statute because he disagreed with the Petitioner's efforts to partition and sell the property. The evidence is clear, however, that testatrix intended for the real estate to be liquidated and the proceeds disbursed. The evidence is also clear that that is what 70% to 80%, of the beneficiaries desired. Furthermore, a representative of Presbyterian Home, with years of experience in dealing with Estates on behalf of the Home, testified that she believe the fees were reasonable and approved the actions of the Petitioner in partitioning and selling the real estate (R. p. 240 – p. 246), and beneficiary Bart Heard testified as to his approval of the Petitioner's fees as well.

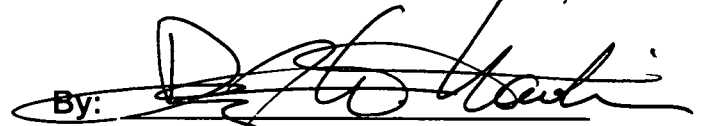
The evidence contradicts many of the Probate Court's findings. This Court should grant certiorari to determine and correctly apply the proper

standard of review.

CONCLUSION

As set forth in the Petition for a Writ of Certiorari and in this Reply, there are ample special and important reasons as required by SCACR 242(b) to review the decision of the Court of Appeals, including novel questions of law concerning the determination of the intent of decedents, recovery of attorneys fees and expenses by a personal representative utilizing an attorney for legal representation, and "reasonable compensation" for personal representatives, as well as the interpretation and proper application of various probate code provisions. Furthermore, a dissenting opinion not only disagrees with the majority's affirmation of the probate court's denial of fees and costs to the Petitioner Personal Representative, as provided by will and statute but also questions the propriety of the 'any evidence' standard of the two-judge rule. Accordingly, this Court should review the decision of the Court of Appeals to address these novel questions of law, consider the dissenting opinion, and clarify the legal issues arising from the interplay of various probate code sections. The Petitioner respectfully requests that the Court grant this Petition, review and correct the decision of the Court of Appeals, and determine a just and proper result in this matter.

RESPECTFULLY SUBMITTED,
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February 2, 2017

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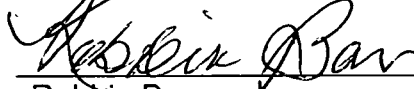
v.

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

PROOF OF SERVICE

I certify that I served Petitioner/Respondent's Reply to Return to Petition for a Writ of Certiorari upon Respondents/Petitioners Martha Brown and Mary Moses by mailing one (1) copy to counsel of record, John R. Ferguson, PO Box 286, Laurens, SC 29360, on February 2, 2017.

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