

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Appellate Case No. 2016-002337

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

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PETITIONER/RESPONDENT'S  
PETITION FOR REHEARING

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TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA  
SUPREME COURT

Petitioner-Respondent Edward D. Sullivan ("Sullivan") respectfully petitions this Court for rehearing in this case pursuant to Rule 221(a), SCACR. The opinion of the Court was filed on May 23, 2018.

### INTRODUCTION

The Court appears to have overlooked the issue of additional fees and costs awarded to Sullivan by the probate court to complete the administration of the Estate and which will be necessitated by the remand and a second settlement hearing as discussed below in Section I.

Further, in arriving at its decision in this case, the Court determined that a standard of "reasonable compensation" as provided by Ms. Kay's will is not sufficient to bring Sullivan's "commissions" within the exception "where the will otherwise directs" as provided by SC Code Section 62-3-719(c). Respectfully, the Court misapprehended the South Carolina Probate Code sections pertaining to "reasonable compensation" of personal representatives and does not give effect to the intent of the decedent Ms. Kay that Sullivan be paid "reasonable compensation." Additionally, the Court seemingly places a 10% ceiling on compensation based upon estate valuation despite the 1987 legislative repeal of such a limitation. Accordingly, Sullivan respectfully requests the Court to grant rehearing and reconsider its opinion in light of the above and as further discussed below.

## LAW/ANALYSIS

- I. The Court over-looked the probate court's award of additional fees to be paid to Sullivan to complete the administration of the Estate.

The Probate Court awarded \$2500 to Sullivan for services rendered after the settlement hearing to wind up the affairs of the Estate. (R. p. 12, paragraph 6). The Court of Appeals cited this award in footnote 4 of its Opinion. (Appendix, p. 5). This Court did not make mention of this aspect of the case in its Opinion, although in affirming the Probate Court's award of fees to Sullivan, the approval of these additional fees is implied. Sullivan respectfully requests that the issue of compensation for his services rendered to the Estate since February 2011, as well as reasonable costs, including legal services provided on his behalf, be remanded. The services expected to wind up the Estate include preparing for and attending the next settlement hearing on Sullivan's Petition for Settlement, litigating ongoing issues raised by Brown and Moses, and making final disbursement of the estate proceeds. Alternatively, Sullivan respectfully requests that this issue be addressed by the Court by affirming a reasonable amount to complete the estate administration.

II. The Court Erred in Ruling that the Testator's Provision for "Reasonable Compensation" to the Personal Representative was not sufficient to bring the measure of compensation within the "where the will otherwise directs" exception of SC Code Ann. 62-3-719(c).

A. The South Carolina Probate Code recognizes and gives effect to "reasonable compensation" as a term of art.

The Court seemingly holds that "reasonable compensation" is not in and of itself a standard of measure or method of determining compensation. Respectfully, the Court overlooks that the legislature has in fact adopted such a measure or method in the Probate Code for determining compensation for trustees, thereby recognizing and giving effect to the term "reasonable compensation." South Carolina Code Section 62-7-708 provides, "If the terms of trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." Sullivan respectfully asserts that "reasonable compensation" and "compensation that is reasonable" are interchangeable statements or terms of art.

The Comment to South Carolina Code Section 62-7-708 states, "Relevant facts in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities, the time devoted to trust duties; the amount and character of trust property; the degree of difficulty; responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance." This section of

the South Carolina Probate Code and the Comments are taken verbatim from the Uniform Trust Code of the Uniform Laws Commission. In doing so, the South Carolina legislature recognized that “reasonable compensation” is not necessarily equivalent to the statutory default percentage rate commission of Section 62-3-719(a) but rather sets forth an entirely different standard for measuring compensation.

The foregoing factors in the Comment to South Carolina Code Section 62-7-708 are similar to those considered by Sullivan in determining “reasonable compensation.” Sullivan repeatedly referenced in his testimony the Florida statute, Fla. Stat. Section 744.617 (1973) and Rule 1.5, RPC, Rule, 407, SCACR, and specifically the time<sup>1</sup> devoted and the results obtained<sup>2</sup>, the issues confronted, litigation, sale of real property, and others. (R. p. 175, Line 11 – p. 176, line 9).

In interpreting the will provision relating to compensation, Sullivan also relied upon and sought the advice of counsel, including Professor Alan Medlin.

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1 The Court writes, “While Sullivan testified he spent approximately 450 hours on the estate, he could not definitively answer the probate court's question as to how he charged for his services – whether it was a set percentage of the estate or based on his time.” (Section I). Respectfully, Sullivan answered in that manner because his charges were neither based solely as a percentage of the estate or solely based on his time. In determining the amount of reasonable compensation, he took those factors into consideration together with a list of others as set forth in the Florida Statute and Rule 1.5 relating to “reasonableness of fees” for lawyers.

2 The Court writes, “[Sullivan] appeared to put significant weight on the “exceptional result. . . “ Respectfully, “results obtained” (or quality of performance as noted above for trustees) should be a factor in determining “reasonable compensation” for personal representatives.

R. p. 175, line 23 – R. p. 176, line 9; R. p. 189, lines 16 - 24; R. p. 204, lines 8 – 25. According to the University of South Carolina School of Law web page, Professor Medlin is an award-winning probate and estate law professor and author and “has served as Reporter for the South Carolina Trust Code, the South Carolina Uniform Power of Attorney Act, and several revisions to the South Carolina Probate Code.”

Respectfully, the Court should recognize the distinction the legislature makes between its “statutory default” methodology and “reasonable compensation.” By providing for “reasonable compensation” for Sullivan, Ms. Kay “otherwise directed” that Sullivan’s compensation was to be “reasonable” and that the limitations of the statutory default code section should not apply or be imposed. Rather, Sullivan’s compensation should be based upon an analysis of the factors as earlier briefed and that were in fact considered by him in establishing his compensation as set forth in his testimony at the settlement hearings. R. p. 175, line 23 – R. p. 176, line 9.

- B. The legislative history of the South Carolina Probate Code reinforces that the Code recognizes and gives effect to the term of art “reasonable compensation.”

After more than two decades of study and consideration of bills to modernize the trust and estate law of South Carolina, The General Assembly adopted the South Carolina Probate Code (the “SCPC”) effective July 1, 1987<sup>3</sup>.

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<sup>3</sup> Medlin, Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous Law, 38 S.C.L. Rev. 4 (1987) at p. 613. Also see LeBlanc, The Proposed South Carolina Probate Code, 36 S.C.L. Rev. (1985).

The SCPC is based upon the Uniform Probate Code established by the Uniform Law Commission. In fact, the "Editor's Notes" at the beginning of the sub-part of each section set forth the derivations from the Uniform Probate Code. In many instances, the sections are "verbatim" while others are "modified." SC Code Section 62-3-719, the interpenetration of which is at the heart of this issue, is a modified provision and sets forth a default statutory percentage fee based upon estate valuation (except for extraordinary services) unless there is a contract or the will "otherwise directs." On the other hand, Section 3-719 of the Uniform Probate Code (1969) provides as follows:

Section 3-719. A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

The statutes concerning personal representative compensation that were repealed in 1987 by the South Carolina Probate Code were Code Section 21-15-1450 under Article 11 "Returns and Commissions." and Code Section 21-15-1460. These statutes read as follows:

#### 21-15-1450 Commissions

Every executor or administrator shall for his care in the execution of his duties received from the estate funds not to exceed five per cent of the appraised value of the personal property of the estate in which he acts as a fiduciary. The minimum commission payable is fifty dollars and no less, regardless of the value of the personal property. Additionally, every

executor or administrator who invests money of the estate in which he acts as fiduciary is entitled to receive a sum not to exceed ten percent of the interest for earned on such investments. No such additional commission is payable by any estate unless the probate judge determines the executor or administrator has acted reasonably in the accomplishment of the assigned duties, and that no unreasonable delay has been encountered. The same commissions provided above must be paid to executors or administrators for the sale of real estate when directed by will or by proper court order. When the executor or administrator is the purchaser at the sale a commission may not be paid. The provisions of this section do not apply in any case where there is a contract providing for the compensation to be paid for such services or where the will otherwise directs. (emphasis added.)

21-15-1460 Action by representatives for additional compensation.

Any executor or administrator who shall have had extraordinary trouble in the management of the estate under his care and shall not be satisfied with sums mentioned in Section 21-15-1450 may be at liberty to bring an action in the court of common pleas for his services and the verdict of the jury and judgment of the court thereupon shall be final and conclusive in such cases. Any executor or administrator who shall have had extraordinary trouble in the management of the estate under his care and shall not be satisfied with sums mentioned in Section 21-15-1450 may be at liberty to bring an action in the court of common pleas for his services and the verdict of the jury and judgment of the court thereupon shall be final and conclusive in such cases. But no verdict shall be given for more than five percent over and above the sums allowed by 21-15-1450.

Thus, prior to the adoption of the South Carolina Probate Code in 1987, there was a 10% limit on "commissions" paid to personal representatives. Today, there exists a 5% cap unless there is a finding of "extraordinary services" to be determined in the discretion of the probate judge without a statutory limitation (subject to review by appellate courts). The absolute statutory limitation of 10% has been repealed.

Rather than adopt the fee-based “reasonable compensation” standard contained in the Uniform Probate Code, the South Carolina legislature decided to keep its “commission-based” standard in place – “unless the will otherwise directs.” (emphasis added.) A review of the current Code Section 62-3-719 reveals that it bears a close resemblance to the the previous statute that provided for commissions. For example, the rate of 5% remains for personal property as well as 5% for the value of real estate – if the real estate is sold pursuant to court order or as allowed by the will. While current statutes do not allow for a separate hearing for additional compensation sought for “extraordinary trouble”, it does allow additional compensation if there is a finding by the judge of “extraordinary services.” Most telling, and of critical importance in the case at hand, is the provision that allows the testator to “opt out” of this commission-based standard by “otherwise directing” in the will. The legislature recognized that the testator may choose his or her own method for determining the amount of compensation to be paid to his or her personal representative rather than being required to adhere to a commission – based standard.

That choice carried over into the South Carolina Probate Code adopted in 1987. South Carolina Code Section 62-3-719(c) includes almost word for word the ability of the testator to choose a method for determining the amount of compensation to be paid to the personal representative rather than the commission-based standard. Ms. Kay's will directs that compensation be

determined by the “fee-based” standard of “reasonable compensation.” In other words, since her will “otherwise directs”, the commission rates imposed by the section do not apply.

Further evidence that the fee-based “reasonable compensation” measure is separate and distinct from the commission-based measure is reflected by “A Uniform Probate Code Digest”<sup>4</sup> published by the Joint Editorial Board for the Uniform Probate Code and presented to states in the 1970's and 1980's in order to promote the adoption of the Uniform Probate Code. The Board wrote:

One particularly important change relates to fees for personal representatives and their attorneys. In contrast to many existing statutes fixing fees for executors and administrators at a percentage of the assets in probate, the Code provides merely that fees for fiduciaries and attorneys be reasonable, and supplies a simple procedure for protesting fees claimed to be excessive. Id at 3.

In adopting a modified version of Section 3-719 the South Carolina legislature drew a distinction between a default statutory provision capped at 5% of the estate (except for extraordinary services) – 62-3-719 (a) – and “reasonable compensation.” In other words, the legislature purposefully limited compensation based solely upon the value of the estate – unless there is a contract or the “will otherwise directs.” By electing to pay “reasonable compensation” as expressed in the will, Ms. Kay opted out of the statutory default limitations. Respectfully, the Court's interpretation disregards this distinction incorporated by the South

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<sup>4</sup> A copy of this undated brochure is on file at the Coleman Karesh Library, University of South Carolina School of Law.

Carolina legislature into its statutory scheme, thereby effectuating a result contrary to Ms. Kay's intent.

- C. The stated purposes and policies of the South Carolina Probate Code support Sullivan's determination of "reasonable compensation."

South Carolina Code Ann. Section 62-1-102 provides that the South Carolina Probate Code "shall be liberally construed and applied to promote its underlying purposes and policies including . . . (2) to discover and make effective the intent of a decedent . . ." and (5) to make uniform the law among the various jurisdictions."

A liberal construction and application of the South Carolina Probate Code would require giving effect to the term "reasonable compensation." First, as provided by Ms. Kay's will, she intended that Sullivan receive "reasonable compensation." Second, "compensation that is reasonable" is a term of art used in the South Carolina Probate Code as the standard for trustees if the terms of the trust do not specify the trustee's compensation. See South Carolina Code Ann. 62-7-708 referenced above. In this regard, South Carolina Code Section 62-7-708 as it provides for trustee compensation, and Ms. Kay's will as it provides for personal representative compensation, are mirror images of each other. As such, "reasonable compensation" as provided by Ms. Kay's will should be given legal effect.

In addition, in order to "make uniform the law of the various jurisdictions,"

“reasonable compensation” for personal representatives should be recognized because The Uniform Probate Code upon which the probate law of most states, including South Carolina, is based uses this terminology as the basis of compensation for personal representatives.

- III. The Court overlooked the time and actual services required to administer the Estate.

The South Carolina Probate Code generally requires that estates be closed within one year. See Section 62-3-1001. In this case, however, Sullivan worked diligently for nearly 4 years to resolve the conflicting claims of the beneficiaries, both through negotiations and litigation, and ultimately obtained “an excellent” amount in the sale of the real estate. The Court seemingly agrees that Sullivan's actions constituted “extraordinary services.”

The Court, however, affirms the probate court's finding that Sullivan's fees are “clearly excessive” and that compensation of about 10% of the Estate valuation should be awarded. The probate court's percentage method, however, is based upon the premise that the amount of work required in estate administration is directly proportional to the value of the assets. However, “a multitude of factors determine the complexity and amount of work required of a decedent's personal representative and his counsel such as: location and form of assets; the existence and nature of encumbrances against these assets; claims against the estate; the number and ages of the heirs or devisees, and

whether or not they can be located; the presence of legal issues which invite, or necessitate, litigation; and the complexity of the litigation itself. Hence, the critical question in determining what constitutes a reasonable fee is not how large or small is the estate, . . . but rather what actual services were required and rendered.” Estate of Painter v. First National Bank of Greeley, 39, Colo. App. 506, 567 P. 2d 820 (1977).

Sullivan, a business attorney, devoted more than 450 hours on the Kay Estate administration between the date of Ms. Kay's death on May 3, 2007 and November 12, 2011 when he filed the Petition for Settlement. (R. p. 202, line 24 – R. p. 203, line 9).<sup>5</sup> The Court of Appeals notes that, “[o]n appeal, [Sullivan] has included all of the invoices, time sheets, affidavits, and correspondence” to support the requested compensation. (App. 6). At an hourly rate of \$225, the compensation for these services would have been in excess of \$101,000. Sullivan was paid \$93,775 for these services – about \$208 per hour. On the other hand, the awarded compensation of \$51,300 is about \$114 per hour.<sup>6</sup>

In view of the fact that there is no longer a statutory percentage limit applicable to personal representative compensation given a finding of “extraordinary services,” Sullivan respectfully requests that the Court reconsider

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<sup>5</sup> 450 hours over 3 years and 5 ½ months (about 180 weeks) is an average of about 2.5 hours per week.

<sup>6</sup> In the recent case of Horton v. Jasper County School District, Opinion No. 27808 filed May 30, 2018, the South Carolina Supreme Court ruled that the “circuit court abused its discretion in reducing an attorney's rate to \$100 per hour without basing its decision on any evidence.” May 30, 2018 Advance Sheets at 63.

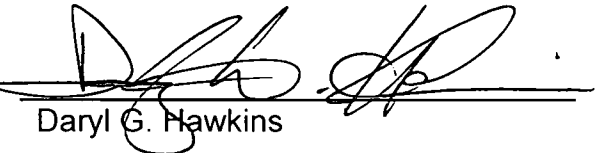
its limitation of compensation to 10% of the estate valuation (\$51,300) and base its award upon the aforementioned factors including the length of the administration, hours devoted, issues confronted, skills required and quality of the services. For example, compensation of 15% of the the estate valuation – about \$171 per hour - would be \$76,950.<sup>7</sup>

### CONCLUSION

For the foregoing reasons, Sullivan respectfully requests rehearing and reconsideration of these issues.

RESPECTFULLY SUBMITTED,

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June 7, 2018

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<sup>7</sup> As noted above in Section II B, there is no longer a statutory percentage limitation given a finding of “extraordinary services.” 62-3-719(a).

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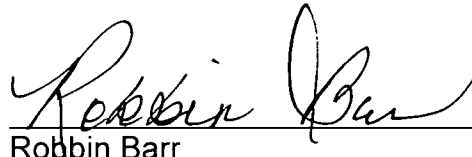
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I certify that I served Petitioner/Respondent's Petition for Rehearing by mailing one (1) copy to counsel of record, John R. Ferguson, Post Office Box 286, Laurens, SC 29360.



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