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

REPLY BRIEF OF PETITIONER/RESPONDENT

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Petitioner/Respondent Edward D. Sullivan, Personal Representative (the "PR"), respectfully submits this brief pursuant to Rule 208(b)(3), SCACR in reply to Respondents/Petitioners Brown and Moses ("Brown and Moses") .

ARGUMENT

I. The Court of Appeals erred in affirming the lower court's ruling that the PR was not entitled to reimbursement for legal fees and expenses because both Ms. Kay's will and South Carolina Code Section 62-3-720 provide for reimbursement of reasonable fees and expenses to the PR.

In affirming the probate court's decision to deny reimbursement of legal fees and expenses related to the Petitioner's Petition for Settlement, the Court of Appeals relies upon SC Code Section 62-3-715 "Transactions authorized for personal representatives; exceptions" and interprets this provision in such a way as to nullify the right to reimbursement afforded to Petitioner by the will and Section 62-3-715. In doing so, the Court of Appeals erred. Allowing this ruling to stand will make it increasingly difficult to find qualified persons willing to serve as personal representative in complicated estates where they run the very real risk of accepting mandatory duties but being personally responsible for any attorney's fees or expense incurred.

A. The Court of Appeals overlooked or misapprehended the will provision providing for the reimbursement for fees and expenses.

The Court of Appeals did not address the reimbursement provided by the will of Ms. Kay and focused only upon the statutory provision providing reimbursement. Item V 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." R. p. 555. Item VII of the will provides the extensive powers of the Petitioner Personal Representative and expressly authorizes [Ms. Kay's] Personal Representative to do all acts which her "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 court order."

The Petition for Settlement was filed in November 2010 pursuant to S.C. Ann. Section 62-3-1001(a)(3)) requiring a personal representative to file a petition for settlement of the the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate."[1] The Respondents requested a hearing and the Petitioner was required to attend on behalf of the Estate. Filing of the Petition and subsequent attendance at the hearing were mandatory, and <u>not</u> optional. In attending the hearing, the Petitioner fulfilled his duties as required and is entitled to be paid pursuant to the terms of the will of Ms. Kay as the fees and expenses in preparing for and attending the hearing and follow up were entirely reasonable. The Court of Appeals erred in denying fees and expenses because reimbursement of fees and expenses are expressly authorized by Ms. Kay's will.

The Court of Appeals also erred in its interpretation and application of SC Code Section 62-3-720 basing its decision to affirm the denial of reimbursement of fees and costs with its concurrence with the probate court's finding that the

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1 The Petition for Settlement was filed in 2010 before the 2013 amendment to the Probate Code which now provides for an "Application for Settlement."

[Petitioner's] fees "primarily stemmed from the contest between [Petitioner] and Respondents over the amount of his compensation . . ." App. 11. If a disgruntled beneficiary can punish the personal representative by simply requesting a hearing on the mandatory Petition (now Application) and making the hearing primarily "a contest between [the personal representative] and [a beneficiary] over the amount of [the PR's] compensation" and thus shift the cost and fees from the Estate to the personal representative, many qualified people will be unwilling to take the task, yet this is currently the law of South Carolina under the decision of he Court of Appeals.

As noted above, the hearing was initiated by a simple request for hearing on the Petition for Settlement without stating any grounds. The Petitioner was required to appear to explain and defend the accounting and administration by law.

The Court of Appeals held that the PR's Due Process rights were met by the trial court's observation that "typically, it is a complaint about something the PR's done or not done . . " and that the hearing . . . "runs a little smoother if we start the case off as you (PR) as the moving party". Substituted Opinion of the Court of Appeals, App. 10. In addition, SC Code Section 62-3-720 does not distinguish between primary or secondary reasons as to why proceedings are held, and, in any event, and whether a hearing is requested by a beneficiary is beyond he control of a personal representative because, according to the statute, an "interested person" may request a hearing for any reason. As noted by Justice Few in dissent, "[Respondents] requested the hearing on [Petitioner's petition for settlement, and at the hearing, [Petitioner] defended his decision to seek a partition and sell the real estate. Because the probate code provides a personal representative who 'defends or prosecutes any proceeding in good faith' entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred,' S.C. Ann. Section 62-3-720 (Supp. 2015),and [Petitioner] filed the petition for settlement and appeared at the hearing in good faith, I would find he is entitled to reasonable attorneys' fees and expenses."

B. The Court of Appeals miscomprehended SC Code 62-3-715.

The Court of Appeals also erred in its interpretation and application of Section 62-3-715 "Transactions authorized for personal representatives; exceptions. The statute 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 his his necessary expenses and disbursements including attorneys' fees." (emphasis added.) The PR was required to attend the hearing to defend his accounting. He was thus entitled to be reimbursed for his fees and costs.

This code section is qualified by the lead-in phrase, "Except as restricted or otherwise provided by the will . . . " As noted above, the will provided expansive powers to the personal representative and must be interpreted broadly in light of the will provisions. Sections 62-3-715 (19) and (20) must be read in combination with the powers granted by the will.

In addition to providing and explaining the accountings and the the issues confronted during the estate administration, the Petitioner successful defended the estate from the ongoing claim by Brown for 5 acres.

Finally, the Court of Appeals erroneously cited and relied upon SC Code Section 62-3-721 to support its decision because it is not applicable.. That provision has to do with actions specifically brought brought to review employment of agents and compensation of PR's. The Petition for Settlement before the Court was filed pursuant to SC Code Section 62-3-1001.

Accordingly, the Court of Appeals erred in affirming the probate court's decision to deny reimbursement of legal fees and costs to the Personal Representative.

II. The PR's compensation, legal fees, and expense were reasonable because he carried out the intent of Ms. Kay in accordance with the provisions of the will and probate code as efficiently and effectively as he could have given the conflicting interests of the interested parties.

The Court of Appeals suggests that even though the PR acted in good faith, the estate could have been settled more cheaply. The Court of Appeals does not, however, provide how that could have been done. The Probate Court's solution, after the fact, was to simply deed out the property and based its Order on that premise. Although this may have "short-cutted" the administration, it would not have been in accordance with the intent of Ms. Kay. It also would have ignored the desires of beneficiaries Lisbon Presbyterian Church, the Lisbon Presbyterian Church Cemetery Fund, the Presbyterian Home and Bart Heard.[2]

III. **The PR's decision and efforts to pursue a division and sale of the Farm including the filing of a partition/declaratory judgment action, as opposed to simply filing a deed of distribution to the heirs, comported with Ms. Kay's testamentary intent and fulfilled his duty to the**

2 The desire of Marla Orias, Bart Heard's sister, as it related to the liquidation of the Estate is not on record.

Estate and its beneficiaries because Lisbon Presbyterian Church, The Presbyterian Home and Bart Heard, together owning 70% of the residuary interests of the Estate, expressed to the PR a desire to receive cash rather than an undivided interest in real estate.

Brown and Moses are unwilling to admit the undeniable fact in this case that none of the other beneficiaries of Ms. Kay's Estate wanted to own property as co-tenants with them. Other beneficiaries desired a distribution of cash as opposed to an undivided interest in real estate and expressed this desire to the PR. The allegations of Brown and Moses concerning excessive fees and expense are nullified by the desires and needs (and support of the PR's actions) of other beneficiaries whose interests in the Estate equal or exceed that of Brown and Moses. The Court of Appeals erred as a matter of law in affirming the probate court's ruling to require the PR to refund a substantial portion of his compensation because in addition to carrying out Ms. Kay's testamentary intent, he has a statutory right to seek partition in his discretion to aid the settlement of the Estate and in this case satisfy the needs and desires of a majority of the beneficiaries.

Penny Arnold of the Presbyterian Home, a 10% residual beneficiary, testified that her organization did not want to be owners of real property and wanted and needed a cash distribution. Ms. Arnold, the point person for the Presbyterian Home, has been handling estate trusts and/or bequests since 1985, even prior to the Presbyterian Home. (R. p. 242, Lines 12-25). She approved the PR's compensation and as well as the amount of legal fees and was pleased with the results. (R. p. 246, Lines 1-11 and 18-25). Bart Heard, another a 10% residual beneficiary, testified in essence that he approved of the

PR's actions to divide the Estate as well as the amount of the PR's compensation.[3] (R. p. 133, Line23; R. p. 105, Line 10).

As to the contention by Brown and Moses there is insufficient evidence to sustain the PR's position that the Church preferred cash over title to real estate, there is ample documentation in the record. There is testimony of the PR, that the Church did not want an undivided interest in real property and preferred a cash distribution. The PR testified without objection that, "Bart Heard and the church and the Presbyterian Home Session all told me that they wanted to be paid—they wanted cash. They could not – didn't want the dirt. And now I find out that the Presbyterian Home says they could not have taken the dirt, I'm sorry —an interest in the real estate." (R. p. 78, Lines 17–22).

The testimony related to the Church's expressed position is corroborated by the April 21, 2008 letter of Attorney Robert Fuller to Neely Blackmon, Clerk of Session of Lisbon Presbyterian Church, in response to a letter written by Church Reverend Hunter. Mr. Fuller quotes Reverend Hunter as stating, "the Lisbon congregation's hope is that the property in Marion's estate will be sold at the appraised value and the congregation will receive the cash value of the congregation's portion." (R. p. 630). Attorney Fuller's letter goes on to explain how the congregational action should be memorialized by resolution with "[t]he stated objective is to realize the value of Ms. Kay's generosity for the benefit of the church." (R. p. 631). (This correspondence was copied to the PR and Reverend Hunter.) Likewise, the purpose of the PR in seeking to divide and sell the Estate's interest in the Farm was "to realize the value of Ms. Kay's generosity

3Marla Orias, also a 10% residual beneficiary, is the sister of Bart Heard. Ms. Orias did not testify in the case.

for the benefit of the Church" and the other beneficiaries as well. The Church's position was expressed to the PR repeatedly through telephone conferences and meetings. The record shows that the PR met with the Church Session and Reverend Hunter on multiple occasions including May 23, 2008. (R. p. 782). In addition, the PR communicated with Reverend Hunter repeatedly via meetings, telephone conference and written correspondence:

1. June 20, 2007; R. p. 736;
2. April 10, 2008; R. p. 779;
3. April 15, 2008; R. p. 779;
4. May 13, 2008; R. p. 782;
5. May 20, 2008; R. p. 782;
6. June 25, 2008; R. p. 783;
7. August 11, 2008; R. p. 784;
8. September 4, 2008; R. p. 784;
9. October 21, 2008; R. p. 785;
10. December 3, 2008; R. p. 755;
11. February 25, 2010; R. p. 791; and
12. April 15, 2010; R. p. 792.

Furthermore, Reverend Hunter met with (1) the PR and consultant John Wilson (July 25, 2007) (R. p. 747), and roughly a week later met with (2) the PR, Wilson, Appraiser, Penny Arnold of The Presbyterian Home, and Moses and Brown to discuss a proposed division of the property (July 31, 2007). See, Testimony of Appraiser Paul Major (R. p. 236, Lines 9–11); Testimony of Penny Arnold (R. p. 244, Lines 3-21). It is undeniably clear that the Church desired a cash distribution from the Estate rather than an ownership in real estate. In fact, there is **no** evidence in the record otherwise. Given that Marla Orias, the sister of Bart Heard is not on record as to her wishes, no less than 70% of the residuary beneficial interests in the Estate made it clear to the PR from the beginning of the estate administration that they wanted a cash distribution from the Estate rather than an ownership in real estate.

Perhaps the most compelling evidence of the incontrovertible fact that the other beneficiaries, including the Lisbon Presbyterian Church, wanted a cash distribution rather than an interest in undivided property is the admission of Respondent-Appellant Brown at the February 21, 2011 hearing in response to a direct question from her counsel, John Ferguson.

Q. All right. And when you got to the meeting in Newberry, who was there

A. Mrs. Penny Arnold (phonetic), I believe is her name, and Reverend Hampton Hunter.

Q. All right. These other parties who were there, the other heirs, **were they looking for land; or were they looking for money**?

A. **Money**.

(emphasis added.) (R. p. 310, Lines 6-13).

Accordingly, the PR acted reasonably in pursuing the partition action.[4] (Ms. Brown also contended at the hearing that she had wanted to divide the property before Ms. Kay's death too. (R. p. 357, Lines 1-3). In addition to the partition action, the PR also sought declaratory judgment relief as a separate cause of action to sort out the claims of the parties. In affirming the probate court's erroneous ruling that the PR should not have pursued a division and sale

4Assuming arguendo that only one or none of the beneficiaries expressed a desire to partition the property, the PR properly exercised his right granted by South law governing estates in South Carolina. S.C. Code Ann. § 62-3-911 provides that the PR or any beneficiary can seek partition. Further, these statutory rights are in addition to the powers granted by Ms. Kay's will.

of the estate's property but should have simply deeded out the property to the beneficiaries (against the 70% majorities' wishes), the Court of Appeals erred.

IV. The resistance by Brown and Moses to the PR's efforts to partition the Farm as well as Brown's ongoing claim for an interest in 5 acres created the delay and expense about which Brown and Moses now complain.

Brown and Moses allege the PR unnecessarily complicated the Estate. Yet it was their resistance to the PR's efforts to reach a fair and amicable resolution in dividing the Farm that created the delay in settling the Estate and thereby causing the expense that they now question[5]. In fact, they succeeded in preventing the division just as they had while Ms. Kay was alive. (See letters of Edward D. Sullivan as attorney for Marion M. Kay to Martha Brown and Mary Moses giving notice of Ms. Kay's desire to divide the Farm. (R. pp. 566-567). Also, see Testimony of Bart Heard (beneficiary). (R. p. 134, Lines 12-16). "I hate that all this has happened. I feel that if the land was divided way back when before [Ms. Kay] passed away, all this could have been resolved. I don't object to any of Mr. Sullivan's fees that he's – that's accrued at all. . . .") Further, a June 21, 2010 letter from counsel for Moses and Brown regarding Brown's ongoing claim for an interest in approximately 5 acres of the Farm reflects their continued resistance to the efforts of the PR to divide the property and/or reach an amicable resolution to settle the Estate early and belies their contention that the claim for the approximate 5 acres was a non-issue. (R. p. 685).

In attempting to reach an amicable resolution related to the Farm, the PR reached out to Brown and Moses and proposed a compromise whereby Charles

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5Further replying to Argument I, Respondents-Appellants' Respondent Brief at page 3.

Copeland would pay fair value for a portion of the Farm (ending his option) and they could then exercise the Right of First Refusal for the remaining acreage if they elected to do so. As an incentive, the PR agreed to ask for the co-operation of the other beneficiaries to approve the transfer of the Estate's interest in the approximately 5 acres (4.59 acres) claimed by Brown **free of consideration**. Sullivan letter to Brown and Moses dated May 2, 2008. (R. pp. 632-633). Neither Brown nor Moses responded.

Later, the PR reached out to Brown and Moses, met with them and the appraiser and made a proposal for division of the Farm. Again, they never made a written response or proposal.

Brown and Moses contend that "Respondent Brown's claim to the 5 acres was advanced only because the PR dragged her into court." Respondent's Brief of Brown and Moses at page 5. When the PR filed the partition/declaratory judgment action, Brown and Moses filed, among other things, a Counterclaim claiming an interest in the 5 acres. Answer to Amended Complaint and Counterclaim dated March 20, 2009. (R. pp. 657-663). However, Brown continued to press this claim at the hearing(s) on the PR's Petition for Settlement. R. p. 326 ll. 8- 22. Brown raised the claim again at the hearing on the PR's Rule 59 Motion (R. p. 444, line 21 – R. p. 450 line 9., and the probate court denied the claim. Order Disposing of Post-Trial Motions. R. p. 18.

Perhaps the most compelling evidence of the fact that Brown's claim regarding the 5 acres created an ongoing issue in the settlement of the Estate is that on June 21, 2010, her counsel John Ferguson wrote to counsel for the Estate:

> I am please [sic] to enclose for your file the executed consent and waiver documents you prepared for Martha Brown and Mary Moses. I hope that this will help you move things along. **I remind you that a condition precedent for my clients' cooperation was Rowland's[6] agreement with Martha about the portion of the property agreed to be hers**. I am pleased that everybody wound up on the same page.
>
> (emphasis added.) See, John Ferguson letter dated June 21, 2010 (R. p. 685).

Despite this "agreement . . . about the portion of the property agreed to be hers" with Rowland Milam, Brown inexplicably continued to press her claim against the Estate.

V. In addition to carrying out the intent of Ms. Kay and responding to the expressed desire of the beneficiaries to sell the property, the partition action cleared up title defects arising from various claims to the property as well as judgments against Moses.

The PR was advised by counsel, among other things, to pursue a partition action in order to clear up title defects. The PR could not have simply signed a quitclaim or a warranty deed because the probate code provides that a transfer of title from an estate to a beneficiary is reflected by a deed of distribution. As to the point that the PR ultimately signed a quitclaim deed, that conveyance was made to a third party and not a beneficiary of the Estate.

The Court of Appeals erred in affirming the probate court finding "that this was a fairly basic estate which could have been easily, quickly and cheaply

6Rowland Milam purchased the Estate's real estate. See, Deed (R. pp. 686-693).

settled by a deed of distribution." Although the PR could have handled the estate that way by dumping the undivided interest problem on 80% of the residuary interests of the Estate, he would have been ignoring the intent of Ms. Kay to sell and distribute cash to her beneficiaries and to create a fund from which the interest could maintain the Milam cemetery plot. Perhaps just as importantly he would have been ignoring the expressed desire of at least 70% of the residual beneficial interests to receive a cash distribution as opposed to a minority ownership of an undivided interest in real estate and the obligations and risks that come with it. In basing its ruling for the PR to refund a substantial portion of his compensation on the finding that a deed of distribution would have been preferred given the intent of Ms. Kay, the expressed desire of a majority of the beneficiaries, the authority granted by the will and SC law, the Court made a manifest error of law.

VI. Brown and Moses misstate the record concerning the hours charged by the PR during the administration of the Estate.

During the 3 years and 6 months of Estate Administration (May 3, 2007 – November 12, 2011), the PR worked 465.8 hours. The no-charge hours listed in the Law Firm invoices reflect some of the services provided and the number of hours that the PR worked for the estate. 249.7 of these hours were "no charge" by the Law Firm. See, August 17, 2010 invoice, 173.3 hours (R. pp. 794-795); plus August 16, 2010 invoice, 76.4 hours (R. p. 775), totaling 249.70. In other words, these hours **were not** billed by the Law Firm. Brown and Moses misstate the record when they write "Collins and Lacey (sic) charged for [the PR's] time and then he sought compensation for the same hours." (See, Respondents' Brief of Brown and Moses at Page 6).

Some of the PR's hours at the Law Firm were billed by the Law Firm during the administration, however, these hours are not included in the "no charge" hours noted above.[7] Additionally, at the PR's request, there were $20,268.50 of Law Firm charges that were discounted or written off, which more than offset the PR time that is reflected as billed by the invoices (R. p. 729), the net effect of which is that the Law Firm did not charge for the PR's services to the Estate. Lastly, the PR was an employee and not an owner or partner while working at the Law Firm (R. p. 173, Line 9), as corrected by Transcript Corrections (R. p. 29) ("No, I was not a partner there. I was an employee.") The legal fees were paid to the Law Firm as opposed to the PR.

Brown and Moses misstate and misrepresent the record when they claim that "[t]he total fee included $18,000 the [PR] paid the paralegals of his law firm to value the Estate's personalty and thereby boos his PR fee." Respondent's Brief of Brown and Moses at Page 7. Also, see Page iv, Item 4. They also misrepresent as their authority for that claim a finding of the probate court (R. pp. 4-5). The probate court did not find that the PR used 204.6 hours of paralegal time from his law firm to value personalty nor did that occur. The court ruled, "I approve the previous payment of $13,499.58 to Collins and Lacey and find that Collins and Lacey is entitled to be paid an additional $12,306.80. Although, the

7November 26, 2007 invoice - $7,395.00; November 26, 2008 - $1,305.00; August 16, 2010 invoice - $522.00; August 17, 2012 - $319.00. These hours are not included in the 465.8 hours used in support of the PR's compensation.

Court questions the necessity of 204.60 hours of paralegal time, they should be compensated for their work." (R. pp. 10-11). Judge Hocker's ruling does not support their claim. Neither does the record.

The PR did not spend "$18,000 of the Estate's money to his[8] law firm's paralegals to value personalty." Nor did Paralegals at the Law Firm spend 204.60 hours appraising personal property of the Estate.[9] Of the total paralegal time, 4.00 hours were spent related to the valuation of personal property. (See Exhibit 1 to Personal Representative's Reply to Addendum to Response of Appellants Moses and Brown (R. p. 1460). 1.70 of these hours were not billed. (See Exhibit 7 (R. p. 1528). There was a .50 hour listed pertaining to determining the value of a vehicle. (.50 hours on June 25, 2007 (R. p. 1469).

The remainder of the paralegal time was spent on estate administration (131.70 hours), including contacting heirs, drafting probate court filings, analyzing Ms. Kay's extensive Memorandum of Personal Property to begin the distribution process to beneficiaries, preparing receipt and release forms for execution by beneficiaries, preparing forms to obtain federal identification number for the Estate, working with bankers concerning account information, obtaining and paying final bills of Ms. Kay, securing keys to Ms. Kay's home, paying pharmacy bills, corresponding with beneficiaries, finding addresses for beneficiaries, working with life insurance companies, seeking refunds of overpayments, retaining the service of a monument company, preparing contracts, reviewing invoices, transferred property to beneficiaries, reviewing

8 The PR was an employee of Collins and Lacy Law Firm. R. p. 29 "Page 143, Line 9 correction."

9Respondents/Appellants' Respondent Brief at Page 8.

plats, seeking to recover benefits from life insurance companies, and preparing correspondence to surveyors. Of these 131.7 hours, however, 28.6 hours were not billed at all (R. p. 1482), reflecting 25.7 and 2.0 calculated at "0.00/hr"). Another 68.40 hours were related to the partition and declaratory judgment action (R. p. 1508).

All of the time is reflected in detail in the Law Firm invoices (R. pp. 729-795), so there can be no dispute as to how this time was spent.

The tangible personal effects were appraised by qualified appraisers. Furthermore, the personal representative's "reasonable compensation" should be determined by an analysis of several factors, not just the value of the estate. The PR has proposed a method for making such a determination. (See, Brief of Petitioner/Respondent at Pages 33-36). The PR's compensation is not a percentage-based commission because the will provides that he shall receive "reasonable compensation."[10]

S.C. Code Ann. § 62-3-706 requires the personal representative to prepare and file with the probate court an inventory and appraisement of probate property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each item, its fair market value as of the date of the decedent's death. S.C. Code Ann. § 62-3-707 authorizes personal representatives to hire qualified appraisers, which the PR in this case did. The ongoing allegation of Brown and Moses that the PR somehow used paralegals at the Law Firm to inflate valuation of personal property so as to increase his

10 Brown and Moses contend that the proposed factors put forth by the PR to determine "reasonable compensation" should only apply prospectively but offer no reason or authority for this position. Respondent's Brief of Brown and Moses at Page 8.

compensation is patently false and a misrepresentation of the evidence in the record.

In any event, the PR presented more than $12,300 of the Law Firm invoices to the probate court for approval prior to making payment. See, Amended Proposal for Distribution (R. pp. 26-27). The probate court approved these fees including the paralegal charges (R. pp. 10-11). Brown and Moses' complaint is without merit.

VII. Brown and Moses misrepresent the testimony of the PR concerning the basis for his determination of "reasonable compensation".

The citation of Brown and Moses on Page 6 of their Respondent's brief omits crucial portions of the PR's testimony. The entire testimony of the PR to the questions of opposing counsel at this point in the hearing is as follows:

> Q. So you were, as a Personal Representative, charging on an hourly basis.
>
> A. No, I wasn't.
>
> Q. Well what did you mean when you said you looked at the time you had into it to figure your charges?
>
> A. I looked at what I thought was a reasonable fee. And as we went down the road, I took draws, I guess you might say, toward what I thought was a reasonable fee, given the amount of time that I had into it and the result that I expected.
>
> Q. So you were charging on a time basis for your Personal Representative fees?
>
> A. No. I had a –I thought I knew what the bill--what a fair and reasonable fee would be for this administration as we

started down the road. And I set, I guess, my draw, against that target. And then as we went down the road and we got a bigger and better result, the final result was based on all the factors and the rule, the time, and the novelty of the issues.[11]

Q. Well, that's how attorneys charge, so that gets me back to to my question before; are you charging as an attorney or are you charging as a Personal Representative?

A. I'm charging as a Personal Representative;

Q. But you're using your attorney's standard –

A. By analogy, yes.

Q. You realize, of course, that we have statutes that deal with how Personal Representatives are compensated?

A. I sure do.

Q. Okay. And do those Statutes say that you charge by your time or that time is one of the factors?

A. The Statute says – I think it gives percentages. I think you can get up to five per cent of the Estate. And then for extraordinary services, you can get more if approved by the Court. Unless – but then Item C of that Statute says, if the Will – if the Will directs otherwise, the Statute does not apply.

Q. And the Will says reasonable, so that means whatever you consider to be reasonable?

A. The Will says reasonable, then that depends on, yeah, one's opinion to what's reasonable. An that -- then I looked to the Rule as applied to lawyer, what's reasonable? I looked at the law in Florida to se what they looked at, the factors that they looked at, and they're similar. It talks about the sale of real estate. It talks about litigation. I also consulted Alan Medlin of the USC Law School about his interpretation of the Statute and the Will. And I relied on other counsel.

R. p. 174, line 9 – R. p. 176, line 9.

11Based on the PR's 465.8 hours (at $225 per hour), the total fee based on number of hours would be $104,805, more than $10,000 than actually paid. (See Brief of Petitioner/Respondent at Pages 14-16).

The PR consistently testified that he based his charges on several factors, including time, novelty and complexity of the issues, and results obtained. The PR prepared pleadings, contracts, consents, and other legal documents, responded to discovery requests, met with counsel, met with appraisers and surveyors, researched courthouse records, researched legal issues, showed real estate to prospective buyers, settled a property claim with an insurance company, negotiated and received an excellent result for the real estate, prepared probate documents, included Inventory and Appraisement(s), and Accountings, all of which were in addition to his other duties in the administration of the Estate. See, PR Exhibit D, and the various time entries of the PR describing his services to the Estate (R. pp. 729-795).

The determination of "reasonable compensation" does not require a mathematical calculation. The Court of Appeals erred in affirming the probate court's limitation of compensation to 10% of the estate's value. The PR provided valuable services to the Estate and is entitled to "reasonable compensation."

VIII. The findings of fact and conclusions of law by the probate court are contradicted by a clear preponderance of the evidence.

Many of the findings of fact and conclusions of law are contradicted by a clear preponderance of the evidence. The probate court found that the PR failed to provide adequate proof of the hours he claimed and a necessity for most of the hours. Yet, invoices, times sheets, and other documentation were provided to the court. R. p. 203, lines 4 – 9; R. p. 730 – R. p. 795; R. p. 935 – R. p. 938; R. p. 993 – R. p. 1199. As the Court of Appeals ruled, "On appeal, [the PR] has included all of the invoices, time sheets, affidavits, and correspondence in support of his claim that he is entitled to the compensation he requested from the probate court." App 7.

As to the the necessity of the hours claimed, the entire record supports that, absent a deed of distribution, the PR acted as expeditiously as possible. However, a deed of distribution would not have carried out the intent of Ms. Kay. The probate court disagreed with the efforts of the PR to carryout Ms. Kay's intent and the entire order of the probate court was based upon this disagreement. See dissent Opinion of Justice Few, App. 17, 18. However, the Court of Appeals noted, "We recognize that [the PR] encountered difficulties in administering certain assets of the Estate and made efforts to rectify these interests. . . . [W]e do not take issue with the [PR's] belief that he acted reasonably and in the best interests of the Estate . . . . " App 8. The clear preponderance of evidence supports the hours devoted by the PR and the reasons and necessity of those hours.

The probate court also found, "The PR unnecessarily complicated the Estate by insisting on filing a partition action." However, the clear preponderance of the evidence demonstrates that the PR worked for months to reach a resolution before filing the partition/declaratory judgment action.

The probate court finds, "The Court does not understand why the PR began charging the Estate before [Ms. Kay] died on May 3, 2007 and before he was appointed PR on May 16, 2007." The charge in question was for 4.00 hours for a meeting in Laurens, SC concerning Ms. Kay's affairs after Ms. Kay had had become ill. The PR explained at the hearing, and the law firm invoices reflect, that the charge was an entry on a time sheet for services rendered to Ms. Kay a few days before she passed away and billing staff included the time entry into the Estate file rather than open two separate files. R. p. 178 line 17 – R. p. 149, line 8. Furthermore, the probate court ignored that, at the PR's request, legal fees were discounted by more than $20,000. R. p. 729.

The probate court found, "No explanation was offered to explain or excuse the failure to provide interim accountings. . . " That is incorrect. The PR testified that the interim accountings are not required by law as he understood, and that an interim accounting was never requested.. R. p. 184, line 22 – R. p. 185, line 6.

The probate court found, "The [PR] failed to provide any legitimate basis for the fees he claimed and instead testified he had no method or formula for determining the amount for the four draws he gave himself other than by pulling a a figure out of the air." That finding is completely contradicted by the record. The PR testified that he determined his compensation based on several factors, including, time, issues confronted, sale of real estate, litigation, and results. R. p 204, lines 8 – 25. In response to the Court's questions, he testified that his method was not strictly on an hourly basis or a percentage basis. R. p 205, lines 1 - 4. Also, see Section VII above. Based upon those responses, the probate court erroneously found no basis for the determination of the fee and that the PR pulled the figure "out of the air." This was error. The determination of "reasonable compensation" does not require a mathematical calculation – only that it be "reasonable." The Court of Appeals erred in affirming this finding by the probate court.

The probate court found, ". . . [N]ot all of the heirs opposed the PR's final accounting . . . ". In fact, 2 of the 3 beneficiaries that testified at the hearing supported the efforts of the PR, and approved the accounting, the amount of compensation paid to the PR, and all the fees and expenses paid on behalf of the Estate. These two, Penelope Arnold and Bart Heard, were unbiased witnesses. The third witness was Respondent Brown, and Brown conceded that Ms. Arnold "probably" has a lot more experience in dealing with estates. R. p. 365, ll. 1 – 9. Given her experience with estates in her position with The Presbyterian Home, Ms. Arnold would have been in a good position to evaluate the PR's services.

The probate court found, "The PR unnecessarily complicated the Estate by converting an eight month option to purchase the Estate's one half interest in it real estate into an indefinite right to purchase and by giving the option holder the right to only buy a portion of the property contrary to the Will." R. P. 8, Item 3. However the PR used his powers under the will, as conceded by Respondent Brown (R. p. 339, line 25 – R. p. 341, line 24), to effect Ms. Kay's intent to provide a meaningful option to Chuck Copeland. R. p. 137, line 22 – R. p. 139, line 10.

The foregoing findings of fact by the probate courthouse conflict with the record. The Court of Appeals erred in finding that the evidence supported the probate court's ruling.

IX. The arguments made by Brown and Moses are not supported by the evidence and are manifestly without merit.

Rule 208(b)(4), "References to Record" provides, "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged. . . . " The Respondent's Brief of Brown and Moses contains approximately 20 citations to the Record[12]; however, 15 of these citations are to the Order that is the subject of the PR's appeal. In other words, the evidence that Brown and Moses cite in support of their arguments is not testimony or exhibits, but the erroneous findings of the probate court. The other 5 citations do

12Page 1, Final Order, finding of fact No. 9 at R .p. 9; Page 2, [Order] R. p.11, No. 19, Page 2 [Order] R. pp. 7 -18; Page 2, [Order] R. p. 11, No. 19; Page 3, [Order], R. p. 8, No. 1; Page 3, [Order] R. p. 8, No. 3", Page 3, [Order] R. p. 9, No. 8; Page 3, [Order] R. p. 10, No. 13; Page 4, Final Order, R. pp 10 – 11, No. 17; Page 5, Final Order, R. p. 8, Nos., 2, 3, and 4; Page 5, R. p. 175/17-20 (sic); Page 6, R. pp. 172/4 – 173/7 (sic);. Page 6,, Final Order, R. p 9, No. 8; Page 6. p 174/9 – 24 (sic); page 6, Final Order, R. 9, No. 8; Page 7, Final Order, R. p 13, c; Page 7, [Order] R. pp. 4-5 and 750; Page 8, Final Order R. p. 8, no. 2; Page 8, R. p. 310/17-31/4 (sic); Page 8, R. p. 204/16-18 (sic).

not support the point for which they are cited and even misstate the evidence and mislead.[13][14]

Respondent's brief of Brown and Moses does not comport with Rule 208(b)(4) because their allegations are not supported by references to salient facts in the record. In fact, they are mischaracterizations of the evidence. See App. 15. As such, their allegations and arguments are manifestly without merit. See Rule 220, SCACR. "The [Court] need not address a point which is manifestly without merit."

CONCLUSION

For the foregoing reasons, 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, including attorney's fees, 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

13For example, on Page 5 Brown and Moses assert that [the PR] admitted the necessity of [finding of extraordinary services] before compensation in excess of 5% can be awarded. Brown and Moses conveniently omit the following sentence of the PR's explanation, "Unless – but then Item C of that Statute says, if the Will – if the Will otherwise directs, the Statute does not apply". R. p. 175, ll. 20 – 22. For another example, on page 8 Brown and Moses assert "[the PR 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 in secret." That is misleading. In fact, the PR testified, " . . And then as we got down the road and it became more and more work. I realized that, you know, you could apply for extra compensation, based on extraordinary service. And then after talking with Mr. – Professor Medlin and studying the will further, I saw that the statute didn't apply. So then I just based my fee on the time that I had involved, the amount of trouble an the efforts, and the result. At the very end, we had such a good result, I determined that that figure was a fair and reasonable amount." R. p. 204, lines 15 – 25.

14Other citations of Brown and Moses are references to language in briefs.

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 23, 2017

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

PROOF OF SERVICE

I certify that I served Reply 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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