

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 18 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
REPLY TO RESPONDENTS/PETITIONERS'
RETURN TO PETITION FOR REHEARING

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Kay

TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA
SUPREME COURT

Pursuant to Rule 240(f), SCACR, Petitioner/Respondent Edward D. Sullivan ("Sullivan"), as Personal Representative of the Estate of Marion M. Kay, respectfully files this Reply to Respondents/Petitioners Brown and Moses' ("Brown and Moses") Return to Petition for Rehearing.

FACTS

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

ARGUMENT

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

In reply to the return of Brown and Moses¹, the probate court recognized that additional services would be required to wind up the Estate and awarded \$2500 to Sullivan to do so. The Court's Opinion is silent on this issue although the affirmation of this amount is implied.

Sullivan respectfully requests that the issue of compensation for his services rendered to the Estate since February 2011 (Settlement Hearings were held on February 2, 2011 and February 21, 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

1 Replying to Page 3, first Paragraph.

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

Since Brown and Moses make no response to these portions of Sullivan's Petition for Rehearing, no reply is necessary.

- III. Respectfully, the Court overlooked the time devoted to the Estate, and the extent of services provided by Sullivan to administer the Estate.

Brown and Moses contend that the Court correctly held 10% "was not insufficient compensation" but the record upon which they rely is primarily the order of the probate judge rather than the evidence contained in the record. In

fact, this Court - taking its own view of the evidence – apparently disagreed with the probate judge on at least two critical findings regarding Sullivan's compensation. First, Sullivan did not complicate the Estate by filing a partition/declaratory judgment action rather than giving a deed of distribution. Second, Sullivan did not “[pull] a figure out of the air” to determine “reasonable compensation.” Brown and Moses' reliance on the probate judge's findings is misplaced. In fact, the finding of the probate court that a PR fee of \$51,300, about 10% of the estate, is reasonable is a “compromise” - as described in the Order - and undoubtedly influenced by these erroneous findings. Final Order, Paragraph 14, at R. p. 4.

The record reflects that Sullivan worked for 3 years and 6 months to probate the will, inventory the assets, confront the issues, hire an appraiser and surveyor, meet with beneficiaries to reach an amicable resolution, show the real estate to potential buyers, litigate and subsequently negotiate a sale of the real estate to potential buyers, litigate and subsequently negotiate a sale of the real estate with an exceptional result, prepare settlement agreements and consents, and file the Petition for Settlement and Proposal for Distribution. A comprehensive listing of these services is included in the Record on Appeal at R. pp. 560 - 565. The time devoted by Sullivan was 465.8 hours. R. pp. 993 – 1199; R. pp. 1278 – 1302. As the Court of Appeals noted, “[o]n appeal, [Sullivan] 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.” Opinion 5414, Section I, Part A at App. 7.

Sullivan consistently explained the services provided to the estate, hours devoted, and the basis for determining his compensation both in a pretrial brief, “Memorandum in Support of Petition for Settlement” filed February 1, 2011 (R. pp. 857 – 864), and in his court testimony. The claims by Brown and Moses that Sullivan “testified he simply charged what he thought he deserved” and that “he should be the arbiter of what constitutes ‘reasonable compensation’” are demonstrably false. Sullivan testified that he relied on counsel, including those knowledgeable in South Carolina probate law, and based his compensation on a variety of factors set forth in other jurisdictions relating to personal representative compensation and Rule 1.5 governing fees for lawyers. These factors include time, the issues confronted, skill required, and over-all results.² See Brief of Petitioner/Respondent, Section IIB at pp. 29 – 33 and the citations to the testimony contained therein.

Respectfully, the Court overlooked that the probate judge took judicial notice that there is a typical ten percent commission for selling non-residential property. R. p. 109, lines 8 – 16. In addition to being an attorney, Sullivan is a licensed Real Estate Broker. R. p. 107, lines 13 – 25; R. p. 548. During the estate administration he showed the real estate to prospective buyers. R. p. 562, paragraph 24. By subsequently selling the real estate without the expense of a real estate commission, the estate benefited from these services alone by

² In reply to pages 1 and 2.

\$36,700 (10% of the \$367,000 total sales price). R. p. 107, lines 8 – 16; R. pp. 669 – 677; R. pp. 698 – 706; R. p. 110, lines 3 – 21.

- IV. The Court should grant rehearing or reconsideration based upon its ruling in the recent case of Horton v. Jasper County School District, Opinion No. 27808 filed May 30, 2018.

Brown and Moses repeatedly contend that four courts, including the probate court and circuit court, have found that “twice the usual statutory fee” (page 1, 3rd paragraph) is “enough” (page 3, “Conclusion”).³ Brown and Moses ignore that, as noted above, this Court has disagreed with the probate court's findings on at least two critical points regarding Sullivan's compensation. Undoubtedly these erroneous findings impacted the probate court's decision to reduce the compensation to approximately 10% of the estate's value. In affirming these findings, the Circuit Court erred as well. Furthermore, this Court held that the “any evidence” two-judge rule standard of review applied by the Court of Appeals was also error. Accordingly, Brown and Moses' continued reliance on the lower courts regarding “reasonable compensation” for Sullivan's services as the personal representative of the Kay Estate is unavailing.⁴

³ In reply to Brown and Moses' Conclusion at page 3. The characterization of this appeal as a “demand for more money” and [Sullivan's] “longing for lucre” are the latest in a long string of personal attacks and inflammatory and scurrilous comments by Brown and Moses and their counsel not supported by the record. The Court of Appeals addressed similar allegations and found them to be “unsubstantiated and a mischaracterization by [Brown and Moses] regarding [Sullivan's] efforts as PR” and not “well-founded.” See Opinion No. 5414 of the Court of Appeals, Section II A at App. 15..

⁴ In further reply to Brown and Moses' Conclusion at page 3.

In Horton v. Jasper County School District, Opinion No. 27808 filed May 30, 2018, the statute at issue provided for “reasonable attorney's fees”. The circuit court awarded \$100 per hour rather than the \$250 and \$295 hourly rates placed into evidence. The 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” and reversed the Court's decision. Horton, May 30, 2018 Advance Sheets at 63. In this case, the standard of review is not “abuse of discretion” but “preponderance of the evidence.” In light of its ruling in Horton, Sullivan respectfully requests that the Court reconsider its determination of reasonable compensation. For example, a fee of \$51,300, the roughly 10% fee awarded, equals about \$110 per hour.⁵ A fee of \$67,451 (about 13% of the estate value) would equal \$145 per hour, the hourly rate obtained by Sullivan for the legal services of Collins and Lacy. A fee of \$93,775 (about 18%), the amount received by Sullivan prior to this appeal, equals about \$201 per hour.⁶ The 21% “commissions sought” referenced by the Court in the last paragraph in Section I of its Opinion includes \$13,447 that was not in fact paid to Sullivan and therefore distorts the percentages for purposes of comparison.

Accordingly, Sullivan respectfully requests that the Court grant rehearing or reconsideration of its determination that \$93,775 - \$201 per hour (about 18% as opposed to 21%) - constitutes “clearly excessive” compensation based upon

⁵ Based on 465.8 hours. See page 3 above.

⁶ In further reply to Brown and Moses Return, Section I.

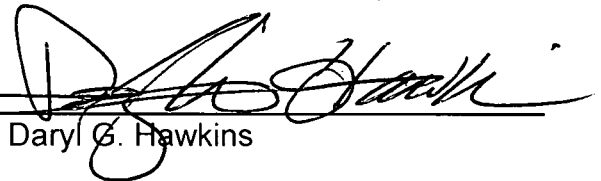
the foregoing analysis and its recent holding in Horton.

CONCLUSION

Brown and Moses do not, and cannot, offer any response or valid objection to matters raised by Sullivan in his Petition for Rehearing and the relief sought therein. For the reasons stated in the Petition as well as above, Sullivan respectfully requests rehearing and reconsideration of these issues.

RESPECTFULLY SUBMITTED,

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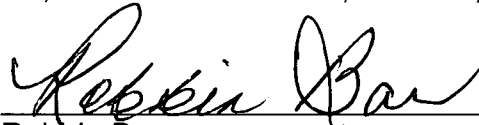
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PROOF OF SERVICE

I certify that I served Petitioner/Respondent's Reply to Respondents/Petitioners' Return to 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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