

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 11 2018

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

PETITIONER/RESPONDENT'S
RETURN TO RESPONDENTS/PETITIONERS'
PETITION FOR REHEARING

Daryl G. Hawkins
Law Office of Daryl G. Hawkins, LLC
1331 Elmwood Avenue, Suite 305
Columbia, SC 29201-2150
(803) 733-3531

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

TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA
SUPREME COURT

Pursuant to Rule 240(e), SCACR, Petitioner/Cross Respondent Edward D. Sullivan, Personal Representative (“Sullivan”), respectfully submits the following response in opposition to Respondents/Cross-Petitioner's Brown and Moses’ (“Brown and Moses”) Petition for Rehearing:

INTRODUCTION

In arriving at its decision in this case, the Court correctly held that Sullivan is entitled to recover the costs of attending the settlement hearing, including legal fees. In addition, the Court properly held Brown and Moses are not entitled to legal fees under the common fund doctrine. Brown and Moses have raised an issue for the first time on appeal and have not stated with particularity points overlooked or misapprehended by the Court as required by Rule 221(a), SCACR. Accordingly, their Petition for Rehearing should be denied.

FACTS

A comprehensive Statement of Facts is set forth in the Brief of Petitioner/Respondent and is incorporated herein by reference.

LAW/ANALYSIS

- I. **The Court properly affirmed that Brown and Moses are responsible for their own attorney's fees.**

Brown and Moses continue to argue for attorney's fees but do not raise any factual basis not already considered by the Court. In affirming the Court of

Appeal's determination that Brown and Moses are responsible for their own attorney's fees, the Court correctly held that the common fund doctrine does not apply when the interests of the parties are adverse, even though services may have benefited all parties. Bedford v Citizens & S. Nat'l Bank of S.C., 203 507, 515, 28 S.E. 2D 405, 407 (1943). In other words, the common fund doctrine requires all interested parties to have the same interest. In this case, several, if not all, of the parties were adverse to Brown and Moses. Beneficiaries receiving at least 70% of the residuary estate desired a cash distribution as opposed to to an undivided interest in real estate. (See R. p. 78, Lines 12 – 22; R. pp. 630 – 631.) Penelope Arnold, an employee of beneficiary The Presbyterian Home of South Carolina, testified in essence that the Presbyterian Home would have been unduly burdened by an interest in real property due to the financial strain of property taxes and upkeep. (R. p. 243 line 12 – p. 244, line 2). Also, the Court correctly notes the testimony of Bart Heard who supported Sullivan and stated the land should have been divided before Ms. Kay passed away. (R. p. 134, line 12 - R. p. 135, line 10.)

Brown and Moses misstate the record as to Lisbon Church (which together with the Lisbon Church Cemetery Fund has a 50% interest in the estate) and conveniently ignore the minutes of the Lisbon Church Session meeting held on May 23, 2008 and included in the record on appeal at R. p. 867 – 869. These minutes state in part:

The members of the session stated that the church had no desire to own real estate and especially an undivided interest in real estate. . .

The minutes further reflect that Sullivan was in attendance at the session meeting. The evidence overwhelmingly supports that a majority of the beneficiaries preferred their interests in cash rather than fractional ownership in land.

Brown and Moses' arguments regarding constitutional issues and church protocol have not been raised previously before the probate court, the circuit court, the Court of Appeals or this Court. These issues have not been preserved for appeal. "An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).

In addition, the argument concerning church protocol misses the point. Sullivan had the powers under the will of Ms. Kay to partition and sell the land. In an effort to reach an amiable and expedient resolution of the issues, he considered the desires of the various beneficiaries pertaining to the real estate. In doing so, the competing interests of the beneficiaries were revealed. The allegation of Brown and Moses that the "Court violated the First Amendment of the United States Constitution" (Memorandum in Support of Petition to Rehear, Section I) is "manifestly devoid of merit" and not worthy to be addressed by the Court (SCACR, 220(c)) as well as being raised for the first time in their Petition

for Rehearing. See Ulmer v Ulmer, supra.

Respondents' retained counsel because they disagreed with the division of the estate. In fact, Respondent Brown continued to press a claim for 5 acres of real estate (R. p. 319, line 19 – p. 327, line 5) after the trial. They also disagreed with Sullivan's compensation. On the other hand, as noted above, Penelope Arnold testified that the Presbyterian Home was in favor of Sullivan's actions in pursuing a partition action. She also approved of Sullivan's compensation and expenses. R. p 246, lines 9 – 25. Bart Heard testified he did not object to any of Sullivan's fees. R. p. 134, L. 5 – p. 135, L. 10). Unquestionably, most if not all of the interests of the other beneficiaries were adverse to the Respondents.¹ Furthermore, there is no evidence of a contract of employment, whether express or implied in law, between Brown and Moses' counsel and all the other beneficiaries. Peppertree Resorts, Ltd. V Cabana Ltd. P'ship, 315 S.C. 36, 41, 431 S.E. 2D 598, 601 (Ct. App. 1993). Finally, as the Court notes "recovery under the common fund is subject to abuse and should be exercised cautiously." Opinion, Part III, E citing Johnson v. Williams, 196 S.C. 528, 532, 14 SE 2d at 23. Given the facts and circumstances of this case, such an award would not promote justice and would in fact be unjust to the other beneficiaries who had adverse interests. Accordingly, the common fund doctrine

¹ Marla Orias, a 10% beneficiary of the Estate, is the step-granddaughter of Ms. Kay and Bart Heard's sister. She is the only beneficiary whose preference – whether to receive cash or own a 5% (10% of Ms. Kay's 50% interest) undivided interest in real estate – is not included in the record.

is not applicable and the probate court's award of fees to Respondents was properly reversed.

II. The Court properly determined that Sullivan should be awarded necessary expenses, including reasonable attorney's fees.

This issue has already been briefed, was the subject of Justice Few's dissent in the Court of Appeals, and is analyzed in the Court's Opinion. As the Court has found, Sullivan provided a timely accounting for all funds, including his fees and costs, and there is ample evidence demonstrating Sullivan defended the claim in good faith. S.C. Code Ann. Section 62-3-710 (2009) entitles a personal representative to receive from the estate his necessary expenses and disbursements, including legal fees, when (1) the personal representative defends or prosecutes, (2) any proceeding in good faith, whether successful or not. The Court correctly notes that, under the plain language of S.C. Code Ann. Section 62-3-710 (2009), it is applicable in this case. Therefore, the Court correctly determined that Sullivan should receive reimbursement for his necessary expenses, including reasonable attorney's fees, incurred at the settlement hearing and nothing further need be added here.

CONCLUSION

Brown and Moses have failed to state with particularity any points overlooked or misapprehended by the Court as required by Rule 221(a),

SCACR. For the foregoing reasons, Sullivan respectfully requests that this Court deny Brown and Moses' Petition for Rehearing.

RESPECTFULLY SUBMITTED,

LAW OFFICE OF DARYL G. HAWKINS, LLC

By: 

Daryl G. Hawkins

1331 Elmwood Avenue, Suite 305 (29201)
Post Office Box 11906
Columbia, South Carolina 29211
803.733.3531 Tel
803.744.1949 Fax

*Attorneys for Petitioner-Respondent
Edward D. Sullivan, PR of the
Estate of Marion M. Kay*

June 11, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2016-002337

In the Matter of the Estate of Marion M. Kay

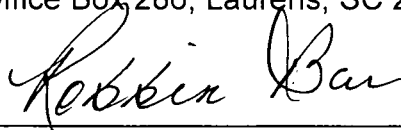
Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay Petitioner/Respondent,

v.

Martha Brown and Mary Moses Respondents/Petitioners

PROOF OF SERVICE

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



Robbin Barr
Law Office of Daryl G. Hawkins, LLC
1331 Elmwood Avenue, Suite 305
Columbia, SC 29201-2150
(803) 733-3531

June 11, 2018