THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

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

v.

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

BRIEF OF PETITIONER/RESPONDENT

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

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

4. Did the Court of Appeals err in affirming the lower court's ruling reducing the Personal Representative's compensation by applying the "two-judge" rule in such as way as to change the standard of review in equity cases from "preponderance of evidence" to the "at law" standard of "without evidentiary support"?

5. Did the Court of Appeals err in affirming the lower court's ruling given that the clear preponderance of evidence weighs heavily in favor of the Personal Representative?

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 Personal Representative, Edward D. Sullivan ("Petitioner"), filed a Petition for Settlement and a Proposal for Distribution. Counsel for Martha Brown and Mary Moses ("Respondents"), 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 Personal Representative's Petition for Settlement.

Hearings were held on February 2, 2011 and February 21, 2011. At the hearings, the Petitioner[1] 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 Petitioner 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

[1] In the lower courts, the Petitioner was alternatively referred to as "PR" (for "Personal Representative") and sometimes "Plaintiff" as reflected by exhibits introduced at the hearing.

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 personal representative 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 Personal Representative in selling real estate owned by the Estate.

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

The Court ruled that the Petitioner 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 Petitioner (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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner'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, later reversed by the Court of Appeals, that counsel for Respondents 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 Petitioner 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 Respondents simultaneously appealed and thereafter the Petitioner, 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 Petitioner'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 time sheets offered by the Petitioner as well as an Affidavit of Teri Stomski, an attorney who had earlier counseled the Petitioner on the wisdom of filing a partition action due to title issues regarding the Estate Property. The Court further denied a claim brought by Respondents for five acres that had been owned by the Estate, denied additional legal fees sought by Respondent Brown and ordered that Respondents be responsible for one-half of the Court reporter costs. (See, Order Disposing of Post-Trial Motions; R. pp. 15-18).

The Petitioner and Respondents 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). Respondents filed a Rule 59 Motion for Rehearing. The motion was denied. (See, Order dated September 30, 2013; R. pp. 21-22).

The Petitioner served his notice of appeal in this matter on October 24, 2013, and served an amended notice of appeal on October 30, 2013. Respondents served a notice of cross-appeal on October 29, 2013. The Court of Appeals issued its opinion, affirming in part, reversing in part, and remanding on June 15, 2016. Both parties filed Petition(s) for rehearing. On November 2, 2016, the Court of Appeals filed a substituted opinion, affirming in part, reversing in part, and remanding. The parties then filed cross Petitions for a Writ of Certiorari, both of which were granted on August 20, 2017.

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-Petitioners 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 Personal Representative, Discretionary Powers Granted by the Will, and Compensation and Reimbursement for Expenses

The will named Ms. Kay's attorney and life-long friend Petitioner Edward D. Sullivan as Personal Representative (See, PR Exhibit B; R. p. 555, Item V(1)); (R. p. 70, Lines 12–18). The Petitioner is an attorney, who at the time of the 2011 hearings, had nearly 23 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 Petitioner has earned a Master of Accountancy degree and an LLM-Taxation degree. The Petitioner 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.

The will essentially authorized and empowered the Petitioner as personal representative "by way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to personal representatives 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 personal representative may seem best and to do all acts which my personal representative 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 personal representative 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 Petitioner During the Administration of the Estate

The primary asset of the Estate was a one-half undivided interest in farm consisting of a 330-acre tract of land, partially planted with pine trees (the "Farm"). Respondent Moses owned property which adjoined the Farm. In 2003, four years prior to her death, Ms. Kay retained the Petitioner to divide the Farm. He corresponded with Respondents 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). Respondents 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, the Respondents 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 Petitioner 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 Petitioner 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 Respondents, 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 Respondents at a deep discount). The Petitioner 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).

With his knowledge of Ms. Kay's intent, the powers granted to him by the will, and the desire of the beneficiaries[2] to receive cash rather than an undivided interest in real estate, the Petitioner 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. Respondents claimed Respondent Brown was entitled to approximately 5 acres of the Farm that had never been deeded to her.

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.[3]

2Other than Respondents.

[3] Respondents are daughters 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 Petitioner discovered during this process that Respondent Mary Moses had judgments against her. The Petitioner 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 Petitioner had several telephone conferences with Robert Fuller, Esquire, counsel for Trinity Presbytery, and received and reviewed Fuller's "opinion" letter (See, PR Exhibit C-1; R. p. 561, Paragraph 16); (PR Exhibit C-9; R. pp. 630-631).

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

In an effort to sort out these claims, the Petitioner 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 Petitioner met several times with Charles Copeland and his wife, Patsy Copeland about Mr. Copeland's option. On Saturday evening, April 26, 2008, the Petitioner 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 Petitioner submitted a written proposal to the Respondents, 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 Respondent 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 Respondents at the appraised value. No response was received from the Respondents. (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 Petitioner arranged a meeting with the beneficiaries, including representatives from Lisbon Presbyterian Church, Presbyterian Home of South Carolina, Respondents, 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, the Respondents refused to discuss any proposal with Mr. Major and the Petitioner 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 the Respondents. They retained counsel. No comment was ever received on the proposal, nor did Respondents 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 an amicable resolution after approximately 20 months, the Petitioner 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 Respondents, 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). The Respondents filed a counterclaim asserting a right to five (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 Petitioner 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 Petitioner and Rowland W. Milam, a relative of Respondents, 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner, 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 Petitioner, 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 Petitioner 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 Petitioner

Item V(3) of the Ms. Kay's will provides "For its services as Personal Representative, the individual Personal Representative 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 Petitioner was an employee ("Of Counsel") with Collins and Lacy, PC, attorneys (the "Law Firm"). The Petitioner

retained the Law Firm to assist in the administration of the Estate. At the Petitioner's request, (1) the hourly rates for attorneys working on the matter were reduced from $225.00 to $145.00, (2) the invoices were discounted/written down in an amount exceeding $20,000.00, (3) and the invoices reflect that the Petitioner 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 Petitioner 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 Petitioner reviewed the statutory and case law on compensation of personal representatives, 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 Petitioner'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 Petitioner 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 Petitioner has continued to provide services to the Estate and incur expenses since November 12, 2010. 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). "An action for an accounting sounds in equity." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009). Therefore, the reviewing court may review the record and make findings with its own view of the preponderance of the evidence. Id. (citing Lawson v. Rogers, 312 S.C. 492, 495, 435 S.E.2d 853, 855 (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).

Notwithstanding the foregoing authority, a majority of the Court of Appeals cited the "two-judge" rule, held the standard of review is whether "any evidence reasonably supports the findings of the court below" (App. 5, 6.) and based its decision on that standard. However, the "two-judge rule" as applied by the majority of the Court of Appeals violates Article V, Section 5 of the South Carolina Constitution and is not binding precedent on this Court and, for the reasons set forth in the dissenting opinion of Justice John Few (App. 18) and Argument IV below, should be abandoned. Accordingly, the reliance of the Court of Appeals on the "two-judge" rule resulted in reversible error.

ARGUMENT

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

The Respondents' demand for a hearing on the Petitioner's Petition for Settlement necessitated that he prepare for all possible issues, especially when the trial court ruled that he must present his evidence as if he was the moving party and without the benefit of pleading by Respondents as to what matters they wished to put into contention, or any evidence they intended to rely upon, or any list of witnesses they intended to call. The majority of the Court of Appeals held that the Petitioner is not entitled to legal fees and costs related to the hearing. (App. 8). In doing so, the majority cites S.C. Code Ann. § 62-3-720, which states, "If any personal representative or person nominated as personal

representative defends or prosecutes a proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred." (emphasis added.) (App. 7). The majority concludes that the statute was intended to cover those fees and expenses only in connection with prosecuting and defending claims against the estate. Under this holding, no personal representative may be reimbursed for legal counsel retained to appear in the proceeding nor much of these costs. This holding will have a chilling effect on the willingness of persons and entities to act as the personal representative in complicated estates.

Respectfully, the majority overlooks that Respondent Brown used the hearing that she requested to pursue a claim against the Estate for five (5) acres of land (or the equivalent value). (R. 100, Lines 23 – 104, Line 18). Brown renewed this request at the Rule 59 Hearing. Petitioner successfully defended against her ongoing claims. (*See*, Order Disposing of Post-Trial Motions, R. 18, paragraph 1). Accordingly, the Petitioner did in fact defend a claim against the Estate (successfully) and is entitled to reimbursement even given the majority's view. Further, as Justice Few notes in the dissent, the probate code actually required the Petitioner to file a petition for settlement, and he both prosecuted and defended in good faith his decisions to support his claims for compensation and to conclude the Estate at the requested hearing. *See* S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015). (App. 17). The Petitioner successfully defended Respondent Brown's claim against the Estate for approximately five (5) acres of land, appeared in good faith, and is entitled to be reimbursed as provided by the statute (and will provisions) for his fees and costs.

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

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

Pursuant to the express provisions of the will, the Petitioner is entitled to reimbursement for costs incurred as well as reasonable compensation for ongoing services provided to the Estate. Counsel for Petitioner at a hearing requested by two heirs

on Petitioner'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 Petitioner sought to introduce evidence on appraisal, Counsel for Respondents 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 South Carolina law requires a personal representative 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 Petitioner to be reimbursed for reasonable costs incurred during the administration of the Estate.

S.C. Code Ann. § 62-3-720 provides, "[if] 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 fees incurred." Respondent Brown continuously pursued a claim for five acres from the Estate, successfully resisted by the Petitioner. The Petitioner was required to attend hearings on behalf of the Estate. In doing so, he appropriately and reasonably chose to be represented by counsel. The Probate Court made a specific finding that the Petitioner did not act in bad faith during the administration of the Estate. The Probate Court denied the Petitioner'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 Petitioner to be reimbursed for these legal fees and costs. Accordingly, the Probate Court erred in ruling otherwise and in

holding that the Petitioner 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 Petitioner.

The Probate Court erred in denying fees and reimbursement of costs to the Petitioner 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 Petitioner's Petition for Settlement was requested by two interested persons, the Respondents. As such, the Petitioner was required to be there and be prepared to present his Petition for Settlement.

Furthermore, the Probate Court erred in disallowing Petitioner's trial expenses as the will provides for reimbursement of reasonable expenses. (See, PR Exhibit B, R. p. 555, Item V(3)). The Petitioner 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 personal representative must file with the court . . . a petition for settlement of the Estate . . ." In addition, S.C. Code Ann. § 62-3-1001 (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 Petitioner 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, personal representatives 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 [personal representative'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 [decedent's] purpose). The Probate Court made a specific finding that the Petitioner did not act in bad faith. Furthermore, Respondent Brown continued to make a claim for five acres of the Estate's property (or its monetary equivalent), successfully resisted by the Petitioner, until the Probate Court ruled otherwise almost one and a half years after the Petition for Settlement was filed. Accordingly, the Petitioner is entitled to be reimbursed for his expenses, including legal fees, witness fess, and court reporter costs.

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

The probate court's decision was erroneously based on its disagreement with the Petitioner's decision to file a partition action and ultimately sell the estate's interest in the real estate. (*See*, App. 17) (Few, A.J., dissenting in part)). The will and the probate code specifically empowered the Petitioner to partition and sell the real estate. Further, the probate code specifically provides for personal representatives or one or more beneficiaries to partition real estate. S.C. Code Ann. § 62-3-920 (Supp. 2015). Most, if not all of the beneficiaries of the Estate (other than Respondents), desired a cash distribution as opposed to an undivided interest in real estate. The will provides for a

residuary share of the Estate to go to the "Lisbon Cemetery fund, absolutely forever, the interest to be used to keep up the Milam-Kay plot." (*See*, PR Exhibit B; R. 554, Item IV). Although the probate court ruled that the Petitioner should have deeded out the real estate to the various beneficiaries, including the cemetery fund, rather than seeking to liquidate it, this bequest to the cemetery fund requires a distribution of cash to a fund for the upkeep of the plot. Because most (70%) of the beneficiaries desired cash and the Respondents consistently failed to respond to the Petitioner's multiple proposals, offers, and requests, the Petitioner determined that the best and most reasonable action to take was to file a partition action and distribute the ultimate sales proceeds to the beneficiaries. The will itself necessitated cash so as to fulfill the bequest to the Lisbon Presbyterian Church Cemetery Fund to provide a resource for maintaining the Milam-Kay plot.

Employing the powers granted by the will and statute and relying specifically on S.C. Code Ann. § 62-3-920, the Petitioner used his discretion to partition the real estate. As noted by Justice Few, "In my view, the probate judges' denial of [Petitioner's] request for fees and expenses was driven by his disagreement with [Petitioner's] decision to file a partition action and ultimately sell the estate's interest in the real estate. [Petitioner] had the right to partition the land pursuant to Kay's will and the probate code and, thus, it was within his discretion to do so." (App. 18). In fact, citing to S.C. Code Ann. § 62-3-1001(a)(3), Justice Few agreed that "the probate code required [Petitioner] to file a petition for settlement." (App. 18). Because the Petitioner had the right to partition the land pursuant to the will and the probate code and that the Petitioner did not act in bad faith, Justice Few reasoned that the Petitioner is entitled to reasonable attorney's fees and expenses. The Court of Appeals erred in affirming the probate court's decision to reduce

the compensation based on its disagreement with the Petitioner's last resort option of filing a partition action and ultimately selling the estate's interest in the real estate.

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

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.

> . . . 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.

The Will gives the Petitioner 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 personal representative to meet certain deadlines, subject to extensions of time as may be granted. The Petitioner complied with all deadlines, as extended, that were imposed by the Code, the Court, and/or probate administration. There is no evidence that the Petitioner 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 [Petitioner]". (See, Final Order; R. p. 10, Item 16). All of the actions of the Petitioner to settle the Estate were reasonable. Despite the powers granted by the will and statute, the Petitioner'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 Petitioner as to what action the Petitioner should have taken, i.e. deed out undivided interests in the real estate to the beneficiaries. In affirming this decision, the Circuit Court and Court of Appeals erred.

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 (R. pp. 566-567), prove that the testator intended for the real property to be sold and/or that the Petitioner had a reasonable belief that such was the intent of Ms. Kay. The Petitioner 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.

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 Petitioner 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 Petitioner in good faith understood that only liquidation would accomplish Ms. Kay's testamentary intent.

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 Petitioner'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 Petitioner broad powers to contract with respect to Ms. Kay's property and the Petitioner 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 Petitioner a power of sale in order to effect the liquidation and distribution of the real estate and effect the testamentary intent of Ms. Kay. All of the foregoing supports the Petitioner'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 Petitioner acted reasonably in exercising his discretionary powers granted by the will and probate code because he acted in the best interests of the Estate.

In handling the Estate as he did, the Petitioner 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 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 Respondents would have controlled the property (since Respondents 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 Respondents 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, have a diminution of value of 30 percent to 35 percent. (R. p. 233, Line 25 – p. 234, Line 15).

That would had been a result the vast majority of beneficiaries did not want. See, e.g., 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 Petitioner 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 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 Petitioner by both the will and statutory authority and would seem to prefer the desires and interests of two heirs above the other four. Neither the Probate Court nor the Court of Appeals 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 Petitioner successfully resolved these issues after exhausting attempts to reconcile the desires of the various beneficiaries amicably.

In addition, 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 Petitioner'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 Petitioner broad powers to contract with

respect with Ms. Kay's property and the Petitioner 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).

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 Petitioner as granted by the will and by statute. Item VII of the will empowers and authorizes the Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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, (f) the competing interests of a Church and other non-profit in the real property per the decedent's will, and (g) the judgments filed against Moses.

Furthermore, Ms. Kay's will expressly provides "Powers for Personal Representatives". (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 personal representatives generally, . . ." This provision regarding powers concludes with " . . . and to do all acts which my personal representative 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 Petitioner but expressly grants the Petitioner 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 Petitioner 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 Petitioner had both the discretion and statutory authority to file the partition. (As a further illustration provided to the Petitioner by Ms. Kay's will, Item IX grants the Personal Representative discretion in reference to tax matters and elections; Item VIII provides that the Personal Representative shall act as trustee for beneficiaries under age 21 and provides that the Personal Representative "shall have with respect to each share or property so retained all the powers and discretions conferred upon it as Personal Representative" (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' holding that a deed of distribution was preferable to them and would have satisfied the Petitioner's duties under the will overlooks the complications and potential defects in title that would have resulted from such a transfer and exposure of the Petitioner to litigation over the transfer. As noted, there were competing claims to the real estate, including the claim of Respondent Brown to an interest in five (5) acres of land belonging to the Estate. S.C. Code Ann. § 62-3-709 specifically empowers the Petitioner to "take possession of property or maintain an action to recover property or to determine the title thereto." In exercising this statutory power, the Petitioner acted reasonably.

S.C. Code Ann. § 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 (R. pp. 660 – 663).

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. S.C. Code Ann. § 62-3-910(A). Also, see S.C. Code Ann. § 62-3-101. 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 Petitioner, 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 Petitioner in his discretion and as allowed by law. A mere deed of distribution or sale by the Petitioner 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 Petitioner 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.

D. The Petitioner had the statutory authority and discretion 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 personal representative or one or more of the interested heirs or devises may petition the court prior to the closing of the Estate to make partition." The Petitioner 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 Petitioner wrongfully filed an action for Declaratory Judgment and partition of the Farm and accordingly decreasing the amount of compensation he was entitled to.

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

A. The Petitioner's method for determining reasonable compensation was proper because the amount was not based solely upon an arbitrary percentage.

South Carolina does not have a definitive standard for assessing reasonable compensation for a personal representative 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 Petitioner in determining compensation where a will directs "reasonable" compensation should be adopted by this Court.

The Probate Court erred in limiting the Petitioner'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 personal representative 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 personal representative, the individual personal representative 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 personal representatives. 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 personal representative, 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. [4]

If the above factors are applied by this Court, it will lead to the inevitable conclusion that the Petitioner in the instant case exceeded the standards as set forth by

[4] S.C. Code Ann. § 62-3-721 includes value of estates, "time consumed," and other surrounding circumstances and condition in reviewing compensation for appraisers.

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 Petitioner'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 personal representative'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 personal representatives. 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 Petitioner in his role as Personal Representative, 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 Petitioner 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 Petitioner in working with the Respondents 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 option [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 Petitioner's method for determining reasonable compensation was proper 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 Petitioner "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 provided 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 Petitioner did in fact provide a legitimate basis for determination of compensation. The Petitioner 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 Petitioner, 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 Petitioner 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 Petitioner. Here the Petitioner had another factor for consideration regarding the relationship with the client. In this case, the Petitioner 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 Petitioner 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 Petitioner is an attorney licensed to practice in South Carolina and with an LLM in Taxation).

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 Petitioner used by analogy what courts in other jurisdictions consider to be extraordinary service in determining "reasonable compensation". As noted, the Petitioner took into consideration a Florida statute, Fla. Stat. §733.617 (1973), governing reasonable compensation of personal representatives. (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 Petitioner 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 Petitioner provided extraordinary service to the Estate. Contrary to the Court's finding that the Petitioner "pulled an amount out of the air," the Petitioner 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 Petitioner's request (See, PR Exhibit D; R. pp. 729-795) and their hourly rates substantially reduced and apparently gives those facts little, if any, weight or consideration. The Courts also do not seem to give

consideration to the Petitioner's sale of the real estate without incurring a real estate commission of $36,700.00 (10% of $367,000.00). (The Petitioner 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)).

The Probate Court erred in finding there were no novel issues in the administration of this Estate. The Petitioner 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 Petitioner 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 [Petitioner] did an excellent job in securing the sales price for the real estate . . . ". (See, Final Order; R. p. 9, Item 6). The Petitioner 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 personal representative. "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 Petitioner'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 Petitioner 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 Petitioner 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 Petitioner.

As noted above, the Petitioner had nearly 23 years experience practicing law at the time of the 2011 hearings, 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 Petitioner 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 Petitioner'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 Petitioner's efforts achieving an excellent sales prices for the real estate .

Contrary to the court's ruling, the evidence supports that the Petitioner 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 Petitioner worked for the Estate; 249.7 of these hours were "no charge" by the law firm because they were performed by the Petitioner. 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 Petitioner 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 Petitioner'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 Petitioner 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 Petitioner 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 Petitioner's time during administration of the Estate was apparently inadvertently omitted. Exhibit E was referenced in the Petitioner'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 Petitioner's compensation. In addition to his testimony, the Petitioner provided a pre-hearing brief which clearly sets forth in detail the Petitioner'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 Petitioner 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 Petitioner 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 Petitioner's time is unsubstantiated.

The Probate Court did not seem to recognize the entries on the Law Firm bills as documenting time of the Petitioner's administration of various aspects of the Estate. "Exhibit E" is documentation of time recorded by the Petitioner on other matters related to the Estate. This was an Exhibit to the Affidavit of the Petitioner 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 Petitioner 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 Petitioner. 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.

IV. The Court of Appeals erred in affirming the lower court's ruling reducing the Petitioner's compensation by applying the "two-judge" rule in such as way as to change the standard of review in equity cases from "preponderance of the evidence" to the "at law" standard of "without evidentiary support."

In substituting its first opinion, the Court of Appeals properly determined that this matter is a case of equity. (App. 6) (substituting the Court's first opinion, which found that this case was an action at law (App. 26)). Because this matter is a case of equity, the appellate court may make factual findings according to its own view of the preponderance of the evidence. In re Howard, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (citations omitted). (See also, App. 26). However, the Court incorrectly applied the two-judge rule, stating that "[i]f a matter is decided by the probate court and affirmed by the circuit court, this court applies the two-judge rule." (App. 6) (citing Dean v. Kilgore, 313 S.C. 257, 259-60, 437 S.E.2d 154, 155-56 (1993)). Because the Court incorrectly applied the two-judge rule, it determined that the "standard of review for this court is whether any evidence reasonably supports the findings of the court below." (App. 6) (citing Dean, 313 S.C. at 260, 437 S.E.2d at 155-56). Respectfully, this interpretation of the two-judge rule is erroneous.

The South Carolina Constitution provides that appellate jurisdiction in cases of equity requires that appellate courts review findings of fact as well as the law. See, S.C. CONST. Art. V, § 5, 1895. The Supreme Court interpreted this provision shortly thereafter

and held that "it may now be regarded as settled that this court may reverse findings of fact by the circuit court [in a case of equity] when the Petitioner satisfies this court that the preponderance of the evidence is against the findings of the circuit court." Wise v. Wise, 60 S.C. 426, 38 S.E. 794, 803 (1901). Nevertheless, the majority in the Court of Appeals applied the "two-judge" rule and in weighing the evidence affirmed the lower court's findings regarding the lower court's decision to reduce the Petitioner's compensation because they "[did] not believe the probate court's decision to decrease the [Petitioner's] compensation based on the value of the Estate and the court's view of the evidence [was] without support." (App. 8). In doing so, the majority applied an improper standard of review resulting in reversible error.

As noted by Justice Few, the "two-judge rule" was first labeled as such in Nienow v Nienow, 268 SC, 161, 172, 232 SE2d 504, 510 (1977). The case law, however, relied upon by Nienow for the proposition that "concurrent findings of fact by the trial judge and master are binding on this Court unless they are without evidentiary support or against the clear preponderance the evidence", 268 S.C. at 170, 232 S.E.2d at 509, can be can be traced back to Todd v Todd, 242 S.C. 263, 130 S.E.2d 552 (1963) in which the Court wrote, "This is an action in equity. Section 20-105 of the 1952 Code. It is the established law in this State that in an equity case this Court may reverse the findings of fact of a Judge of a County Court where the appellant satisfies this Court that the findings of the trial Judge were without evidentiary support or are against the clear preponderance of the evidence." citing Frazier v Frazier, 228 S.C. 149, 89 S.E.2d 225 (1955)and Oswald v Oswald, 230 SC 200, 95 S.E.2d 493 (1956) (emphasis added.) In this case, however, the Court of Appeals did not consider or allow that the standard of review includes "if

appellant satisfies this Court that the findings of the trial judge are against the clear preponderance of the evidence." The Court of Appeals wrote, "While we do not take issue with [Petitioner's] belief that he acted reasonably and in the best interests of the Estate, we also do not believe the probate court's decision to decrease [Petitioner's] compensation based on the value of the Estate and the court's view of the evidence is without support." (emphasis added.) App. 8. Respectfully, the Court in effect not only drastically changes the proper standard of review but is not in accord with the South Carolina Constitution as noted above.

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

V. The Court of Appeals erred in affirming the lower court's ruling reducing the Petitioner's compensation because the clear preponderance of the evidence weighs heavily in favor of the Petitioner.

The lower court made a finding of fact that the Petitioner "unnecessarily complicated the Estate by insisting on filing a partition action." (R. 8, paragraph 2). To the contrary, there is no credible evidence that the Petitioner complicated the Estate by "insisting" on filing a partition action.(R. p. 8, Para 2). In fact, Petitioner did not insist,

but worked with the parties for 20 months and offered several proposals, to which there was no response from Respondents. Without citing to any law, the lower court determined that the Petitioner should have issued a deed of distribution to the beneficiaries in lieu of seeking to liquidate the real estate. (R. p. 8, Para 2). However, not only did Ms. Kay intend for the real property to be divided and sold, a super majority of the heirs had the same desire. The lower court's ruling would negate in its entirety SC Code Section 62-3-911 that provides for a partition action by the personal representative or one or more of the interested heir or devisees. This is reversible error.

The lower court's finding of fact that "[t]his was a fairly basic estate which could have been easily, quickly and cheaply settled by a deed of distribution" and that "[t]his would also have been in conformity with the Testatrix's Will" is contrary to the clear preponderance of the evidence. (R. 8, paragraph 2). Ms. Kay clearly intended for the real estate to be liquidated and the proceeds disbursed to the beneficiaries rather than simply giving them an undivided interest in real estate.

In addition, the lower court found that "the [Petitioner] failed to provide any legitimate basis for the fees he claimed and instead testified that he had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air. "Although the [Petitioner] in Memorandum argued that he had 468.6 hours of time as [personal representative], the proof he provided failed to support this." (R. 9, paragraph 8). This is not correct. The record the Petitioner used various factors in determining the amount of the compensation, including time—468.6 hours—effort, novelty of issues, and the result. (R. 174, Lines 19 – 175, Line 3). Because

the will called for "reasonable compensation" of the personal representative and there is no specific standard or formula set in South Carolina, Petitioner was forced to determine what would be considered "reasonable compensation." Petitioner determined his fees based on several factors, including the Model Rules of Professional Conduct (although he was not charging as an attorney, he is still bound by the rules) and the well-established formulas found in Florida and Colorado. (R. 174, Lines 12 – 176, line 9). Petitioner also consulted with Alan Medlin, a well-known expert in the field, and another attorney to determine reasonableness. (R. 175, Lines 23 - 176, Line 9; R. 181, Lines 21 – 182, Line 7). As the Court of Appeals notes, the Petitioner provided invoices, time sheets, and affidavits. Contrary to the lower court's finding, the Petitioner simply did not "pull a number out of the air" and did in fact provide a method that was used to determine "reasonable compensation."

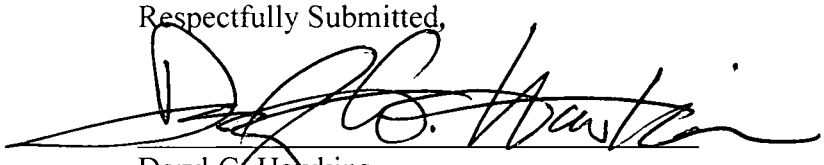
Therefore, the clear preponderance of the evidence supports that the Petitioner did in fact provide a legitimate basis for his compensation as the personal representative of the Estate because he submitted the appropriate invoices, times sheets, and affidavits and because beneficiaries testified that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

CONCLUSION

Respectfully, the Court of Appeals erred in applying the two-judge rule as the standard of review and should have applied the preponderance of the evidence standard. Additionally, the Court's opinion affirming the lower court's decision relating to determination of reasonable compensation in the face of the overwhelming evidence, facts, and circumstances of this case as well as this Court's interpretation of S.C. Ann. §

62-3-720 and will provision pertaining to recovery of legal fees and costs will have a chilling effect on those that are asked to serve as personal representatives and undertake that enormous responsibility. For the foregoing reasons, the orders below should be reversed to the extent (1) they require a refund of compensation by the Petitioner and (2) deny payment for additional services to the Estate and reimbursement for the fees and costs incurred by the Petitioner, and the Petition for Settlement and Proposal for Distribution approved subject to the further award or approval of compensation and legal fees and costs to the Petitioner in accordance with the terms of the will and statute. The case should be remanded for final accounting/settlement and distribution of remaining assets accordingly.

Respectfully Submitted,



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Attorney for Petitioner/Respondent

September 20, 2017

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)
$292,500 Sales Price (145,040) 30% Discounted Market Value **$ 147,460**	$292,500 Sales Price (134,680) 35% Discounted Market Value **$ 157,820**

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 Supreme Court

RECEIVED
SEP 20 2017
S.C. SUPREME COURT

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

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

v.

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

PROOF OF SERVICE

I certify that I served Brief of Petitioner/Respondent by mailing one (1) copy to counsel of record, John R. Ferguson, Post Office Box 286, Laurens, SC 29360, as well as a courtesy copy via e-mail transmission.

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September 20, 2017