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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2016-002337

REPLY BRIEF OF RESPONDENTS/APPELLANTS

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AN EXAMINATION OF PETITIONER'S STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Respondents/Appellants have previously stated their view of the facts and will not burden the Court with a repetition; however, they feel an obligation to correct Petitioner's misstatements of the facts in his Statement of the Case and his Statement of the Facts and to call the Court's attention to the inconsistencies in those documents.

On page 3 of his Respondent's Brief of Petitioner/Respondent (hereinafter Brief) Petitioner correctly states that the PR's affidavit outlining and describing the events of the Estate administration and the affidavit of R. David Massey were not allowed into evidence, and on page 4 the Petitioner correctly states that the Teri Stomski affidavit was not allowed into evidence. Petitioner nonetheless cites all three of these documents in his briefs as support for his position.

On page 7 of his Brief Petitioner correctly quotes the Will's Option to Purchase, which allows Charles Copeland to buy only the entirety of the Testatrix's interest in the farm for a period of eight months. Despite this, Petitioner admits to the Court on page 10 of his Brief that long after the eight month option period expired he was trying to sell just 46.85 acres to Mr. Copeland (See R. p. 147/7-24) and filing two lawsuits to enable that (R. p. 148/9- 149/1).

Petitioner wrongly claims on page 8, para. 1 of his Brief that "In 2003, four years prior to her death, Ms. Kay retained the PR to divide the farm." In fact, she asked him to write a letter to the Respondents to ascertain their interest in dividing the farm. If she had really wanted her farm partitioned, Petitioner would be grossly negligent in failing to accomplish that in four years.

Respondents were not "bitterly disappointed to learn that they did not inherit Ms. Kay's interest in the farm." (Page 8, para. 2). Had this actually been the case, they would have asserted a claim to that effect. Instead, they just expressed surprise that the Testatrix had changed her mind (R. p. 308/9- 309/9), because this was not the understanding within the family of how the farm was to be disposed of (R. pp. 256/6-16; 322/12-25).

Throughout his Brief (e.g., pp. 9, para. 2; 18, para. 2; 22, para. 2; 24, top of page) Petitioner falsely continues to assert that Lisbon Presbyterian Church and its Cemetery Fund, which together had a 50% share in the Estate, supported his settlement position. He has cited no evidence for this beyond a second-hand statement from the Presbytery lawyer about the pastor's personal opinion (Ex C-9, R. p. 630). The lawyer does not take this statement as a given and instead says that the only way to determine what the church wants to do with real property is to have a congregational vote. (See also R.p. 471/16-19). That vote did not occur until after everybody had agreed to the sale to Roland Milam, and the church stayed out of the controversy until then (R. p. 472/1-4), except for an unsuccessful attempt to get answers from the Petitioner (Letter from Lisbon Presbyterian Church to Mr. Sullivan, R. p. 873).

Petitioner does note (Brief, page 11, para. 2), however, that he met with the Lisbon Session on April 26, 2008 to discuss a compromise proposal. Petitioner could easily at that time have asked for a resolution to give him guidance concerning the opinion of the Session about what the congregation wanted. Although this would not have been binding on the congregation, it would at least have given some evidence about what the church wanted to do. He failed to do that and cannot now be heard to speculate on what the church wanted.

It is misleading to claim that "Mary Moses and Martha Brown filed a counterclaim asserting a right to 5 acres." (Brief p. 12, para. 2). While the counterclaim was in a pleading filed by both Respondents, only Martha Brown sought a right to the 5 acres, and she did not continue to assert her right after the trial, even though she was entitled to do so (R.p. 260/17-23).

On page 14 of his Brief, para. 4, Petitioner states what he allegedly did to wind up the Estate. He hired a Laurens County law firm to hand out the personal property (R. p. 181/7-5) pursuant to the Testatrix's detailed personalty memorandum, and almost all the items to be handed out were labeled with the name of their beneficiaries (R. pp. 71/19- 73/7). There was minimal work for the PR to do to distribute the personalty.

On page 16 of his Brief, Petitioner states that the value of his services to the Estate through November 12, 2010 was $ 104,805. This flies in the face of the probate judge's determination that his time sheets were unreliable (Order, R. p. 8, #1 and p. 9, #8) and that this was a basic, uncomplicated Estate (Order, R. p. 8, #2).

ARGUMENT

I. The Court of Appeals erred in reversing the Probate Court's and the Court of Common Pleas's decision to award attorney fees to Respondents Brown and Moses.

The Petitioner repeatedly asserts that 70% of the heirs, including Lisbon Presbyterian Church and its Cemetery Fund, supported his position. He offers no testimony to support this and no documents from the church. Instead, the only support he offers is a letter from the Presbytery's attorney, who said that only a congregational vote can determine what the church wants to do (Ex. C-9, R. p. 630). That vote, which came at the end of litigation, had not been held at the time of the letter Petitioner cites. Petitioner's many attempts to mislead the Court on this issue should be taken into account in its determination of whether he has acted in bad faith.

Petitioner cites the brief and limited representation of Bart Heard as a factor militating against the application of the common fund doctrine. There is nowhere in the record where Mr. McElveen questions any witness, presents any evidence or is even present for the taking of evidence; and the Final Order (R. pp. 7-14) does not list him as counsel. There is also nowhere in the record where either Bart Heard or any lawyer acting on his behalf disclaims an interest in the funds Respondents' counsel forced Petitioner to return to the Estate (though he has refused to do so). If Mr. Heard accepts the benefits of Respondents' counsel's representation, he is responsible for compensating him. The common fund doctrine applies.

In discussing the contract of employment requirement for a common fund recovery, Petitioner blurs the line between express and implied contracts. There is no dispute that the heirs other than the Respondents did not sign a written contract with their attorney, but the history of

the case shows that Respondents' counsel acted on behalf of all the heirs to an extent sufficient to create an implied contract of representation. See *Peppertree Resorts v. Cabana Limited Partnership*, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993). The central question is whether all the heirs had an interest in the success of Respondents' attorney, and they did.

II. The Court of Appeals erred in ruling that the Personal Representative did not improperly exercise his power or breach his fiduciary duty to the Estate.

There are abundant examples in the record of the PR putting his own interests ahead of those of the Estate. See especially R. pp.1414-27 and 875-80. See also Final Order, R. p. 11, # 19; p. 6 # 5 and Order disposing of Post-Trial Motions, R. pp. 16-18 concerning the PR's acting on his own behalf. Although this was a "fairly basic estate" (Final Order, R. p. 8 #2 and p. 9 # 7), the Petitioner/PR ran up "clearly excessive" commissions (Final Order, R. p. 10, # 13) having no legitimate basis (Final Order, R. p. 9, # 8). He even invited the holder of an option to purchase to sue the Estate more than two years after it had expired (Ex 1, R. p. 817, para. 5). At the very beginning of the Estate before there were any complications, he told an heir that his fee would consume the Estate's $ 68,000 in stocks and bonds (R. p. 316/3-21). By the end of the Estate, he was attempting to charge $ 157,179 in fees and costs (Final Order, R. p. 8, para. 1). All of this violated his common law duty to the Estate and S.C. Code Ann. 62-3-703, not to mention the S.C. Rules of Professional Conduct. See *In the Matter of Hannah*, 301 S.C. 310, 391 S.E.2d 728 (1990).

Petitioner takes issue with Respondents' assertion that he secretly paid himself $ 93,775 before Respondents demanded a hearing to find out what he was up to (Brief, p. 22, para. 1). The secrecy of his payments to himself was found by the probate judge (Final Order, R. p. 9, # 9) and admitted by Petitioner (R. p. 185/11-16). He then claims that "The amounts paid had been disclosed in accountings previously filed and served on Brown and Moses...." (Brief, p. 22, para. 1) This misleads the Court, because Petitioner waited until a hearing had been scheduled and the

case was about to come to trial (Final Order, R.p. 9, #9) and even the day trial began (R. p. 428/24- 129/5) before he provided that information. Petitioner's continuing violations of his duty of candor to the tribunal must be considered by this Court in deciding whether Petitioner has acted in good faith.

In his Brief at page 22, para. 2, Petitioner states that "the Probate Court made specific findings supporting an award of reasonable compensation of $ 51,300...." This is contradicted by the Petitioner's own statements in his appeal. In his Grounds for Appeal to the Court of Common Pleas (R. p. 1258, para. 2) he states, " The Court uses a ten percent compromise without explanation for arrival at this amount." In his Appellant's Brief in the Court of Appeals, Petitioner states (p. 26), "The Probate Court erred in... not setting forth a... basis... for... determining reasonable compensation." These statements are an admission that the $ 51,300 figure lacks evidentiary support.

III. The Court of Appeals erred in ruling that the Personal Representative was entitled to a fee greater than 5% of the Estate.

The Petitioner asks this Court to base an award of more than 5% of the Estate as a PR fee on the Will's provision that the PR receive "reasonable compensation." (As to this being mere "boilerplate", see R.p. 533.) Inasmuch as the Will provides no guidance for what constitutes reasonable compensation, the matter becomes an issue for the probate judge's discretion. The limitation on that discretion is that the judge has to base his conclusion on the evidence. Here, as Petitioner himself has noted, the judge cites no evidence and instead attempts to apply S.C. Code Ann. 62-3-719 mechanically without supporting factual findings, including the essential finding of extraordinary services. This Court is therefore entitled to use its own view of the facts.

The circuit judge who heard the appeal had been a probate judge for a dozen years (R. p. 532/19-20) and had some interesting insights. He said that the Petitioner's partition action was unnecessary (R. p. 532/4-25) and that the Petitioner, who said he was entitled to a bigger fee because of his expertise, nevertheless spent a huge amount of time researching his authority

under the Will (R. pp. 531/10- 532/3), something he should already have known (R. pp. 533/24-534/3). He also said it was a waste of the Estate's money to spend $ 18,000 to value property worth $ 29,000, especially when there was a memorandum for personal property and a non-taxable estate (R. p. 531/4-21). The sole purpose of that $ 18,000 expenditure was to boost the Estate's value so that the PR would get a greater commission, and he got the benefit of that.

Petitioner accuses the undersigned (Brief, p. 25, para. 2) of falsely stating that all the courts below found that the PR's actions in court were for his own benefit and not for the benefit of the Estate. This is firmly rooted in the record. The probate judge found "[Daryl G. Hawkins's] representation was primarily of the PR in his individual capacity seeking approval of the PR's commissions and expenses." (Final Order, R. p. 11, #19). "[The PR's] motions were primarily for his own benefit." (Order Disposing of Post-Trial Motions, R. p. 18, para. 2). These findings were affirmed by the Court of Common Pleas (Form 4 Order, R. p. 19). The Court of Appeals agreed: "We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity." (Joint Appendix, p. 11, para. 3). Although these findings were initially pertaining to attorney fees and costs (which are at the heart of Petitioner's appeal), they are inseparable from how the PR managed the Estate; because he incurred the fees and costs by malfeasance and in a failed attempt to vindicate his handling of the Estate. See also the more specific findings about PR decisions which were for his own compensation benefit (Final Order, R. p. 8, # 2, 3 and 4).

The PR at some points in the case said that he was charging for his time, but his law firm was already doing that. The result was that the Estate was double billed for the PR's excessive hours. See R.p. 1421, # 8(d). It is abuses like this which led the probate judge to find that the Petitioner, a member of the Bar, had no legitimate basis for the fees he claimed (Final Order, R. p. 9, # 8). See *Ingram v. Kasey's Associates*, 340 S.C. 98, 107, 531 S.E.2d 287, n. 2 (2000): "Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter

that is the subject of the litigation to the prejudice of the defendant."

The probate judge used the value of the Estate as a basis for his fee award ("The Probate Court [limited] the Petitioner's compensation to essentially 10% of the Estate...." Brief of Petitioner/Respondent, p. 34); however, the value of the Estate he used was one created by the misuse of $ 18,000 of the Estate's assets to pay Petitioner's paralegals to inflate the value of the Estate. The judge said that the paralegal expense was unnecessary (Final Order, R. p. p. 10-11, #12)- as did the circuit judge (R. pp. 534-35)- yet he gave the PR the benefit of his misuse of Estate finds.

Petitioner attempts to justify his charge for PR services incurred before the Testatrix died and therefore before he was appointed PR (Brief, p. 26, para. 1). Suffice it to say that the probate judge did not buy his rationalizations (Final Order, R. pp. 8-9, #5.) As the judge in the first appeal said, "Just because the personal representative wants to do it doesn't mean that he gets to do it." (R. p. 538/2-3).

It must also be noted that the Petitioner, who testified he was charging according to the subjective standard of what he thought he was owed (R. p. 174/14-16, 205), informed the heirs that he was not acting as an attorney for anyone (Ex C-11, R.p. 632). See also Petitioner's admission that he was not charging as an attorney (R.p. 173/5-7.), despite his subsequent attempts to backtrack and charge as an attorney. Even Petitioner's counsel told the circuit court, "Well, he is a lawyer, but at the same time he's a PR and all Prs don't just get the rate they would otherwise get paid in life for the other things they may do." (R. p. 513/19-22)

IV. The Court of Appeals erred in ruling that the PR should not pay all the costs associated with his litigation.

All the courts below have found that the Petitioner's litigation was for his own benefit. For this reason, they have found that he must pay his own attorney fees. It must therefore follow that he should pay the costs associated with the appeal which was for his benefit and not the

Estate's. This is not a new issue, because the probate judge previously found he was not entitled to recover expenses incurred solely for his personal benefit (Final Order, R. p. 11, #19). There was no need for the Respondents to appeal a ruling in their favor. Respondents are now merely asking that the ruling remain in force for appellate expenses. An Estate has always been responsible only for the personal representative's necessary expenses, S.C. Code Ann. 62-3-720. The PR's appeal and its expenses were unauthorized, see S.C. Code Ann. 62-3-715(20) and 62-3-703(a); so those expenses cannot be forced upon the Estate.

In the usual appeal, Rule 222, SCACR, provides that the prevailing party is entitled to costs, and this is typically raised by motion after the appeal has ended. Rule 208, SCACR, does not apply to appeal expenses, and the issue therefore usually does not have to be raised before an opinion is issued. The reason Respondents have raised it at an earlier stage is that there is an unusual fact situation here, and the expenses are not limited by Rule 222, SCACR. A resolution of the issue in the Court's opinion would benefit the parties, provide guidance on remand and promote judicial economy. It is simply contrary to this Court's duty to do equity to require the Estate to pay the expenses of Petitioner's appeal (including post-judgment interest) when the appeal was not for the benefit of the Estate. This Court must not allow the Petitioner to become the beneficiary of his own wrong, *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920).

CONCLUSION

The Respondents should be awarded the relief they have sought, and the Petitioner's request for relief should be denied. The costs (including post-judgment interest) and attorney fees associated with this appeal for the Petitioner's individual benefit should be borne by the Petitioner in his individual capacity.

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