

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Appellate Case No. 2016-002337

AUG 15 2018

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 MOTION FOR COSTS**

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

Attorney 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(f), SCACR, Petitioner/Respondent Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay (the "PR"), respectfully files this Reply to Respondents/Petitioners Brown and Moses' ("Brown and Moses") Return to Motion for Costs.

ARGUMENT

There were four primary issues raised on appeal by the PR:

- (1) whether the probate court erred in determining the amount of "reasonable compensation" for the services of the PR;
- (2) whether the probate court erred in ruling that the PR was not entitled to be reimbursed for legal fees and costs¹;
- (3) whether the probate court erred in ruling that Brown and Moses were entitled to legal fees and costs under the common fund doctrine²;
and
- (4) whether the Court of Appeals erred in applying the two-judge rule standard of review.

As to issues 2 and 3 above, the PR was the prevailing party as this Court (issue 2) and the Court of Appeals (first as to issue 3, affirmed by the Supreme Court) reversed the probate court and remanded the case for further proceedings

¹ Supreme Court reversed all lower courts on this issue.

² Court of Appeals reversed the lower courts on this issue, and the Supreme Court affirmed that ruling.

to determine certain of the legal fees and costs due from the Estate to the PR. Regarding issue 1, although the Court disagreed with the PR on his interpretation of the Probate Code regarding "reasonable compensation," it noted that the probate court's determination that the PR complicated the estate administration by pursuing a partition action was erroneous. The Court also noted that it did not agree with the probate court's finding that the PR "pulled a figure out of the air" as reasonable compensation. As to the contention of Moses and Brown in their cross-appeal that the probate court erred in awarding more than a 5% fee to the PR, the PR prevailed.

The PR also prevailed regarding issue 4 above. The Court ruled that the two-judge rule did not apply and as argued by the PR, the proper standard of review was "preponderance of the evidence."

As to the any "extreme [unfairness]" claimed by Brown and Moses, the PR respectfully requests that the Court take note of its previous determination that it was the failure of Brown and Moses to respond to the PR's multiple attempts and effort to settle the estate amicably or offer any counter - proposal to a division of the real estate that prolonged the estate administration. But for that resistance, the estate may have closed and the proceeds distributed to the estate beneficiaries in 2009, nine years ago. In addition, the PR worked diligently for 3 1/2 years in good faith to resolve the issues and settle the estate, acted in good faith and sought assistance of counsel. He has now incurred costs over a period of 7 years on

appeals in the Circuit Court, Court of Appeals and the Supreme Court, successfully reversing the probate court's rulings, as noted above.

As to the reason for the appeals cited by Brown and Moses, Brown and Moses argued throughout the appeals in the Circuit Court, Court of Appeals, and the Supreme Court that the PR fees should be no more than 5%, that the PR breached his fiduciary duty and acted in bad faith, that the PR should pay all of the costs of the hearing on the Petition for Settlement, including post-judgment interest and that the estate or the PR should pay all of the fees and costs of Brown and Moses.

The Respondents/Petitioners erroneously argue that the success of the PR in the appeal in having the award of attorney's fees to the Respondents/Petitioners under the Common Fund Doctrine reversed, was ". . . based on grounds not argued by Petitioner." Return to Petitioner/Respondent's Motion for Costs, p.1.

In order for the Common Fund Doctrine to apply, all interested parties must have the same interests. The PR's positions in briefs and arguments made clear the interests were not the same.

The PR argued in the appeal, among other things, that, "not only did Brown and Moses not have a common interest with other beneficiaries, their interests were diametrically opposed." Reply Brief of Appellant-Respondent, filed 9/26/14 in the SC Court of Appeals. The PR also noted for the Court as a conflict of their interests, that counsel for Brown and Moses had requested, ". . . that the Court

award Brown and Moses the monetary interest of Brown's alleged share of 5 acres once owned by the Estate." Id. at pp. 21-22; and Brief of Appellant-Respondent in Ct. of App., p. 10.

The PR both by brief and oral argument advocated the differing interests of Brown and Moses and other beneficiaries in whether or not the property should be disposed of by a Deed of Distribution to the beneficiaries (the position advocated by Brown and Moses) or to convert the property to cash and distribute the proceeds (the position of the Church, the Presbyterian Home and Bart Heard). See, e.g., Brief of Appellant-Respondent at pp. 8, 14, 20 (parts B and C), 27-29 (references to Penny Arnold's testimony of the opposition to the Brown and Moses proposal of a Deed of Distribution by describing the hardship to the Presbyterian Home of owning land versus cash), and 40-41; and Reply Brief of Appellant-Respondent, Argument I, pp. 1-5 (discussing the conflicting issues of Brown and Moses distribution of land – and most beneficiaries (70%) – desiring cash); p. 7 (issues with 5 acres of land sought by Brown); and Argument III, pp. 8-9.

Contrary to Brown and Moses' argument in their Brief, the Court of Appeals strongly relied on the PR's brief and oral argument as to the factual basis for finding the interests of Brown and Moses and most other beneficiaries to be adverse. See, e.g., the holding, "Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse. In the Matter of the Estate of Marion M. Kay, 418 S.C. 400, 792 S.E.2d 907 at 916

(S.C. App. 2016):

Because the common fund doctrine requires all interested parties to have the same interests, we do not believe the probate court should have required the Estate to pay for Respondents' attorney's fees. Several beneficiaries were in favor of selling the real estate as opposed to an in-kind distribution. Specifically, Penelope Arnold, the director of the Presbyterian Home of South Carolina's charitable foundation, testified "[the Presbyterian Home] do[es] not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds." Arnold further stated that, at a prior meeting with all the beneficiaries to resolve issues with the Estate's division, she and Reverend Hunter, of Lisbon Presbyterian Church, were not well-received by Respondents based on their preferences over the Estate's division. Lisbon Presbyterian Church also preferred to receive its 25% share of the Estate in cash."

Id. at p. 917.

The PR ultimately succeeded in overturning multiple errors made by the Probate Court and generally prevailed on those issues. The PR respectfully requests the fees and costs as permitted by Rule 240, SCACR.

CONCLUSION

The PR prevailed on the issue of the proper standard of review, whether he was entitled to reimbursement of costs, including legal fees, and whether Brown and Moses were entitled to legal fees and costs under the common fund doctrine. The PR also prevailed on all issues raised in the cross appeal by Brown and Moses. Accordingly, the PR requests that the Court assess legal fees and costs in the amount of \$10,199.19 as listed in the previously filed Itemized Statement of Costs.

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

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

August 15, 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

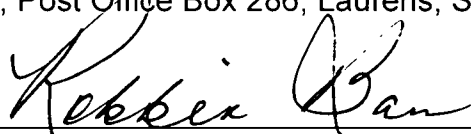
Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay Petitioner/Respondent,

v.

Martha Brown and Mary Moses Respondents/Petitioners

PROOF OF SERVICE

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

August 15, 2018