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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

PETITION FOR REHEARING

The undersigned hereby moves the Court for a rehearing pursuant to Rule 221, SCACR and the attached Memorandum, which is incorporated herein.

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May 31, 2018

MEMORANDUM IN SUPPORT OF PETITION TO REHEAR

I. The court erroneously decided the issue of Respondents/Petitioners' attorney fees.

The Court erred in holding that Respondents/Petitioners are not entitled to attorney fees under the common fund doctrine because the beneficiaries in the Estate were not united in the cause. In so holding, the Court wrongly accepted Petitioner/Respondent's assertion that a seventy percent majority was opposed to Ms. Brown's and Ms. Moses's acceptance of the Personal Representative's offer of a hearing and wanted the farm sold immediately.

In order to find that a majority of the beneficiaries held that view, the Court had to find that the Lisbon Presbyterian Church and its Cemetery Fund, which together had a fifty percent share, were part of that majority. The Court accomplished that by citing Mr. Sullivan's testimony to that effect. In doing so the Court exceeded its subject matter jurisdiction.

> [I]t is important to note our limited jurisdiction over church matters. Church disputes may be resolved by the courts only if the resolution can be made without extensive inquiry into religious law. It is not the function of the courts to dictate procedures for a church to follow. [citations omitted] To preserve 'complete religious liberty, untrammeled by state authority,' we limit our inquiry into church affairs and respect the boundaries of church self-governance. *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320 (2002). See also *The Protestant Episcopal Church in the Diocese of South Carolina v. The Episcopal Church*, 421 S.C. 211, 806 S.E.2d 82 (2017).

The Presbyterian Church (USA) is hierarchical. Under its constitution the only way the will of a church can be determined concerning the sale of land is by majority vote of the congregation, and no vote had been held during the relevant time. See Plaintiff's Ex. No. C-9, (R., pp. 630-631) and the testimony of church session member, Charles Blackmon (R. pp. 470/20- 471/3, 471/16-21). Even the Petitioner/Respondent conceded this (R. p. 198/15-18). By deciding the matter without reference to church law, the Court violated the First Amendment of

the United States Constitution. See *Jones v. Wolf*, 443 U.S. 595 (1979).

"[I]n resolving... civil law disputes, courts must accept as final and binding the decisions of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration." *Pearson v. Church of God*, 325 S.C. 45, 52-3, 478 S.E.2d 849 (1996). The Court failed to follow this principle in accepting the Personal Representative's incompetent speculation and hearsay as to what he believed the church's position to be as a substitute for a vote of the congregation. "To assume such jurisdiction would not only be an attempt by the civil courts to deal with matters of which they have no special knowledge, but it would be inconsistent with complete religious liberty, untrammeled by state authority. *Bramlett v. Young*, 229 S.C. 519, 537, 93 S.E.2d 873 (1956). See also *Fire Bap. Holiness v. Greater Fuller Tabernacle*, 323 S.C. 418, 475 S.E.2d 767 (Ct. App. 1996).

The Court supported its ruling with factual findings which are not supported by the record. Among these are the following:

1. "A majority of the beneficiaries of the estate were not united in the pursuit of this cause. A majority of the beneficiaries supported Sullivan's efforts to sell the farm and distribute cash proceeds according to Kay's will." This alleged beneficiary agreement is supported only by the testimony of Bart Heard and Penelope Arnold, who together represent 20% of the Estate, speaking about their personal positions. Marla Orias was given an opportunity to express her opposition at the hearing but she declined (R. p. 39/9-16), so she and her 10% share must be counted as acquiescing. Lisbon Presbyterian Church and its Cemetery Fund did not express any opposition to a hearing, nor did they demand by a congregational vote that the farm be sold, the only way they could express that; so they and their 50% share must be deemed to have acquiesced in the hearing.

This is especially true because Lisbon's session (its governing body) had shown a scepticism about what Mr. Sullivan was up to and unsuccessfully demanded more information about his handling of the Estate (R. pp. 832-33; 872-874). His refusal to respond (R. p. 185/11-

16) would not have made them more inclined to rubber stamp his stewardship.

2. "During Sullivan's administration of the estate, he learned that the majority of the beneficiaries preferred their interests in cash rather than fractional ownership in land. Accordingly, Sullivan decided the best course of action was to negotiate a sale of the real estate, and if that failed, to file a partition action." The Court's unquestioning acceptance of Mr. Sullivan's self-serving declarations, which were made without any proof, has led it astray. Nowhere does Mr. Sullivan state the sources for his alleged understanding. Instead we are just supposed to accept his assertions, even though they are contrary to the law and the evidence.

3. "Moreover, because the beneficiaries did not acquiesce in Brown's and Moses's representation... we find no implied contract existed." In *Peppertree Resorts v. Cabana Limited Partnership*, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993), not only was there no express contract of representation, but the relationship of the parties was extremely adversarial. Notwithstanding that, the Court found that there was a unity of interest in the result which required that the attorney who created the benefit be paid. Peace, love and harmony are not required to find an implied contract.

Here, there was an implied contract of representation, because Marla Orias, Lisbon Presbyterian Church and the Lisbon Cemetery Fund (60% of the beneficiaries) did not oppose and acquiesced in the probate hearing and will benefit from its results. This supports the finding of an implied contract. The Court should also uphold the equitable principle that it cannot be the agent for unjust enrichment.. The undersigned protected and preserved a common fund for all the beneficiaries, and all the beneficiaries should share in the expense. See *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

The efforts of Respondents/Petitioners have increased the Estate by $ 42,475. All of the beneficiaries will potentially benefit from those efforts, and it is grossly inequitable for some beneficiaries to receive the benefit without sharing in the cost necessary for the result and thereby put all the costs on Ms. Brown and Ms. Moses. "The [common fund] rule is founded upon the

just principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefitted should bear their just share of the expenses, including a reasonable attorney's fee...." *Johnson v. Williams*, 196 S.C. 528, 531-2, 14 S.E.2d 21, 23 (1941).

4. "Moreover, because the beneficiaries ... commended Sullivan's performance and opined that Brown and Moses should bear the costs incurred before the probate court... we find no implied contract existed." Only Bart Heard, who had a 10% interest, took this position. There is no support in the record for the finding that all the beneficiaries agreed with this. Neither the evidence nor the law supports the finding that there was no implied contract.

If the Court desires further confirmation of the positions of the heirs, there is an alternative. Those beneficiaries who on remand do not want to compensate the undersigned or who have signed waivers to the extra compensation would agree not to share in the extra money generated by Ms. Moses's and Ms. Brown's efforts while those who want to share in the extra funds would share in the cost of obtaining them. This would satisfy the Court's concern about express support for Respondents/Petitioners' efforts while avoiding unjust enrichment.

It is unfair to blame Respondents/Petitioners for the delay in bringing the case to a conclusion when the primary fault lies with the PR's refusal to give information to them and to Lisbon Presbyterian Church. It is also true that no settlement would have been possible until Lisbon's congregation voted in favor of a settlement proposal, and this was not done until well after the PR's settlement offers in question when a new offer was made (R. p. 472/1-5) which everyone, including Respondents/Petitioners agreed to. Ms. Brown and Ms. Moses were therefore not the only cause of a settlement delay and must not be made to bear all the blame.

II. The court erred in granting an attorney fee to the Personal Representative.

In granting a fee to the Personal Representative's attorney for attending the hearing the PR offered to the beneficiaries, the Court took note that S.C. Code Section 62-3-1001(a)(3) required the PR to attend the hearing with his counsel. While this is true, it overlooks the reason

for the hearing in the first place.

The PR ignored the attempts of the beneficiaries to get information about his handling of the Estate (Defendants' Ex. No. 9, R. pp. 832-33), including what he was paying himself (R.p. 185/11-16). It was only when a hearing was in the offing and he was served with a subpoena that he began providing documents. See Paragraph 9, Final Order, R. p. 9 and R. pp. 870-74. Because of the documents he was forced to turn over and his testimony on cross-examination, it became known that he had grossly overpaid himself, and he was ordered to return $ 42,475 in excess commissions, Paragraph 14, Final Order, R. p. 10). It is unfair to penalize the Respondents/Petitioners for their reluctance to sign off on a settlement while the Personal Representative insisted on withholding essential information.

The Court is incorrect that Brown and Moses entirely ignored Sullivan's attempts to settle the case. In fact they met with him to discuss his first settlement proposal (R. pp. 309-313). This proposal was unacceptable to all the heirs (R. pp. 236/16-18; 311/14-21), and the second proposal did not resolve Ms. Brown's and Ms. Moses's concerns (R. pp. 312/24- 314/2). Ms. Brown made her own settlement proposal, which Mr. Sullivan rejected (R. pp. 312/8-14; 313/20-314/2). It is therefore not correct to find that Ms. Brown and Ms. Moses did not engage in settlement negotiations. They were willing to settle (R. p. 311/5-7; 313/20-23) and agreed to mediation, but they were rightly unwilling to settle in the dark.

If the PR had been serious about settlement, all he had to do was to provide Ms. Brown and Ms. Moses with the information they needed to evaluate his settlement proposals. Instead, he withheld that information in an attempt to avoid revealing what he had paid himself, an amount which four courts have now found to be excessive. It is unreasonable for this Court to punish Ms. Brown and Ms. Moses for taking the position that they would not settle until Mr. Sullivan gave them the information they sought and which he had a fiduciary duty to provide. This was their right, and it is inequitable and unjust for this Court to penalize them for exercising it.

One of the things which dragged out the Estate administration considerably was the PR's insistence on converting the eight month Copeland option into an option of indefinite duration. In considering this the Court said, " While Copeland indisputably did not exercise his option during the eight months following Kay's death, Sullivan believed the eight month time period was tolled until an appraiser determined the Farm's fair market value." Mr. Sullivan, who is a lawyer, has cited no law in support of this alleged belief, and the Court has not asked whether this delay was reasonable as required by S.C. Code 62-3-703(a) or supported by the law. In fact, the law is that time is of the essence with options. *Faulkner v. Millar*, 319 S.C. 216, 460 S.E.2d 378 (1995). Any need of the PR for more information to evaluate Mr. Copeland's offer is no excuse to extend indefinitely the deadline for Mr. Copeland to make the offer, yet the Court faults only Ms. Moses and Ms. Brown for delay. **Three years** after Ms. Kay's death Mr. Sullivan was offering Mr. Copeland a hearing "if you are interested in pursuing the option as it is written in the will" (R. p. 817).

Had the PR been fair with his fees and not hidden how he was administering the Estate, there would have been no need for a hearing. Giving him more money makes him the beneficiary of his own wrong, and "No one is allowed to take advantage of his own wrong." *Wilson v. Clarendon County*, 139 S.C. 333, 138 S.E. 33, 34 (1927). It is unfair that his attorney is compensated for his work at the hearing the PR necessitated by his misfeasance while the undersigned, who was able to reveal his mishandling of the Estate only after many hours of work, is not. Even if the PR had been entitled to compensation for the hearing, the probate judge clearly took all the PR's efforts into consideration in awarding a generous fee of 10% of the large Estate. The Court has also given insufficient attention to the equities of the matter.

The Court's reading of S.C. Code Ann. 62-3-720 is contrary to the intent of the legislature. The probate code is a unified entity, and its statutes are in pari materia. The Court's broad reading of one statute in isolation is an invitation to mischief. In holding that a PR can do anything he chooses in court and be paid, the Court ignores S.C. Code Ann. 63-3-712, which

speaks to improper exercise of PR powers and S.C. Code Ann. 63-3-715, which commands that a PR act "reasonably for the benefit of interested parties." The most important limitation on a PR's powers, however, is found in S.C. Code Ann. 62-3-703(a) where we find "A personal representative has a duty to settle and distribute the estate... as expeditiously and efficiently *as is consistent with the best interest of the estate.*" (Emphasis supplied)

For this reason, all of the courts below found that the PR's litigation to gain a bigger commission for himself was not for the benefit of the Estate but for himself and should not be subsidized by the Estate. This was the intent of the legislature, which said only "reasonable attorney fees" could be paid by the Estate. Had the litigation been primarily for the benefit of the Estate, S.C. Code Ann. 62-3-720 would have applied, but it does not apply to the present situation where the litigation was not primarily by Mr. Sullivan in his capacity as PR but rather by him in his personal capacity for his personal benefit. These are not "reasonable attorney fees."

Even if Ms. Brown's claim for the 5 acres she sought entitled the PR to some compensation, this was a minor part of the total hearing which would not justify payment of the PR's entire attorney fee, whether incurred for the benefit of the Estate or not. As for the reduction of the fees of Mr. Sullivan's law firm, many of these hours were later made part of the charges the PR sought to impose. There was no free lunch for the beneficiaries.

CONCLUSION

The award of an attorney fee to the undersigned under the common fund doctrine should be restored, or at the very least the beneficiaries should be given the option of receiving the extra funds only if they participate in the undersigned's compensation. The Personal Representative should not receive extra compensation to pay his attorney; because it was his misconduct which necessitated the probate hearing, because his attorney's work was for his personal benefit and not for the Estate and because the Estate has already paid him extraordinarily well.

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 31 day of May, 2018 she served the Petition for Rehearing with attached memorandum herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

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

Deborah S Ball

May 31, 2018