THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

In the Matter of the Estate of Marion M. Kay

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

v.

Martha Brown and Mary Moses, ... Respondents/-Appellants

FINAL BRIEF OF RESPONDENTS/APPELLANTS

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Attorneys for Respondents

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FINAL BRIEF OF CROSS-APPELLANTS/RESPONDENTS

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Statement of the Case

This is a case in which the Appellant/Personal Representative of the Estate of Marion M. Kay, who is a member of the South Carolina Bar, drew a Will for an aged friend and gave himself vast powers to administer her estate. He then used those powers to maximize his fees from the Estate and tried to get the heirs to sign off on his administration without revealing to them that he had already paid himself $ 93,775 and was seeking to boost that to $ 102,222. When the present Cross-Appellants raised questions, he sent them a letter inviting them to send the Probate Court a letter seeking a hearing to review his administration, and they did this.

The probate judge found that this was not a complex estate but that the PR had unnecessarily complicated it by unilaterally converting an 8 month option to purchase all the Estate's interest in a farm into an indefinite option to purchase part of the farm and by filing an unnecessary suit to partition the estate when a deed of distribution was all that was required. The partition action, which featured the PR's attempts to impose the drawing of property lines as he thought best, became contested. The PR spent vast quantities of paralegal time to value the Estate's personalty, despite the fact that there was no controversy over to whom the personalty was to go and the Estate was not taxable. The PR, who began charging the Estate before the testatrix died, also charged for putting the Estate files back in order after he had disorganized them. The court below found that the PR's actions did not benefit the heirs, but increased the PR's commissions.

When he was questioned about the basis for his substantial charges, the PR said that he did not base his charges on concrete factors but rather charged what he thought he was due. The probate judge referred to this as pulling numbers out of the air. The judge

required the PR to refund $ 43,475 (which he has not done) and denied extra compensation. The judge did not make factual findings justifying the elevated level of compensation he allowed.

Both sides appealed to the Court of Common Pleas, but the Honorable Frank R. Addy, Jr. denied relief to both sides. This appeal timely followed.

Argument

I. The Court below erred in finding that the Personal Representative has acted in good faith in his handing of the Estate and awarding him a large fee, because this is contrary to the Court's factual findings, the law and the evidence. (Issues I, II and III)

In his Order below, the Honorable Donald B. Hocker, Associate Probate Judge for Laurens County, found that the Personal Representative (PR) had not acted in bad faith (Final Order #16, R. p. 10) and was entitled to a fee of $ 51,300 (Final Order #14, R. p. 10). These findings are contrary to the evidence before him and to his own factual findings.

The Addendum to Response of Appellants (R. pp. 1414-27) contains a detailed analysis of the evidence proving the Personal Representative's violation of his fiduciary duty to the Estate. There are multiple instances of the PR's increasing the complexity of what should have been a simple estate in order to increase his commissions. The judge below found that the PR unnecessarily complicated the Estate by changing the Will's provisions concerning an option (Final Order # 3, R. p. 8). He found that the PR unnecessarily sold real estate in the Estate and noted that this generated proceeds for the PR. (Final Order # 4, R. p. 8) He found that the PR unnecessarily complicated the Estate by filing a partition action instead of just issuing a deed of distribution as he should have (Final Order #3, R. p. 8), even though no heir was pushing for partition .

The Testatrix (whose Will was drafted by the PR) made a detailed Memorandum of Personal Effects (R. p. 71, lines 22-24; p. 72, lines 15-17) and labeled many items to show who was to get what (R. p. 72, line 18- p. 73, line7). The Estate was plainly not taxable (R. 707), and there were no disputes about the ownership or distribution of the Estate's personalty. Despite this, the PR used 204.6 hours of paralegal time from his law firm (Final Order # 17, R. pp.10-11) to value the personalty. Plainly, the point of this was to boost the value of the Estate and thereby boost his commission. See S.C. Code Section 62-3-719.

Not content to wait until the Will he drafted went into effect, the PR began charging the Estate before the Testatrix died and before he was appointed PR (Final Order #5, R. pp. 8-9). This is not the only odd charge. He billed the Estate for 3.3 hours spent preparing and summarizing all the decedent's documents (Ex. D, R. p.734). Three years after his appointment he charged the Estate for 6.9 hours to "Put file back in order." (Invoice dated August 17, 2010, R. p. 777) The PR had relatives living in Laurens County, and he charged the Estate for 23 trips there from Columbia (R. pp. 828-9), far more than administering the Estate required.

These are but some of the shocking charges the PR made against the Estate, but even by themselves they add up to a pattern of bilking the Estate with any charge he can think of. This was a garden variety non-taxable Estate where the Testatrix died testate with a clear Will (Final Order # 2 and # 7, R. pp. 8, 9). It should not have been complicated or expensive to settle, but the PR attempted to charge the Estate $ 102,222 for his services (Final Order, p. 1, R. p. 7), and secretly (Final Order # 9, R. p. 9) paid himself $ 93,775 before Respondents demanded a hearing to find out what he was up to, including giving himself at an early stage $ 60,000 worth of stocks and bonds owned by the Estate (R. p. 316, lines 3-21), the value of which had been rising. At the hearing he claimed that special factors justified the charges. Judge Hocker found, "Although the PR

argued the existence of novel issues regarding the real estate, I do not find any." (Final Order # 7, R. p. 9) The judge ordered him to return $ 42,475 to the Estate (Final Order # 14, R. p. 10), but he has refused to do this.

While the judge reduced the PR's fees to $ 51,300 (Final Order #14, R. pp. 9-10), that was 10% of the Estate (using the inflated personalty valuation numbers) and there were no findings justifying this compensation exceeding the usual 5% as suggested by S.C. Code Section 62-3-703 (assuming that the PR was entitled to any fee). This was despite a finding that the PR's charges to the Estate had no legitimate basis and were the product of "pulling a figure out of the air." (Final Order #8, R. p. 9).

Under the statute, the judge was required to find "extraordinary services" to award more than 5%, but no such finding was made. Given the PR's looting of the Estate, he was not entitled to even a 5% fee. The Court's award of this baseless and excessive PR commission was an abuse of discretion. Even the PR in his Grounds for Appeal to the Court of Common Pleas (p. 38, R. p. 1258) admitted that "The Court uses a ten percent compromise without explanation for arrival at that amount."

It must be noted that the PR is a member of the S.C. Bar and is held to a higher standard of conduct. (See Rule 1.8(c) of the S.C. Rules of Professional Conduct concerning lawyers preparing instruments to benefit themselves.) It is thus all the more startling that Judge Hocker found, "The PR failed to provide any legitimate basis for the fees he claimed...." (Final Order, # 8, R. p. 9) Through his efforts, his law firm was awarded $ 25,806.38 (Final Order #17, R. pp. 10-11) for unnecessary work, including $ 7441.57 (Final Order, p. 1(g), R. p. 13) for work on what the Court found to be an unnecessary partition action (Final Order # 2 and #4, R. p. 8). In addition, "[T]he Court questions the necessity of 204.6 hours of paralegal time...." (Final Order # 17, R. pp. 10-11) But it was this unnecessary paralegal time which produced the very personalty values the judge used in computing the value of the Estate and then the PR's commission.

The PR failed to prove the hours he claimed (Final Order # 1, R. p. 8) and the necessity of most of the hours he claimed. (Final Order # 1, R. p. 8). He unnecessarily complicated the Estate (Final Order # 2 and # 3, R. p. 8), and "The commissions sought by the PR are clearly excessive...." (Final Order # 13, R. p. 10) None of this adds up to good faith or the basis for a commission.

II. The Court below erred by not requiring the Personal Representative to pay the costs associated with his personal appeals, including post-judgment interest, court costs and attorney fees. (Issue IV)

In denying the PR's request for attorney fees, the Court below found that the PR's actions in court were for his own personal benefit and not for the benefit of the Estate. (Final Order #19, R. p. 11 and # 5 on p. 6, R. p. 12; Order Disposing of Post-Trial Motions, R. pp. 16-18) It is therefore grossly unfair for the heirs to pay for the PR's attempts to increase his compensation and further obscure his wrongdoing. See *Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007) and *Darby v. Furman Co., Inc.*, 334 S.C. 343, 513 S.E.2d 848 (1999). A personal representative is a fiduciary of the Estate, *Ex Parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 838 (Ct. App. 2009). If the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that. See *In the Matter of Hanna*, 301 S.C. 310, 391 S.E.2d 728 (1990).

III. The Court below erred by omitting to rule on the significance of the written agreement of three of the heirs to limit the amount they receive from the Estate. (Issue V)

At the request of the PR, three of the heirs signed statements for filing stating that they were satisfied with the distribution he proposed, which awarded him commissions far in excess of what the Court below awarded. It is the position of the Respondents this should be treated as an admission against their interest and that those heirs thereby

waived their right to receive more from the Estate and are estopped to claim more. That portion of the Estate which they have waived should be returned to the Estate to be distributed to Respondents. Among other things, this would defray the Respondents' costs of appeal, especially if the PR is not made to bear these costs. It would be inequitable for the settling heirs to receive the benefits of the appeal without participating in its costs. (See Final Order #4, p. 6, R. p. 12; Order of Judge Addy dated August 20, 2013 R. p. 19); Motion to Alter, Amend or Rehear Tr. 1566; Order of Judge Addy dated September 30, 2013, R. p. 21.)

IV. The Court below erred by improperly and inconsistently limiting the compensation for counsel for Cross-Appellants Brown and Moses based upon an error of law. (Issue VI)

The Court below recognized that all the heirs benefitted from the work of the undersigned and that the Estate should pay for his services. (Final Order #4, p. 6, R. p. 12) This finding dealt with the undersigned's work through the hearing. This in turn necessitated a post-trial motion seeking further compensation for work after the hearing. In his Order Disposing of Post-Trial Motions (R. pp. 16- 18), Judge Hocker found that he could not award the undersigned attorney fees as a matter of law in that "the Common Fund Doctrine does not apply because no extra assets were generated for the Estate." (P. 3 of order, R. p. 18) This is an error of law.

In its Final Order (#4 under Conclusions of Law, R. p. 12), the Court below stated that its award was for both preserving and protecting the common fund. This is consistent with *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). Defending against the PR's post-trial assaults on the order continued to preserve and protect the common fund and should be compensated. It is also true that the Court below abused its discretion, even under its restrictive reading of the law, in not awarding the undersigned compensation for drafting the proposed order for the Court, including the extensive

discussions which accompanied that.

V. The Court below erred in granting the Personal Representative equitable relief, because he came before the Court with Unclean Hands. (Issue VII)

Much of the relief awarded by the Court below to the PR was in equity. See *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 13 (Ct. App. 1988). The Clean Hands Doctrine is therefore relevant: "Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Associates*, 340 S.C. 98, 107, 531 S.E.2d 287, n. 2 (2000).

The Court below made numerous findings detailing how the PR consistently sacrificed the interests of the Estate in favor of his own unjust enrichment. He is held to a higher standard, both because he is a member of the Bar and because he is a fiduciary. He is not entitled to any fee and should be required to disgorge the grossly inflated fee he has already received. See *In the Matter of James*, 267 S.C. 474, 229 S.E.2d 594 (1976).

VI. The Court below erred in failing to find that the Personal Representative did not settle and distribute the Estate in compliance with S.C. Code Section 62-3-703. (Issue VIII)

S.C. Code Section 62-3-703 states

> A personal representative is a fiduciary.... A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of the probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the Will, and any order in proceedings to which he is a party for the best interests of successors to the estate.

The Final Order (R. p. 6) in this case reads like an indictment of the PR, and the undersigned also requests this Court to review his Addendum to Response of Appellants (R. pp. 1414-27), which summarizes the evidence of the PR's misdeeds. Despite its

findings that the PR consistently benefitted himself to the detriment of the Estate, the Court below failed to draw the conclusion called for by its own factual findings that the PR had not fulfilled his obligations under Code Section 62-3-703. Instead, without proper factual findings, the Court below rewarded the PR's malfeasance with a fee of $ 51,300 (Final Order # 14, R. p. 10) or 10% of the Estate (Final Order # 11, R. pp. 9-10) as inflated by the PR. It made no effort to justify this excessive fee, as even the PR acknowledged: "The Court uses a ten per cent compromise without explanation for arrival at this amount.") (Personal Representative's Grounds for Appeal, R. p. 1258) Having found that the PR inflated his fee by performing unnecessary work and inflating the value of the Estate's personalty, the judge then used these inflated numbers to reward the PR for his "service". This is an abuse of discretion.

CONCLUSION

The Personal Representative is not entitled to any relief. Instead, he should be forced to disgorge the money he has already received with post-judgment interest, and he should be required to pay the costs and attorney fees of Respondents/Cross-Appellants. The three heirs who filed statements with the Court limiting their recovery should have their recovery limited to those amounts. Counsel for Respondents/Cross-Appellants should be fully compensated for his work in this case. The PR should bear all costs associated with the appeal, including the attorney fees for Respondents/Cross-Appellants' counsel, the amount of which should be determined on remand.

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September 15, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Brief of Respondents/Appellants, Respondents'/Appellants' Final Reply Brief and Respondents' Final Brief of Respondents/Appellants herein comply with Rule 211(b), SCACR.

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September 17, 2014

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson & Wham, LLC and that on the 17 day of September, 2014 she served the Final Brief of Respondents/Appellants, Respondents'/Appellants' Final Reply Brief and Respondents' Final Brief of Respondents/Appellants herein by depositing a copy of them in the United States Mail, postage prepaid and addressed to:

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September 17, 2014

Deborah S. Ball