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,

vs.

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

RESPONDENT'S BRIEF OF PETITIONER/RESPONDENT

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5. **Whether the standard of review applied by the Court of Appeals regarding the foregoing issues raised by Respondents Brown and Moses resulted in reversible error?**

Pursuant to Rule 208(b)(2), SCACR, Petitioner/Respondent Edward D. Sullivan, Personal Representative (the "PR"), respectfully submits this respondent's brief in response to the Petitioner's Brief of Respondents/Petitioners Brown and Moses ("Brown and Moses").

INTRODUCTION

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

In arriving at its decision in this case, the South Carolina Court of Appeals correctly held that SC Code Section 62-3-719 (a) does not limit the PR to 5% of the Estate's value under the facts of this case. It also correctly notes the allegations of Brown and Moses of bad faith are unsubstantiated and a mischaracterization by Respondents of the PR's efforts. Finally, the Court properly reversed the lower court's ruling requiring the Estate to pay legal fees of counsel for Brown and Moses under the common fund doctrine.

In the related cross-appeal, the PR argues the Court of Appeals erred in affirming the probate court's order arbitrary ruling to limit the PR's compensation to 10% of the Estate, denying the PR's request for reimbursement of legal fees and costs, and its application of an improper standard of review. See Brief of Petitioner/Respondent.

STATEMENT OF THE CASE[1]

This action arises from the administration of the Estate of Marion M. Kay, who died on May 3, 2007. On November 12, 2010, after more than three years and six months of Estate administration, litigation in the Circuit Court, and the negotiation and closing on a sale of the Estate's interest in real estate, the PR, Edward D. Sullivan, filed a Petition for Settlement and a Proposal for Distribution. Counsel for Martha Brown and Mary Moses, each 1/10 residual beneficiaries and defendants in the aforementioned litigation wrote a letter to the Probate Court requesting a hearing. No pleadings were filed other than PR's Petition for Settlement.

Hearings were held on February 2, 2011 and February 21, 2011. At the hearings, Mr. Sullivan presented the (1) Last Will and Testament of Ms. Marion M. Kay, (2) a Supplemental Inventory and Appraisement reflecting her assets and valuation at the time of death and several accountings for the administration, (3) his extensive affidavit including issues confronted during the administration of the Estate and his time spent on the administration (4) an affidavit of an expert witness in support of his compensation (5) invoices for legal fees for services rendered by a law firm during the administration of the Estate, (6) invoices for legal counsel and expert witnesses for purposes of the hearing.

In addition, the PR testified as to the identity of the beneficiaries of the residuary Estate, and their respective interests, the intent of Ms. Kay as it related to the liquidation and distribution of the Estate's primary asset, a one-half

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1 This Statement of the Case also appears in the PR's Brief of Petitioner/Respondent in the cross-appeal.

undivided interest in a 330 acre tract of land (the "Farm"), the stated desires of various beneficiaries to receive cash rather than an interest in land, the various competing claims to the Farm which led to litigation including a partition and declaratory judgment action, the results of the litigation, the novel issues in the administration of the Estate, the difficulty in completing the Estate, and the various charges and expenses of the Estate administration, including the amount of PR compensation and factors used in determining reasonable compensation.

The reasonableness of compensation was supported by the testimony of two beneficiaries of the Estate. In addition, two expert witnesses testified as to the outstanding results achieved by the PR in selling real estate owned by the Estate.

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

The Court ruled that the PR should not have filed a partition/declaratory action to sort out various claims to Estate Property, but rather should have deeded out the Estate property to the beneficiaries as tenants-in-common. The Probate Court essentially found that the PR (1) unnecessarily complicated the Estate and (2) failed to provide adequate proof for the hours claimed and necessity for the hours. Based on these findings, the Court ruled that the amount paid to the PR during the three and one-half year administration, $93,775.00, was excessive, that a fee of $51,300.00, about 10% of the Estate value was reasonable, and ordered the PR to refund to the Estate within 30 days

the amount paid in excess of $51,300.00, that amount being $42,475.00 or, if the PR completed the settlement, a refund of $39,975.00, reflecting additional compensation of $2,500.00 for winding up the Estate. (See, Final Order, R. p. 10, Paragraph 14; R. p. 13, Items a) and b)). Additionally, the Court denied the PR's request for compensation for preparing for and attending the hearing, as well as the request for reimbursement of legal fees and witness fees.

The Probate Court also ruled, later reversed by the Court of Appeals, that counsel for Brown and Moses was entitled to be paid $19,860.00 by the Estate pursuant to the common fund doctrine. (See, Final Order, R. p. 11, Paragraph 21; R. p. 13, Item e)).

The PR filed a Rule 59, SCRCP 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). Brown and Moses simultaneously appealed and thereafter the PR, in an abundance of caution, cross-appealed to preserve his rights to an appeal. These appeals were later dismissed so that the Probate Court could entertain the PR's Rule 59 motion. After a hearing on the Rule 59 motion, the Court upheld its earlier decision and declined to re-open the record to allow in certain time sheets offered by the PR as well as an Affidavit of Teri Stomski, an attorney who had earlier counseled the PR on the wisdom of filing a partition action due to title issues regarding the Estate Property. The Court denied a claim of Brown and Moses for five acres of land that had been owned by the Estate, denied additional legal fees sought by Brown and Moses and

ordered that Brown and Moses be responsible for one-half of the Court reporter costs. (See, Order Disposing of Post-Trial Motions; R. pp. 15-18).

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

The PR served his notice of appeal in this matter on October 24, 2013, and served an amended notice of appeal on October 30, 2013. Brown and Moses 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[2]

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);

2 This Statement of Facts also appears in the PR's Brief of Petitioner/Respondent in the PR's cross-appeal.

(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 PR, Discretionary Powers Granted by the Will, and Compensation and Reimbursement for Expenses

The will named Ms. Kay's attorney and life-long friend Edward D. Sullivan ("Mr. Sullivan" or the "PR") as Personal Representative (See, PR Exhibit B; R. p. 555, Item V(1)); (R. p. 70, Lines 12–18). Mr. Sullivan is an attorney with more than 25 years of legal experience. In addition, he is a Certified Public Accountant with several years of experience in public accounting and as Controller of a propane gas company. In addition to Bachelors of Science - Accounting and Juris Doctor Degrees, the PR has earned a Master of Accountancy degree and an LLM-Taxation degree. Mr. Sullivan is also a licensed real estate broker. He is originally from Laurens, South Carolina, and he and Ms. Kay both attended Lisbon Presbyterian Church, a small church in Mountville (Laurens County), South Carolina. (See, PR Exhibit A; R. pp. 548-549); (R. p. 62, Line 16 – p. 63, Line 2). He also served as her attorney in various matters beginning in 1997, including an effort to divide the Farm in 2003.

The will essentially authorized and empowered the PR "by way of illustration and not of limitation and in addition to any inherent, implied or

statutory powers granted to PRs generally" . . . "to exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right, upon such terms and conditions as to my PR my seem best and to do all acts which my PR may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a Court order." (Emphasis added) (See, PR Exhibit B; R. pp. 555-556, Item VII). In addition, the will's language regarding Copeland's option provides "the decision of my PR regarding the fair market price to be final" (emphasis added). (See, PR Exhibit B; R. pp. 556-557, Item IX).

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

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

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

The PR understood that Ms. Kay intended that her real estate be sold and the proceeds distributed to the devisees. (R. p. 155, Lines 4–19). In addition to Ms. Kay's previous desire to divide the farm, the provision of the will referenced above refers to the "interest to be used to keep up the Milam-Kay plot." (See, PR Exhibit B; R. p. 554, Item IV). The PR did not believe a simple deed of distribution to the beneficiaries would carry out Ms. Kay's testamentary intent (The beneficiaries would be minority co-tenants of the Farm with Brown and Moses, responsible for property taxes and insurance, and subject to liability. Because of the lack of marketability of their respective interest in the property, these heirs would be faced with filing a partition action or selling to Brown and Moses at a deep discount). The PR was also concerned about possible title issues. (R. p. 148, Line 21 – p. 153, Line 22); (R. p. 159, Line 13 – p. 161, Line 5).

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

With his knowledge of Ms. Kay's intent, the powers granted to him by the will, and the desire of the beneficiaries[3] to receive cash rather than an undivided interest in real estate, the PR set out to divide the property so that he could sell

the Estate's land and distribute cash to the beneficiaries. The division was very complicated and involved the following issues:

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

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

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

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

Another issue was what action was required by church protocol regarding the church's interest in the Estate to properly approve and consent to the sale of the real estate. The PR had several telephone conferences with Robert Fuller, and received and reviewed his "opinion" letter (See, PR Exhibit C-1; R. p. 561, Paragraph 16); (PR Exhibit C-9; R. pp. 630-631).

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3 Other than Moses and Brown.

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

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

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

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

In another attempt to reach a resolution, the PR arranged a meeting with the beneficiaries, including representatives from Lisbon Presbyterian Church, Presbyterian Home of South Carolina, Mary Moses, Martha Brown, and Paul Major, appraiser. The meeting was held in Newberry, SC at Paul Major's office

on July 31, 2008. Reverend Hampton Hunter attended the meeting on behalf of the church. Penny Arnold attended the meeting on behalf of Presbyterian Home of SC. The purpose of the meeting was to discuss an equitable division of the Farm. Initially, Ms. Moses and Ms. Brown refused to discuss any proposal with Mr. Major and the PR as long as Reverend Hunter and Ms. Arnold were allowed to attend the meeting. Subsequently, the meeting was held and it was decided that Mr. Major would prepare a proposed division of the property and present a written proposal to the parties. (R. p. 99, Line 11 – p. 100, Line 6); (PR Exhibit C-1; R. p. 562, Paragraph 21).

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

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

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

and the parties engaged in discovery. After approximately 15 months, a mediator was retained to mediate the dispute. (R. p. 100, Line 3 – p. 102, Line 3); (PR Exhibit C-1; R. p. 562, Paragraph 23).

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

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

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

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

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

The PR prepared the deeds and attended the closing of the transactions in Laurens, South Carolina on July 9, 2010. (See, PR Exhibit C-1; R. p. 563, Paragraph 32); (PR Exhibit C-16; R. pp. 686-706). Through the efforts of the PR, there was no sales commission. The net proceeds collected by the Estate were $365,012.85. (See, Settlement Statements, PR Exhibit C-16; R. pp. 694-705). Furthermore, the Estate was expressly relieved of any responsibility for roll-back taxes. (See, Addendum to Settlement Statements, PR Exhibit C-1, R. p. 563, Paragraph 32); (PR Exhibit C-16; R. p. 706). Despite the downturn in the economy and the stagnant real estate market, the Estate realized almost 94% of the appraised value through the efforts of the PR, an "exceptional" result. (See, PR Exhibit C-1; R. p. 563, Paragraph 30); (R. p. 233, Lines 6–24).

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

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

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

From Ms. Kay's death until August 31, 2010, the PR was an employee ("Of Counsel") with Collins and Lacy, PC, attorneys (the "Law Firm"). The PR retained the Law Firm to assist in the administration of the Estate. At the PR's request, the hourly rates for attorneys working on the matter were reduced from $225.00 to $145.00. Additionally, at the PR's request, the invoices were discounted/written down in an amount exceeding $20,000.00. In addition, at the PR's request, the invoices reflect that the PR had 249.7 "no charge" hours so as to further reduce the fees to the Estate and to avoid doubling billing by the PR. (R. p. 91, Line 19 – p. 95, Line 12); August 17, 2010 invoice (PR Exhibit D; R. pp. 794-995), 173.3 hours plus August 16, 2010 invoice, 76.4 hours (R. p. 775). Furthermore, the PR worked an additional 216.10 hours in this matter in addition to the time listed on the aforementioned invoices - a total of 465.80 hours. (See, Rule 59 Motion to Re-open Record, Accept Additional Evidence, and/or to Alter or Amend Judgment; R. pp. 935-938).

In order to determine a reasonable amount of compensation, the PR reviewed the statutory and case law on compensation of PRs, consulted with Alan Medlin, a professor at the University of South Carolina School of Law, teaching Trusts and Estates and a recognized authority in South Carolina on

these issues. He also sought and relied on other counsel. (R. p. 174, Line 5 – p. 176, Line 9); (R. p. 189, Lines 16–24).

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

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

STANDARD OF REVIEW

"The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity." University of Southern California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the

petitioners below. Dean v. Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993). "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 in accordance 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).

A majority of the Court of Appeals, citing 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. If that is the standard, there is more than substantial evidence to affirm the Court of Appeals on the issues raised by Brown and Moses. However, as argued by the PR in his cross-appeal, the "two judge rule" is unconstitutional and not binding precedent on this Court. See PR's Brief of Petitioner/Respondent at pp. 16, 45 – 49. Also, see the dissenting opinion of Justice John Few at App. 18. In any event, the arguments put forth by Brown and Moses in their petitioner's brief fail under under any standard of review because there is certainly sufficient evidence, indeed a clear preponderance of the evidence, to affirm the Court of Appeals' decision that the PR is not limited to a 5% fee, that he did not

improperly exercise his power or breach his fiduciary duty, and that the common fund doctrine is inapplicable in this case.

ARGUMENT

I. The Court of Appeals Did Not Err in Reversing the Probate Court's Decision to Award Attorney's Fees to Brown and Moses.

A. Brown and Moses are adverse to the other beneficiaries.

In reversing the Probate Court's decision to award Respondents' Counsel Attorney's fees based on the common fund doctrine, the Court correctly ruled that legal fees cannot be awarded when the interests of the parties are adverse, even though services may have benefited all parties. Bedford v Citizens & S. Nat'l Bank of S.C., 203 507, 515, 28 S.E.2d 405, 407 (1943). In other words, the common fund doctrine requires all interested parties to have the same interest.

In this case, several, if not all, of the parties were adverse to Respondents. Beneficiaries receiving at least 70% of the residuary estate desired a cash distribution as opposed to to an undivided interest in real estate. (See R. p. 78, Lines 12 – 22; R. pp. 630 – 631.) Penelope Arnold of beneficiary The Presbyterian Home of South Carolina testified in essence that the Presbyterian Home would have been unduly burdened by an interest in real property due to the financial strain of property taxes and upkeep (R. p. 243 line 12 – p. 244, line 2). Further evidence of adverse interests, as noted by the Court of Appeals, was the testimony of Ms. Arnold in which she stated that at a meeting with the beneficiaries to resolve issues with the estate's division, she

and Reverend Hunter, of Lisbon Presbyterian Church[4], were not well-received by Brown and Moses over the Estate's division. In fact, Ms. Arnold testified that after the meeting with Brown and Moses, she reported to the President of the [Presbyterian Home] the "discomfort" and that [the Presbyterian Home] might not ever see any funds from this Estate." (R. p. 245, lines 2 – 19, App. 13).

Brown and Moses retained counsel because they disagreed with the division of the estate and stated positions adverse to the other beneficiaries. In response to the partition and declaratory judgment action filed by the PR, Brown and Moses filed a counter-claim against the Estate regarding "approximately 4.59 acres" of real estate, which, if successful, would have diminished the estate and reduced the benefit ultimately received by all of the other beneficiaries (R.660, paragraphs 18 – 22). Even though that lawsuit was settled, and dismissed with prejudice, Brown renewed and continued to press this claim for approximately 5 acres of land at the hearing(s) on PR's Petition for Settlement, continuing to be adverse to the interests of all other beneficiaries. (R. p. 319, line 19 – p. 327, line 5).

Brown and Moses also disagreed with the Personal Representative's compensation. On the other hand, Penelope Arnold testified that the Presbyterian Home was in favor of the Personal Representative's actions in pursuing a partition action. She also approved of the Personal Representative's compensation and expenses. R. p 246, lines 9 – 25. Bart Heard testified he did not object to any of the Personal Representative's fees (R. p. 134, L. 5 – p. 135,

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4 Ms. Kay's will bequeaths unto Lisbon Presbyterian Church and the Lisbon Presbyterian Church Cemetery Fund a ¼ interest (25%) each, for a total of 50% or half

L. 10) and was represented by his own counsel during some of the proceedings. (See, R. p. 379, Lines 16-19). This is not a case where members of a general class "stood aloof and without counsel". See, Petition of Crum - Johnson v Williams, 196 S.C. 528, 14 S.E.2d 21 (1941) at 193. Unquestionably, most if not all of the interests of the other beneficiaries were adverse to the Respondents.

B. A contract of employment, a requirement of the common-fund doctrine, is non-existent in this case.

"Before an attorney may be allowed compensation out of a common fund, there must be a contract of employment, whether express or implied in law, between the attorney and **all** parties with an interest in the fund." (emphasis added). Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship, 315 S.C. 36, 41, 431 S.E.2d 598, 601 (Ct. App. 1993). There is no evidence of a contract of employment, whether express or implied in law, between the counsel for Brown and Moses and all the other beneficiaries. As noted above, beneficiary Bart Heard was represented by his own counsel during some of the proceedings. See, 1/11/2012 Transcript, R. p. 379, lines 16 – 19. Accordingly, there can be no express or implied contract between Respondents' counsel and all parties with an interest in the Fund. Petition of Crum - Johnson v. Williams, 196 S.C. At 532-33. 14 S.E.2d at 23 (1941).

As the Court of Appeals notes, "the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice." App. p. 12, Opinion, Part I, E citing Petition of Crum - Johnson v. Williams, 196 S.C. 528, 531, 14 S.E.2d 21, 23. Given the

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of the Estate. R. p. 554.

facts and circumstances of this case, such an award would not promote justice and would in fact be unjust to the other beneficiaries who made known to the PR during administration of the estate, and to the Probate Judge at the hearing, that they had adverse interests to Brown and Moses as well as the testator's intent for the property to be sold. Accordingly, the common fund doctrine is not applicable and the probate court's award of fees to Respondents was properly reversed.

Brown and Moses seemingly argue that testimony of beneficiaries approving the PR's compensation and expenses and efforts during the administration was motivated by "[impatience] to get their money" (Petitioner's Brief of Brown and Moses, page 8) and therefore somehow not indicative of an adverse interest. However, Brown and Moses offer no evidence to support this assertion and also ignore the nearly 4 years prior to the hearing of conflicting and adverse claims to the real estate by the beneficiaries, the partition and sale of the real estate, the support by other beneficiaries of the Petitioner's efforts, and their expressed desire to partition, sell and distribute the proceeds from the sale to the beneficiaries, rather than inherit land.

"It is recognized generally by the Courts that the allowance of counsel fees from a fund is capable of great abuse, and should be exercised with the most jealous caution and circumspection with regard to the rights of litigants, lest thereby the administration of justice be brought into reproach." Petition of Crum - Johnson v Williams, 196 S.C. 528, 14 S.E.2d 21 (1941). "Such allowances are appropriate only in exceptional cases and for dominating reasons of justice." Id. citing Sprague v Ticonic National Bank, 307 U.S. 161, 59 S.CT. 777, 83 L.Ed.

184 (1939). For the foregoing reasons, the request of Brown and Moses for legal fees on appeal does not comport with the requirements of the "common fund" doctrine and cannot be awarded notwithstanding the ruling that the issue was not preserved on appeal.

II. The Court of Appeals Did Not Err in Ruling that the Personal Representative did not improperly Exercise his Power or Breach his duty to the Estate and its Beneficiaries.

As the Court of Appeals properly ruled in its Opinion, Brown and Moses' allegations that the PR acted in bad faith were "unsubstantiated and a mischaracterization by Respondents of Appellant's efforts as PR." See Opinion at Part II, Section A (App. 15). Brown and Moses continue to mischaracterize the PR's actions and continuously misstate the record. For example, Brown and Moses' assertion that the PR "secretly paid himself $93,775 before [Brown and Moses] demanded a hearing to find out what he was up to" is false. (Brief of Brown and Moses, pp. 3, 12 and 14.) The amounts paid had been disclosed in accountings previously filed and served on Brown and Moses and all other beneficiaries. R. pp. 713 – 720.

In this case, the Probate Court made specific findings supporting an award of reasonable compensation of $51,300 despite his disagreement with PR's actions to liquidate the estate based on the PR's understanding of Ms. Kay's intent and the desire of 70% of the residuary interests to partition the property and receive cash. These findings include (1) the outstanding result in the sale of real estate (May 24, 2011 Order; R. p. 9, Paragraph 6); (2) the approval of beneficiaries (R. p. 10, Paragraph 14); (3) the exemplary credentials of the PR (R. p. 10, Paragraph 15); and (4) the good faith efforts of the PR (R. p.

10, Paragraph 16). In response to the contention of Brown and Moses that the fee should be reduce, there is substantial evidence, a clear preponderance of the evidence, in the Record to support the Probate Court's award of fees.[5]

The evidence is clear and well supported factually in the Record that the PR acted in good faith. He sought and relied upon legal counsel[6] and other advisors. (See, PR Exhibit C-1; R. p. 561, Paragraph 15 and R. p. 564, Paragraph 34-z); (R. p. 175, Line 23 - p. 176, Line 9); (R. p. 189, Lines 16-24); (R. p. 204, Lines 8-25). He attempted to address all claims to the real estate, first through negotiation and attempted compromise and secondly by filing a partition/declaratory judgment action. (See, PR Exhibit C-11; R. pp. 632-633); (PR Exhibit C-12A; R. pp. 634-656); (PR Exhibit C-1; R. p. 562, Paragraph 23). At his request, his legal counsel reduced their normal billing rates. (R. p. 93, Lines 14–22). He also requested and received substantial discounts to legal fees incurred. (R. p. 94, Line 15 - p. 65, Line 7).

Likewise, the PR achieved what two expert witnesses stated to be an outstanding result in the sale of the real estate and performed numerous tasks to enhance the value of the Estate. The PR, a licensed real estate broker, showed the property. He negotiated with the Purchaser who paid approximately 94% of the fair market value of the property, most of which was for a one-half undivided interest. (See, PR Exhibit C-1; R. p. 563, Paragraphs 29 and 30). Based on those negotiations, he received an excellent price in the opinion of experts. (R.

5 PR has argued in his own Petitioner's brief why the award should be increased but here merely responds to Brown and Moses' arguments for a decrease in the fee.

p. 222, Lines 5-15; R. p. 233, Lines 14-24). He did not charge a sales commission. (R. p. 107, Lines 13–25); (R. p. 108; Line 20 – p. 109, Line 16). The PR's efforts to liquidate the sale were desired by no less than 70% of the residuary beneficiaries of the Estate, including Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard; (See, PR Exhibit C-9; R. pp. 630-631); (R. p. 78, Lines 12-22); (R. p. 133, Line 2 – p. 135, Line 10); (R. p. 243, Line 12 - p. 244, Line 2); (PR's Brief of Petitioner/Respondent at Page 9).

For these reasons, the Court did not err in affirming that the PR did not improperly exercise his power or breach his duty to the Estate and its Beneficiaries.

III. The Court of Appeals Did Not Err in Ruling that the Personal Representative was entitled to a fee greater than 5% of the Estate.

Item V(3) of Ms. Kay's Will provides "For [his] services as PR, the individual PR shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." See, PR Exhibit B; R. p. 555). Reasonable compensation should be determined by an analysis of various factors such as the law relating to legal fees in South Carolina. See, Rule 407, SCACR; Rule 1.5. Also, see Layman, supra. Other jurisdictions have used such factors as the law pertaining to compensation for personal representative. See, for example, Fla. Stat. § 733.617 (1973).

Brown and Moses erroneously rely on S.C. Code Ann. § 62-3-719(a) as serving to limit the compensation to five (5%) percent. Such reliance is

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6 Professor Allan Medlin, Collins and Lacy Law Firm, Attorney Teri Stomski and others. The allusion to "paid hearsay" by Brown and Moses on page 14 of their brief is nonsensical.

misplaced. S.C. Code Ann. § 62-3-719(c) provides that "[t]he provisions of this section do not apply . . . where the will otherwise directs . . " In this case, the will does otherwise direct and provides "the individual personal representative shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses." Since the will "otherwise directs", the 5% limitation of Section (a) does not apply.

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

Brown and Moses misstate the rulings of the Probate Court and Circuit Court and accordingly mislead this Court in falsely writing, "Like the Court of Appeals, the first two courts below found that the [PR's] actions in court were for his own benefit and not for the benefit of the Estate." Petitioners' Brief of Respondents/Petitioners at p. 12. These rulings dealt solely with the denial of the PR's request for legal fees and costs as provided by the will and statute - **not** the amount of his compensation for service as the personal representative. In fact, the courts below found that the PR did not act in bad faith during his administration of the Estate, and the Court of Appeals correctly noted that "the

[PR] presented substantiated evidence that he worked diligently over a course of three years to accommodate all interested parties." App. 15.

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

The record reflects that the PR worked diligently for more than 3 years and 8 months to sort out the various competing claims under the circumstances surrounding the administration of the Estate and achieved an outstanding result. (See the foregoing Statement of Facts, Sections C, D and E). The Court of Appeals correctly determined that the "specific circumstances" and "competing interests" merited the imposition of a fee greater than 5%. Accordingly, while the PR has argued in cross appeal that the compensation should be increased, there is substantial evidence, indeed a clear preponderance of evidence, to allow the fees and costs found by the Probate Court to be appropriate and to be affirmed.

IV. The Court of Appeals did not err in ruling that the contention of Brown and Moses that the PR should pay all costs associated with probate proceedings was not preserved for appellate review.

Rule 208 (b) SCACR provides that issues on appeal must be set forth in a statement of issues presented for review. The argument of Brown and Moses

that the probate court erred in failing to require the PR to pay all costs associated with the probate proceedings, including attorney's fees, court costs, and post-judgment interest, was is conclusory and not preserved for review. Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006). Accordingly, the two sentences are insufficient to assert a legal error and the Court properly declined to address the argument.

In any event, Brown and Moses cite no legal authority to support their position. The case law upon which they rely does not support their contention, particularly in light of the probate court's finding that the PR did **not** act in bad faith. As determined by the Court of Appeals, the contentions of bad faith put forth by Brown and Moses are "unsubstantiated and a mischaracterization by [Brown and Moses] regarding [Sullivan's] efforts as PR." App. 15. In addition, Rule 222, SCACR, governs costs on appeal. Also, see Rule 220 (The [Court] need not address a point which is manifestly without merit.)

V. The Standard of Review applied by the Court of Appeals regarding the foregoing issues raised by Brown and Moses did not result in reversible error.

As briefed by the PR in the cross-appeal, a majority of the Court of Appeals incorrectly applied the "two-judge" rule and made errors of law in affirming the probate court's order reducing the compensation of the Personal Representative and denying reimbursement of fees and costs to the Personal Representative. See Brief of Petitioner/Respondent, pages 45 – 50.

Nevertheless, the Court of Appeals did not err regarding the issues raised by Brown and Moses. The appellate court may reverse the lower courts on errors of law or make findings of fact where the facts relied upon below are

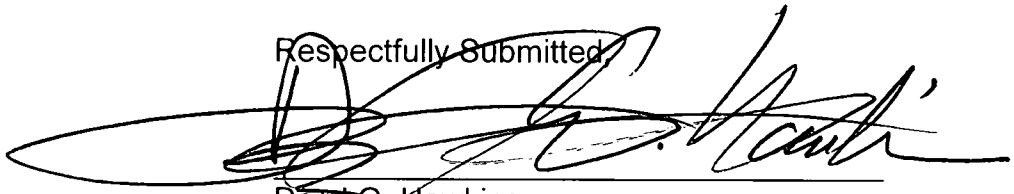
without evidentiary support or against the clear preponderance of the evidence. Geddings v Geddings, 319 S.C. 213, 460 S.E. 2d, 376 (1995). In accordance with the foregoing, the Court of Appeals properly reversed the probate court regarding legal fees awarded Brown and Moses based on the common fund doctrine and properly ruled against Brown and Moses on all other issues because the clear preponderance of the evidence supports the rulings that the Personal Representative's compensation was not limited 5% and the PR did not improperly exercise his power in connection with the Estate. The Court of Appeals should be affirmed on these issues and the relied sought by his Petitioner's brief should be granted. as it regards the issues raised and sought to be reversed by Brown and Moses.

CONCLUSION

For the foregoing reasons, the Court of Appeal should be affirmed regarding the issues raised by Brown and Moses.

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

Respectfully Submitted,



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October 20, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2016-002337

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S.C. SUPREME COURT

In the Matter of the Estate of Marion M. Kay

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

v.

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

PROOF OF SERVICE

I certify that I served Respondent's Brief of Petitioner/Respondent by mailing one (1) copy to counsel of record, John R. Ferguson, Post Office Box 286, Laurens, SC 29360.

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