

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

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

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In the Matter of the Estate of Marion M. Kay

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

v.

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

Appellate Case No. 2016-002337

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RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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John R. Ferguson  
S.C. Bar No. 1987  
107 W. Laurens St. - PO Box 286  
Laurens, SC 29360  
(864) 984-212  
Fax (864) 984-7372

COX, FERGUSON & WHAM, LLC  
Attorneys for Respondents/Petitioners

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## **STATEMENT OF THE ISSUES ON APPEAL**

**I. Did the Court of Appeals correctly affirm the two courts below that Petitioner was not entitled to be reimbursed for excess fees and expenses for attending the hearing he requested for his Petition for Settlement and for his dubious efforts to settle the Estate?**

**II. Did the Court of Appeals correctly affirm the probate court's reduction of the compensation Petitioner had paid himself in secret?**

**III. Did the Court of Appeals correctly affirm the two lower courts' determination that the Petitioner was not entitled to additional compensation?**

**IV. Did the Court of Appeals err in applying the Two Judge Rule to reduce Petitioner's compensation and does the applicable standard of review need clarification?**

**V. Did the Court of Appeals correctly determine that the evidence supported the ruling of the two judges below that Petitioner's compensation should be reduced?**

## STATEMENT OF THE CASE

To lessen the burden on the Court, Respondents adopt Petitioner's Statement of the Case with the following additions and corrections:

1. Petitioner states that he based his compensation on several factors and lists them. The probate judge found that his fees had no such basis and 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 of the four draws he gave himself other than pulling figures out of the air." The probate judge further found that the Petitioner "[failed] to provide adequate proof for the hours he claims and... to prove the necessity for most of the hours he claims."

2. Petitioner was not denied all witness fees. He was granted witness fees for witnesses testifying on behalf of the Estate (\$ 5750) but not witness fees for witnesses testifying on his personal behalf.

3. The probate court and subsequent courts found that there were no novel issues.

4. The Petitioner, whose PR fees were based on the value of the Estate, spent \$ 18,000 of the Estate's money to pay his law firm's paralegals to value its personalty.

5. Though Petitioner's Rule 59 motion seeking to add to the record was denied, he is arguing documents which were not admitted into evidence.

6. The circuit court upheld the Final Order of the probate judge.

7. The Court of Appeals upheld the two orders below, except that it overturned an award of attorney fees to Respondents' counsel pursuant to the common fund doctrine.

## ARGUMENT

### **I. The Court of Appeals correctly affirmed the two courts below that Petitioner was not entitled to be reimbursed for excess fees and expenses for attending the hearing he requested for his Petition for Settlement and for his dubious efforts to settle the Estate.**

The probate hearing below resulted from Petitioner's request pursuant to S.C. Code Ann. 62-3-1001(a)(3) for a hearing on his Petition for Settlement. He admits that this is a hearing the probate code required him to request. (Brief of Petitioner/Respondent, p. 18, full para. 1.) He did not demand pleadings or any other information from Respondents before his hearing and so has waived that objection. There was a delay of several weeks during the hearing, so the Petitioner had time to consider all the issues (and attempt to reinvent the claimed basis for his fees) and was not prejudiced.

Respondents would have been happy to provide more information about their objections to Petitioner's handling of the Estate, but Petitioner made that impossible by waiting until a short time before the hearing to turn over to them (pursuant to their prior demand) the documentation showing how he had handled the Estate. See Final Order, finding of fact No. 9 at R. p. 9 and Brief of Petitioner/Respondent, para. 2 on p. 43, "On the day before the hearing, the Petitioner provided to the Probate Court and opposing counsel a comprehensive affidavit with supporting exhibits...." (That affidavit by itself shows that Petitioner was aware of the main issues to be argued.) As it was, Respondents' counsel had to scramble to find "where the bodies were buried" in the short time Petitioner gave him to review his documentation. Petitioner cannot legitimately complain about a problem he created.

Throughout his brief, Petitioner takes the position that the probate judge has no power to review his decisions, fees and expenses. He claims that the Will and S.C. Code Ann. 62-3-720 give him the absolute right to charge the Estate whatever he wants, regardless of whether his decisions, fees and expenses were for the benefit of the Estate or for himself. In his view, judges are powerless to deal with breaches of fiduciary duty. This would be an absurd result.

Petitioner inflates the importance of a request by one (not both) of the Respondents for 5 acres to complete a partition she had agreed to with the decedent. This was a minor issue which had to be raised at the hearing requested by the PR or waived, and it was not in any way predominant below or ever part of the appeal. Because this issue had previously come up during the Petitioner's partition action, it was not a surprise to Petitioner.

The Petitioner seeks reward for his "outstanding result achieved" in selling the subject property to the buyer sent him by Respondents. The sales price was less than the appraised value of the property, so the outstanding result finding is not supported by the evidence. Respondents approved this sale to Rowland Milam and did nothing to contest it.

The Petitioner's asserts that he is entitled to *reasonable* costs. If his claim for costs had indeed been reasonable, this would not have been a contested item. The probate judge correctly found that expenses primarily for the personal benefit of the Personal Representative (PR) should not be charged to the Estate (R. p. 11, No. 19). Under S.C. Code Ann. 62-3-720 the PR can receive from the Estate only *necessary* expenses and the Will allowed only *reasonable* expenses. The orders below found that the PR's expenses were neither reasonable nor necessary. If probate judges were denied their power of oversight, a PR could charge his Estate for a trip to the Riviera to research French probate law and there would be no recourse.

The Petitioner cites the foreign case of *Weidlich v. Comley*, 267 F.2d 133 (2d. Cir. 1959) for the proposition that a PR who is "unjustly assailed" for carrying out his duties is entitled to his legitimate expenses. The order of the probate judge (R. pp. 7-18) found that the PR was justly assailed for illegitimate expenses and unwarranted attorney fees.

The PR complains that he was not awarded attorney fees, but the judges below and the Court of Appeals correctly found that the function of his attorney had been to defend and enhance Petitioner's claim for PR fees and costs, not benefit the Estate. "[Petitioner's attorney's] representation was primarily of the PR in his individual capacity seeking approval of the PR's commissions and expenses." (R. p. 11, No. 19). Contrary to the Petitioner's assertion, the courts

have no obligation to reward him as he dreams of being rewarded.

**II. The Court of Appeals correctly affirmed the probate court's reduction of the compensation Petitioner had paid himself in secret.**

There were numerous reasons that the courts below and the Court of Appeals have required that the Petitioner return to the Estate \$ 42,475 in excess payments to himself (R. p. 10, No. 14)- although he has refused for the money to leave his Unclean Hands. This was not just a matter of a disagreement about the misbegotten partition action.

The Petitioner did not provide adequate proof of his hours or of the necessity of those hours (R. p. 8, No. 1). He unnecessarily complicated the Estate by rewriting and expanding the Will's option to purchase (R. p. 8, No. 3). He failed to provide any legitimate basis for the fees he claimed (R. p. 9, No. 8). The commissions the PR sought were "clearly excessive" (R. p. 10, No. 13).

Throughout his Brief Petitioner repeatedly asserts that 70% of the beneficiaries supported his handling of the Estate. This wrongfully counts Lisbon Presbyterian Church and Lisbon Cemetery Fund that together had a 50% interest in his column, but no one testified to this and the church did not vote on what it and its Cemetery Fund wanted to do until near the end of litigation when the Rowland Milam sale was proposed and agreed to by them and Respondents.

The Petitioner likewise errs in equating the broad powers he had under the Will with how the Testatrix would have wanted him to exercise those powers. It was certainly not her intention that he drag out her Estate's administration for three and a half years, that he rewrite an 8 month option to buy all her interest in a farm to become a right to buy a portion of the farm for an indefinite period and after a partition action, that he sue her beneficiaries and that he do everything he could to maximize his compensation and thereby minimize the inheritance her beneficiaries would receive. This self-enrichment is also contrary to S.C. Code Ann. 62-1-102(b)(3).

The Petitioner claims that the sale of the real estate was necessary to carry out the intentions of the Testatrix, although she never sought partition while she lived. Assuming that the Petitioner was supposed to partition the realty, S.C. Code Ann. 62-3-703(a) required that if he do it, then he must do it expeditiously and efficiently. This is not what happened. He hired his Columbia law firm to do a Laurens County partition and he paid them a total of \$ 25,806.38 (Final Order, R. pp. 10-11, No. 17), but they never achieved a partition order. The heirs could have accomplished partition much more efficiently and less expensively on their own. There is certainly no requirement that only the PR can file a partition action.

For the first time Petitioner raises the argument that the Lisbon Cemetery Fund was not a legal entity capable of receiving an interest under a deed. He cannot introduce new arguments at this late stage; and the church, which owns the Cemetery Fund, was quite capable of dealing with any interest it acquired.

The Will's Option to Purchase should not have been a factor in settling the Estate. The PR belatedly decided that he wanted an appraisal, although under the Will he had the absolute power to set the purchase price; but he could have made a decision on any timely offer after he had the appraisal. There is no evidence that the holder of the option made any offer for the property during the 8 month period the option was operative. Even though the option had expired, the PR used it as an excuse to delay settlement of the Estate indefinitely. Then he charged the Estate to get the former option holder to sign a release of his expired right.

The late and much-lamented Justice Bruce Littlejohn once observed to the writer that "An expert is someone you pay to say your way." This was fully on display when the Petitioner's expert pronounced his sale of the subject property for less than its appraised value to be an excellent result. Respondents object to Petitioner's attempt to introduce new evidence on this topic through his Appendix A, just as they object to Petitioner's use of his so-called Exhibit E (See Petitioner's Brief at p. 43, paragraph 2 and R. pp. 1299-1302), which was never introduced as evidence at trial and was therefore not before the probate judge or this court.

The Petitioner devotes a portion of his brief to the alleged necessity of his declaratory judgment action and his partition action to clear title. As he himself admits, S.C. Code Ann. 62-3-910 protects the purchaser from any of the problems he raises. If the purchaser has no cause to sue and the Estate benefits from a fair value sale, then there is no one who is in a position to complain about the bogus issues raised by Petitioner. Petitioner had the right by statute to do a deed of distribution; so it would serve no purpose to sue him after he had delivered one to a purchaser, and he ultimately signed a quitclaim deed. The only liability a PR has under S.C. Code Ann. 62-3-910(B) is when the sale is contrary to his fiduciary duty.

Many of the objections Petitioner raises now to a deed of distribution were not raised below, and some of the issues are simply inapplicable. Respondent Brown's claim to the 5 acres was advanced only because the PR dragged her into court. His alleged worry about an old right of first refusal was ridiculous, because all he had to do was to offer the land to the holder of the right but he did not do that.

Finally, the Petitioner continually conflates his abstract legal right to do something like suing the beneficiaries with the reasonableness of doing it. Any power in the Will was subject to the statutory mandate to handle the Estate efficiently and expeditiously for the best interests of the Estate. S.C. Code Ann. 62-3-703(a). The probate judge recognized that there was a clear pattern of the Petitioner using his discretion to create complexity to enrich himself. See Final Order, R. p. 8, Nos. 2, 3 and 4. A fiduciary cannot be rewarded for violating his duty.

### **III. The Court of Appeals correctly affirmed the two lower courts' determination that the Petitioner was not entitled to additional compensation.**

S.C. Code Ann. 62-3-719 makes five percent of the Estate's value the default compensation for personal representatives. If there is a finding of extraordinary services, this can be raised to ten percent. S.C. Code Ann. 62-3-719. Petitioner admitted the necessity of this finding (R. p. 175/17-20) and is bound by that admission; but there was no such finding by the probate judge, who thereby abused his discretion in making his award.

The Will provided for “reasonable compensation” but gave no directions for determining that. This means that the determination of reasonable compensation was left to the probate judge’s discretion, and he chose to apply what he understood to be the statutory standard. This resulted in the arbitrary and erroneous omission of the extraordinary services requirement.

Petitioner devotes a great deal of new argument to what the compensation standard should be, and attempts to use the standards for lawyers even though he testified that he was not charging as an attorney (R. pp. 172/4- 173/7). If the Court did adopt his recommendations, such a substantive new rule would have to be prospective and would not benefit Petitioner. Any such new rule would also run a substantial risk of conflicting with the compensation statute cited above.

Petitioner complains about the finding that he “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.” (Final Order, R. p. 9, No. 8). This finding was based on Petitioner’s own testimony. See R. p. 174/9-24. The probate (now circuit) judge, who was in a unique position to evaluate the credibility of the witnesses, was not obligated to accept everything Petitioner said- and manifestly did not.

In arguing a variety of attorney fee factors not presented to the courts below, Petitioner logically starts with the time involved; however, he fails to take into account that the probate judge (and the other courts) found his sworn testimony of the hours he had worked not to be credible (Final Order, R. p. 9, No. 8). This lack of credibility would inevitably have affected the judge’s determination of what fee was justified.

One of the most jaw-dropping assertions of Petitioner was that the Estate benefitted because he did not charge it a real estate commission on top of his PR commission (Brief of Petitioner/Respondent, p. 41, top of page). This flash of naked greed illuminates the PR’s approach to his duties. Not all double billing was avoided, however. Collins and Lacey charged for Petitioner’s time and then he sought compensation as PR for the same hours. See the

reference to “the entries on the Law Firm bills as documenting time of the Petitioner’s administration of various aspects of the Estate.” Brief of Petitioner/Respondent, p. 44, para. 4. Petitioner was consistently focused on maximizing his and his law firm’s compensation from the Estate to its detriment contrary to his fiduciary duty.

**IV. The Court of Appeals did not err in applying the Two Judge Rule to reduce Petitioner’s compensation, but the applicable standard of review needs to be clarified.**

At oral argument before the Court of Appeals, both parties urged that Court to apply the Two Judge Rule. The concurring and dissenting opinion raised various issues concerning the rule which this Court should resolve; but whatever standard of review is applied, the Petitioner has failed to establish his entitlement to relief. In fact, he has unfairly benefitted, because the Court of Appeals gave him the benefit of findings which were unsupported by the evidence and the benefit of the overvaluation of the Estate. He was thus not entitled to the fee he received.

Petitioner fails in his argument on the law to recognize that the Two Judge Rule is not so much a separate standard of review, as it is a specialized subset of the usual preponderance of the evidence standard. The Two Judge Rule says that there is a presumption that the preponderance of the evidence standard has been met where two judges below have concurred in a finding, except where the conclusion agreed to by the two judges is without evidentiary support. See *Crown Central Corp. v. Elmwood Prop.*, 244 S.C. 588, 138 S.E.2d 38 (1964) and *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993).

**V. The Court of Appeals correctly determined that the evidence supported the ruling of the two judges below that Petitioner’s compensation should be reduced.**

As stated above, the Petitioner hired his Columbia law firm to get the subject land partitioned. Although they charged the Estate a total of \$ 25,806.38 (Final Order, R. p. 13, c), they failed to do this. (The total fee included \$ 18,000 the Petitioner paid the paralegals of his law firm to value the Estate’s personalty and thereby boost his PR fee. See R. pp. 4-5 and 750.)

This complicated the Estate and made settlement more difficult. A deed of distribution would have been a much better option and would have saved the heirs quite a bit of money. Without any citation to the record, Petitioner asserts that the both the Testatrix and a super majority of the heirs wanted the land partitioned. Suffice it to say that Ms. Kay never launched a partition action while she lived or advocated it in her Will, and none of the heirs pushed for partition. Again, the question is not whether Petitioner had the legal power to file a partition action, but rather whether it was primarily for the Estate's benefit or for his own. The lower courts correctly found that the situation called for a deed of distribution instead of enriching Petitioner and his law firm through a lawsuit (Final Order, R. p. 8, No. 2).

Interestingly enough, the Petitioner in discussing why he thinks he is entitled to an increased fee provides an example of why such an increase is not warranted. During one of his alleged attempts to settle the case, he invited Respondents to a private meeting in Newberry to discuss voluntary partition. When they arrived, Petitioner sprang on them that he had invited the other heirs as well. Petitioner's witness, Penny Arnold, testified to the result (quoted on p. 37 of Petitioner's Brief): "They- were unhappy. They didn't know we were going to be there." See also R. p. 310/17- 311/4 for Respondent Brown's perspective on the meeting. In other words, Petitioner torpedoed settlement by the way he treated Respondents and then sought to be rewarded for making the case more complicated and expensive.

As to Petitioner's being forced to determine his own compensation, he himself testified that the way he was supposed to resolve any issue about his compensation was to ask the judge (R. p. 204/16-18), not just pay himself what he wanted in secret. The new standards he advocates now (and should have advocated to the probate judge) would have to be prospective and would not benefit him.


#### CONCLUSION

The courts below correctly denied Petitioner the relief he seeks and in fact gave him more than he was entitled to. His appeal should be dismissed with costs, attorney fees and post-

judgment interest assessed against him personally. He should immediately comply with the probate order below concerning the return of unearned compensation. Respondents should be granted the relief they have sought, including costs and attorney fees for post-trial work and the appeal.

COX, FERGUSON & WHAM, LLC  
Attorneys for the Respondents/Appellants

By: \_\_\_\_\_



John R. Ferguson  
S.C. Bar No. 1987

107 E. Laurens St.- P.O. Box 286  
Laurens, S.C. 29360  
(864) 984-2126

October 10, 2017

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CERTIFICATE OF SERVICE

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The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 11 day of October, 2017 she served the Respondents' Brief of Respondents/Appellants herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.  
Attorney at Law  
P.O. Box 11906  
Columbia, SC 29211.

Dulvora Ball

October 11, 2017